THE JOURNAL OF THE NSW BAR ASSOCIATION | WINTER 2011

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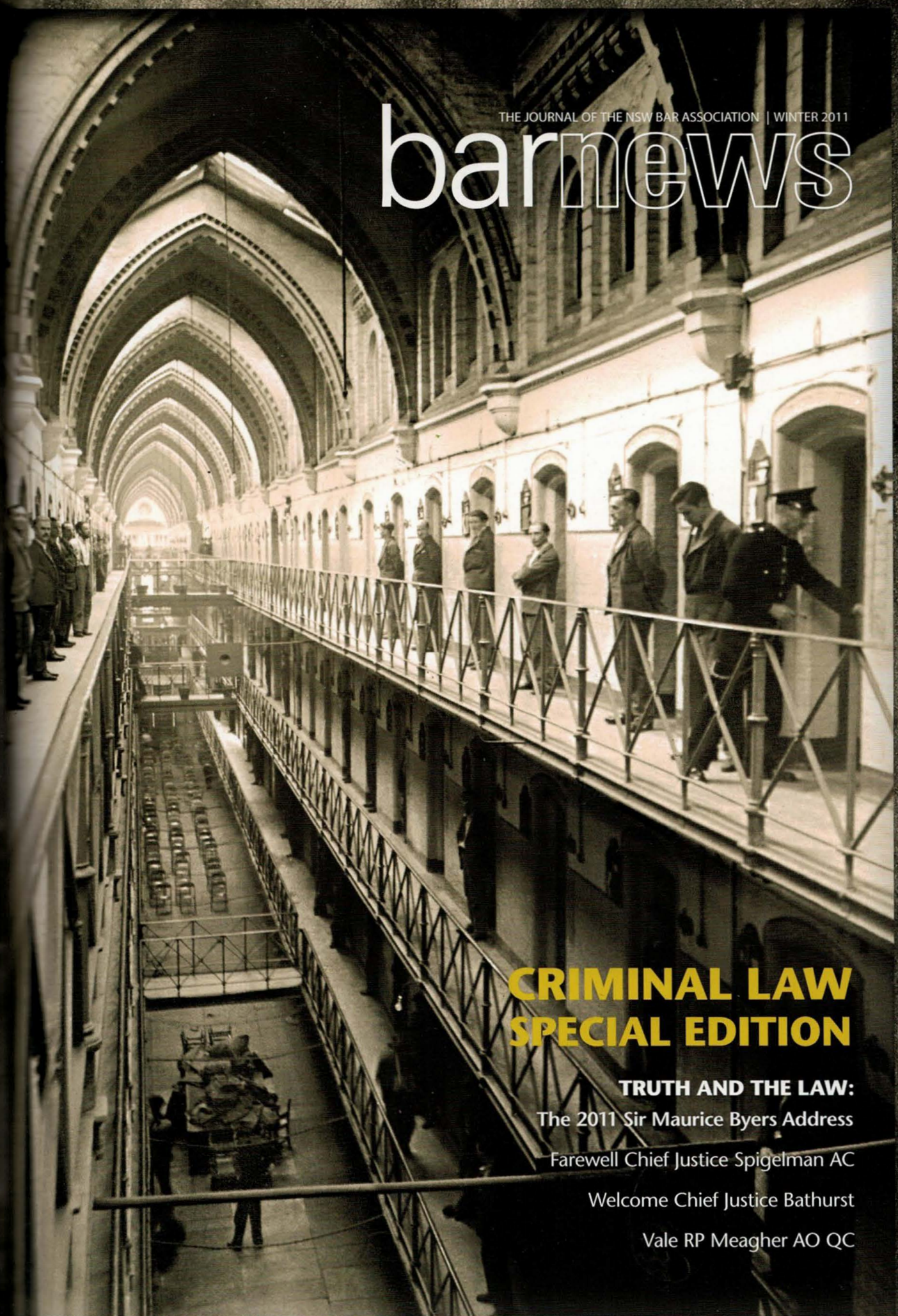

CRIMINAL LAW SPECIAL EDITION

TRUTH AND THE LAW:
The 2011 Sir Maurice Byers Address

Farewell Chief Justice Spigelman AC

Welcome Chief Justice Bathurst

Vale RP Meagher AO QC

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Chief Justice Tom Bathurst, the Hon James Spigelman AC and the Hon Murray Gleeson AC
Photo: Courtesty of the Supreme Court of New South Wales

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Views expressed by contributors to *Bar News* are not necessarily those of the New South Wales Bar Association. Contributions are welcome and should be addressed to the editor, Andrew Bell SC.

Eleven Wentworth
11/180 Phillip Street
Sydney 2000
DX 377 Sydney

Cover: Prisoners line up outside their cells at Strangeways Prison, 1948. Photo: Bert Hardy / Getty Images.

This issue of *Bar News* has, as its focus, the practice of criminal law and I am indebted to Keith Chapple SC and Chris O'Donnell – my two longest standing colleagues on the *Bar News* committee – for driving this special issue to completion. They have corralled a galaxy of talent from the criminal law bar, complemented by contributions from the attorney general, the chief judge in Common Law and the Commonwealth director of public prosecutions. The directive was for pithy articles (with the usual concession for the venerable Barker QC) on designated topics, and the resulting smorgasbord will not disappoint.

I very much hope that the range of contributions will appeal to and interest not only the criminal law bar, but all members and readers. The practice of criminal law is demanding, requiring not only great forensic skill and a mastery of the laws of evidence and criminal procedure, but also the ability to appear before both judge and jury alike. One further attribute that I came to appreciate when preparing this issue is that criminal law barristers are vastly superior at honouring deadlines than their colleagues on the civil side. I thank all contributors very much for their timely and excellent contributions.

One further attribute that I came to appreciate when preparing this issue is that criminal law barristers are vastly superior at honouring deadlines than their colleagues on the civil side.

Also featured in this issue are the speeches delivered on the occasion of the two great ceremonial sittings marking the retirement of Chief Justice Spigelman AC and the appointment of Tom Bathurst QC as his successor. Both were marvellous occasions; neither was a case of 'standing room only' as even the standing room was fully occupied. The packed attendances were a just tribute to the immense contribution of the outgoing chief justice to the law and the public, the intellectual and cultural life of the nation and, in the new chief justice's case, a mark of the profession's strongest approbation, esteem and good wishes. Chief Justice Spigelman's Sir Maurice Byers lecture on the topic of 'Truth and the Law' is also published in this issue.

Justice Dyson Heydon's eulogy in honour and memory of his good friend and colleague, Roddy Meagher QC, is fully reproduced, together with a series of memorable photos of a man, to use his Honour's words 'of vivid, rich, complex and magnificent personality'. At the time of going to press, news of the death of another former leading member of the bar, Alec Shand QC, had just come to hand. Tributes in memory of his notable career as an advocate will appear in the next issue of *Bar News*.

For those requiring light-hearted satirical relief, in this issue Bullfry celebrates his inclusion in a leading broadsheet's list of prominent barristers, only to discover that his 'category' is prominent for all the wrong reasons. There are also reviews of two excellent new books, both published by the Federation Press: AJ Brown's *Michael Kirby: Paradoxes and Principles* and Mark Leeming's *Resolving Conflicts of Laws* (which has nothing to do with private international law but is a splendid work nevertheless).

Good reading.

Andrew Bell SC
Editor

Interesting times in criminal law

By Keith Chapple SC

Photo: iStockphoto.com

This edition of the magazine is known around the Bar News Editorial Committee table as 'The Criminal Law Issue'. Our editor, Andrew Bell SC is a man blessed with a spirit of adventure and a sense of humour and was immediately enthusiastic about the idea of exploring the topic of criminal law at the New South Wales Bar in some detail. Flattery gets you everywhere in *Bar News* circles.

Chris O'Donnell and I are the resident criminal law people on the committee and it fell to us to put a plan together. Chris has been doing things for BN for even more years than I have and between us we realised we knew a lot of the people in the field. The brief was simple: put together an issue largely devoted to criminal law. To help do that we asked for input from a cross-section of criminal barristers to try and show the state of the law, some of its general recent history and the way it is practised in this state.

Everybody we approached loved the idea and agreed immediately to contribute. The results are all around for you to read and we think they are really worth your time. To the many contributors, thank you for coming on board. We are very grateful for your help.

As I was talking with my colleagues about the topics we were suggesting to them, some serious, some lighter and more anecdotal, I started thinking about my 30 years or so at the bar and before that working as a solicitor. Although the basic framework of the law is still the same as in the 1970s, there were some major differences to the system that we now work in. A few of them are worth touching on.

Some of the actions by prison officers were horrific including 'running the gauntlet' on admission to some institutions and systematic beating up of inmates generally.

The most obvious changes are in the numbers. The bar was much smaller than it is today as were the pieces of legislation we were dealing with. Crime figures were lower. There were fewer courts and the prison population was nothing like it is currently.

The prison system has expanded dramatically over three to four decades to cope with the rising inmate numbers and to try and improve conditions. The old facilities at Long Bay, Parramatta and the large country gaols all seemed to have been built from the same public works plan and their facades were familiar to anyone who watched black and white English movies. Conditions and discipline inside them were pretty black and white, too. Some of the actions by prison officers were horrific including 'running the gauntlet' on admission to some institutions and systematic beating up of inmates generally.

Early in my career as a solicitor I was employed by the Aboriginal Legal Service which had been started a few years earlier by the late Peter Tobin and others to try and make a difference in dealing with Aboriginal offenders. Every time I hear Cuba mentioned I think of Peter, a truly inspirational criminal lawyer who achieved so much in such a short career. The way Aboriginals were dealt with in some country courts by magistrates could be a real eye opener. Some of the atmosphere comes across in *Dixon v McCarthy:* (1975) 1 NSWLR 617. Around the time I joined the ALS the Nagle Royal Commission into Prisons was established after some of the prisoners drew attention to conditions at Bathurst Gaol by burning part of it down. The royal commission exposed the brutality endemic in the prison system up to that time.

I spent some months before I moved up to the Cowra office travelling

with ALS field officers to every institution in the state to document Aboriginal complaints that covered many years and many problems. These were included in submissions to the royal commission. There were prisons scattered all over the place, including in the middle of country towns, afforestation camps deep in the woods and custody wards like the enclosed ward at Morisset Psychiatric Hospital, out along a dirt track with big walls around it and heavily medicated people inside. Tragically, it was real life, not a Hollywood set.

Even in Sydney there have been big changes to prisons. The Silverwater Complex including Mulawa Women's Prison used to be just a relatively small group of buildings, not the extensive complex it is now; and Parklea I think was an even more recent addition.

Legal visits to gaols were and can still be difficult. The Nagle Royal Commission improved legal contacts a lot but these days I find that it's not so much getting in, but being able to work there. Many trials have hours of electronic evidence and you often need days to get instructions on telephone intercepts and so on, which is all disrupted by the rigid gaol timetables. This has led to trials grinding to a halt while you take part of your instructions at court; a terrible arrangement for everybody.

The start of the 1980s was marked by the appearance of major Commonwealth and state drug cases that changed the meaning of the expression 'a long trial'.

The dramatic rise in the number of prisoners on remand and the increase in the complexity of many cases from about 1980 onwards caused major delays in the court system in New South Wales. As a result a huge operation was directed by the chief judge of the District Court, which successfully reduced the backlog in that jurisdiction by the late 1990s (See: 'Changing Times in the District Court'- *Bar News* Winter 2004).

The start of the 1980s was marked by the appearance of major Commonwealth and state drug cases that changed the meaning of the expression 'a long trial'. The introduction of life imprisonment maximum sentences, complex evidentiary questions, multiple accused and large numbers of witnesses meant that these trials were invariably measured in months, not weeks or days as had been common before. Police investigations could take years so it is not surprising that the evidence filled trolley after trolley. Human ingenuity conceived more novel ways to import. Shipping

containers, machinery, motor vehicles, boats, suitcases, dinner plates and human beings are only some of the methods that have been used to conceal drugs. It was a very steep learning curve for judges and lawyers alike. Now no-one is particularly surprised when we hear that South American drug cartels are using their own submarines.

Trials involving allegations of fraud, identity theft, terrorism, cyber crime and offences involving children are also filling the court diaries these days, and some bring with them the need for increased security, larger juries and more court resources.

Juries themselves seem to have changed over the years. I cannot recall having a hung jury in any trial when I was instructing or appearing before 1990. Since then, even with the introduction of majority verdicts, there have been many. Recently I acted for a client charged with murder and we had three hung juries. We have been told that this has never happened before. In that case there was what is generally described on bail applications as a 'very strong Crown case', but plenty of other evidence that threw doubt on the prosecution case theory and this obviously troubled all three juries. They deliberated for a long time and seemed to approach their task very carefully and seriously. All of this is expensive and takes time and in a real sense is another form of delay but as some wise soul once said: 'Justice can't be rushed.' It can take weeks for jurors to discuss and debate what are obviously serious matters for the accused and the community. I have no idea if the police are still investigating the evidence we drew their attention to during those trials.

One problem seems to be this idea of the prosecution and police case theory and the practice of trying to jam evidence into it and ignore the rest. Sometimes, unless you are involved in a giant leap of faith there is no real evidence that a crime has actually been committed. In another recent case where there was no body, my client was acquitted of murdering his partner and it appears the jury was clearly troubled by the police ignoring suggested sightings of the missing man after he was supposed to have been killed. They were finally getting statements from some of these witnesses while that trial was underway. Deliberations once again took an incredible amount of time as the jury obviously struggled with the unsatisfactory state of the evidence. The trial went for a long time, our client was on remand for ages and his life was ruined.

Over recent years there have been many important changes that have transformed the whole procedure followed in criminal trials and hearings. These include the introduction of electronically recorded records of interview, the reversal of the order of addresses in criminal trials so that the defence goes last, the passing of the Evidence Act and the reliance on DNA evidence and grasping its shortcomings.

But it would not be right to mention some important features of criminal law in New South Wales over the last few decades without touching on the Wood Royal Commission into the NSW Police Service. When I looked at the final report today I was surprised to see that the Letters Patent setting up the commission were originally issued to Justice Wood on 13 May 1994. It seems like it was only yesterday. It is hard to exaggerate the dramatic effect the commission hearings all those years ago had on the police, lawyers and the public all over Australia as they exposed decades of 'entrenched and systemic corruption' in the New South Wales Police Force. Evidence was given by a seemingly endless number of police officers who had 'rolled over' and given commission investigators information about corrupt activities, some of which even criminal lawyers hadn't suspected. The terrible details covered many years, involved the city and the country and went up and down the ranks. I acted for a lot of people at the commission and its successor, the Police Integrity Commission. One of them, a detective in his forties, was typical of many who said he had joined the police as a teenage cadet, had begun his corrupt activity in his second week of employment and continued it throughout his whole career.

Apart from some well publicised exceptions, one hopes it has resulted in a better police force. If it has then the whole criminal justice system in the state is better for it.

As for the barristers, I can tell you that we are as varied as any other group in the law. I have had the pleasure of being led by and opposed to some real polymaths whose skill and hard work is only matched by their professional integrity and courtesy. There have been only one or two cases where the opposite applied. We are not infallible but all in all it has been an unforgettable journey.

We live in truly momentous times.

Bar Practice Course 01 - 2011

Back row: Daniel Hanna, Angus Stewart, Rob Munro, Mark Rowley, Martin Smith, Phil Sharrock, Conor Bannan, Chris Peadon, Simon Keizer, Tom French, Phil English, Matthew Sealey, Paul Santone, Alexander Flecknoe-Brown

Third row: Patrick Holmes, Vanessa Bosnjak, Ben Cochrane, Blake Palmer, Hilbert Chiu, Sasha Shearman, Jason Donnelly, Daniel Joyce, Awais Ahmad, Tatiana Stack, Jane Petrolo, Sarah Talbert, Sanjay Wavde, Tiffany Davy

Second row: Hagen Jewell, Michelle Swift, Anne-Marie Mannile, Priscilla Blackadder, Sarah Haddad, Leigh Sanderson, Michael Rennie, Hugh McDermott, Misha Hammond, John Zerilli, Marcus Hassal, Nishad Kulkarni, Denis Barlin, Luke Waterson

Front row: Paul Guterres, Louise Jardim, Caroline Dobraszczyk, Claire Latham, Samantha King, Michael Bennett, Anne Hemmings, Sandrine Alexandre-Hughes, Theresa Dinh, Deborah Dinnen, Frances Lalic, Susan Cirillo, Cara Feiner, Kathryn Millist-Spendlove. Absent: Tara Croft.

Criminal law a major policy focus for the Bar Association

By Bernie Coles QC

It is a great honour to assume the office of president following the appointment of my predecessor, the Hon Tom Bathurst, as chief justice of the Supreme Court of New South Wales. Over the years Tom has been a devoted servant of the law, holding a variety of positions at the Bar Association and beyond, culminating in his roles as president of the Australian Bar Association, and then of course this association. Tom has played a crucial role in the development of National Model Legal profession legislation and rules, as was acknowledged by the attorney general in his speech on behalf of the bar at the new chief justice's swearing in:

> As president of the Australian Bar you proved a strong leader at a time when the move to a unified national legal profession was in doubt. Should this ultimately come to pass, the contribution of your Honour – who helped draft rules which have been adopted by all state bar associations – should be acknowledged.

His skill as an advocate and jurist is widely acknowledged, and his appointment has been universally welcomed. Tom's contribution has received specific recognition from the Bar Council, which on 26 May resolved that he be appointed a Life Member for 'exceptional service to the Bar Association and to the profession of the law'.

This Winter edition of *Bar News* focusses upon the crucial area of the criminal law. The association's records indicate that 692 barristers practice in criminal law – over a third of the bar. Further, the criminal law has traditionally been, and continues to be, a major policy focus for the Bar Association, not least in terms of the threat to the Rule of Law which is posed from time to time by law and order legislation. The government's recent Crimes Amendment (Murder of Police Officers) Act, which introduced mandatory life sentences for persons convicted of murdering police officers, is a case in point.

...the criminal law has traditionally been, and continues to be, a major policy focus for the Bar Association, not least in terms of the threat to the Rule of Law which is posed from time to time by law and order legislation.

The Bar Association has established a constructive dialogue with the Hon Greg Smith SC MP, the new attorney general, who as a senior counsel and former deputy senior crown prosecutor understands the issues facing the bar and the need for the bar to advocate issues of legal principle which may not accord with the government's own policies. The Bar Association's Criminal Law Committee prepared a comprehensive submission opposing the Murder of Police Officers legislation on the grounds that, among other things, 'mandatory sentencing breaches basic principles of justice, in particular the concept that similar cases should be treated similarly but that relevant differences should lead to different results.' The Bar Association's submission was provided to all parties in the parliament and individual briefings of members of parliament were conducted.

Despite the Bar Association's concerns, the legislation passed the parliament. It is of the utmost importance that there are clear lines of communication with the attorney general so that there is mutual understanding, even if we cannot agree on every occasion. I have already had the opportunity to meet the attorney since my appointment as president, and am pleased to report that that kind of mature, co-operative approach is very much in evidence. The association will continue to pursue the interests of the bar with the new government, not least in the areas of legal aid and tort law reform.

The announcement of the appointment of Tom Bathurst as chief justice coincided with the Bench and Bar Dinner, which was held on Friday, 13 May. Once again, it was a great success, with excellent speeches from the Hon Patrick Keane, John Griffiths SC and Angela Pearman. A good time was had by all.

The Bar Council has again this year reviewed the senior counsel

protocol. It is crucial that the protocol remain under ongoing scrutiny in order to ensure that the senior counsel selection process continues to be relevant, and again this year the views of members were sought as to how the silk appointment process could be improved. As a result of the review process, the protocol has been amended to make it clear that there is no reason why a barrister who practises as a 'pure mediator', that is, who sits as a mediator or in related ADR proceedings, cannot be considered for appointment as senior counsel.

The Bar Council has also approved changes to the *Guide to Practical Aspects for Silk Applicants* which broaden the range of professional experience which applicants can include in their applications.

Members were also invited to make submissions to the review of the Bar Association's educational programmes conducted by the Hon Kevin Lindgren QC. The review has now been completed and its recommendations are currently being considered by Bar Council. Although no final decisions have been made, Bar Council will be considering the establishment of a specific Education Committee, and closely considering changes to the form and content of the bar exams, among other things.

Both the Bar Council and I welcome the views of members on matters which are important or are of particular concern to them.

Dear Sir

The Autumn *Bar News* informs us that someone has actually written a book about vexatious litigants.

Vexatious litigants present an increasing problem for the administration of justice. I suspect, (and someone has probably unbeknownst to me established with numbers), that the increase in the vexatious litigant problem has marched alongside the diminution in real terms of legal aid funding. I note that the Law Council immediately took the Commonwealth attorney-general to task for a perceived failure to increase legal aid funding in the recent budget.

I think I have an answer to the first problem and a partial answer to the second. I first committed it to paper in 2008, as the draft below shows. Perhaps publication in *Bar News* will spur the New South Wales attorney general to adopt this proposal.

I would welcome the opportunity to serve on a committee charged with identifying those whose names ought to be entered upon schedules A and B.

Gerard Craddock

Vexatious Litigation (Repeal and Reform) Act 2008

1. All laws in force at the time of the enactment of this Act restricting the right of any person to litigate in the courts of New South Wales are repealed.
2. Persons whose names appear on Schedule A to this Act are free to litigate in NSW, but only against other persons whose names appear on Schedule A.
3. All proceedings referred to in section 2 are to be presided over by a person whose name appears on Schedule A.
4. Parties to proceedings referred to in section 2 are entitled, but not obliged, to appear by representatives. All persons who represent parties to proceedings referred to in section 2 must be legal practitioners whose names appear on Schedule B.
5. Legal practitioners whose names appear on Schedule B are only entitled to appear as advocates in proceedings referred to in section 2.
6. Proceedings referred to in section 2 may, at the sole and unfettered discretion of the chief justice of NSW, be televised by any public or private broadcaster at a fee to be determined by the chief justice. Monies paid by broadcasters for rights to broadcast proceedings referred to in section 2 are to be paid to the Department of Attorney General and Justice and are to be made available for the provision of advocacy services to indigent litigants, whose names do not appear on Schedule A, by legal practitioners who are on the roll of legal practitioners for New South Wales but whose names do not appear on Schedule B.

Dear Sir

I am entirely disinterested in the debate, but SG Campbell's suggestion (*Bar News*, Autumn 2011, Letters) should not pass without comment. I, for one, do not consider Duncan Graham's hypothesis (*Bar News*, Summer 2010–2011) as either far fetched or fanciful. To the contrary, it reflects the truth of the matter. And I suggest that the proper test is not that of the 'passing acquaintance of the bar' but rather the reasonably fair minded objective bystander appraised of all of the facts. I am confident she would agree with Duncan Graham.

Robert Reitano

Judicial views on litigation funding

The following paper was delivered by the Hon Justice RI Barrett at the INSOL International Annual Regional Conference in Singapore on 15 March 2011.

One form of funding of litigation by liquidators and trustees in bankruptcy is of long standing in Australia. For more than a hundred years[1], liquidators and trustees have been able to ask the court to give a preferred position in the application of assets to a creditor who has financially assisted recovery proceedings[2].

It was in insolvency recovery litigation and consumer class action litigation – fields where available resources were almost by definition unequal to the task – that the need for external funding first came to be recognised. The Australian Law Reform Commission recommended[3] 23 years ago that there be legislative approval of litigation funding for class actions. The government did not act on the recommendation. But, as things turned out it did not need to.

In decisions of 2006 and 2009 (the *Fostif* case[4] and the *Jeffery & Katauskas* case[5]), the High Court of Australia has placed its seal of approval very firmly on what had become a growing but hesitant judicial acceptance of the general concept of commercial funding of proceedings by strangers to the litigation.

And so today, Australia has a well-established litigation funding industry. A major funder is listed on the Australian Securities Exchange. It issues regular reports to the market[6]. We find, for example, a market announcement of 28 February of the failure of a mediation in proceedings involving Lehman Brothers; and on 21 February there is an announcement of a conditional settlement of litigation against Babcock & Brown, complete with a reference to the amount the company is to receive and the profit derived for shareholders.

In the *Fostif* case in 2006, the High Court came to grips squarely with the competing claims of access to justice and the protection of judicial process through the traditional prohibitions on champerty and maintenance. The result was that access to justice won and champerty and maintenance (no longer torts in most Australian jurisdictions) lost.

The Australian Law Reform Commission recommended[4] 23 years ago that there be legislative approval of litigation funding for class actions. The government did not act on the recommendation. But, as things turned out it did not need to.

The majority said, quite simply, that a litigation funding agreement – under which an outside party provides the finance for litigation and takes a share of the spoils – is not per se objectionable. Blanket disapproval was replaced by two ad hoc control mechanisms – abuse of process and public policy.

To mention these particular instruments of control, as the High Court did, is to conjure up various possibilities. But on examination, the possibilities all seem to fall away. It is not an abuse of process or contrary to public policy that the funder is entitled to a share of the proceeds; or that the funder has control of the litigation; or that the funding acts as a stimulus to the bringing of an action that would otherwise not have been brought; or that the lawyers take their instructions from the funder.

In one area, concern remained – that the funder who stands to gain a share of financial fruits of victory is not exposed to the risk of the financial consequences of defeat. This, of course, is real under our system where the loser is generally ordered to pay the winner's costs of the action.

It was argued in the High Court case of Jeffery & Katauskas in 2009 that a tendency to abuse of process can arise if the plaintiff is impecunious and the funder controlling the proceedings has no potential liability for the defendant's costs if the defendant wins. The argument did not succeed. The general rule is that costs cannot be ordered against a non-party, so insulation of the non-party funder from the risk of costs liability is no more than a working out of the litigation process in the ordinary way.

The matter of external funding does tend to become prominent when the court is asked to order at an early stage that a plaintiff provide security for the defendant's costs. It was said in the *Green*[7] case in 2008 – after the High Court decision in Fostif – that a court should be more willing to make an order for security for costs against a plaintiff funded by a non-party whose interest is solely to make a commercial profit. In the exercise of the discretion they have on security for costs, judges are I think now inclined to seek ways to ensure that

the funder recognised in advance as responsible for any costs liability that the funded litigant might come to owe to the other party.

Another area where skirmishes can develop is over access to litigation funding agreements. The opponent of the funded party understandably wants to know the details of the funding. The general approach of the courts is that, unless the funded party somehow puts it in issue, information about the war chest is privileged and entitled to protection on broader bases of the proper administration of justice.

were spectacularly unsuccessful and, on his assessment, might not have been brought – or at least pursued in the way they were pursued – had it not been for the funder's presence and influence. His general thesis is that funding can produce excesses that even the most assiduous case management cannot control, despite the reality that a funder has no interest in spending good money on a hopeless case.

If one were to attempt to sum up the judicial attitude to litigation funding in Australia today, it would be something like this:

... funding can produce excesses that even the most assiduous case management cannot control, despite the reality that a funder has no interest in spending good money on a hopeless case.

But the matters I have mentioned are truly skirmishes. The big picture is settled, but not without disquiet. That disquiet emerges starkly from the powerful dissenting judgments[8] in both *Fostif* and *Jeffery & Katauskas*. It also finds expression in an October 2009 address to a judges' conference by Justice Patrick Keane (then of the Queensland Court of Appeal and now chief justice of the Federal Court of Australia)[9]. He was not at all comfortable with the idea that, as in the *Hall v Poolman* case[10], it is acceptable for a funded liquidator to prosecute to conclusion proceedings that yield only enough to pay the lawyers, the funder and the liquidator himself. He also traced the history of two other pieces of mega-litigation, both externally funded (and one of which was brought by a liquidator), which

- *first*, the desirability of ready access to justice justifies third party funding;
- *second*, it is a distortion, but not a fatal one, for decision-making about the course of the litigation to be effectively out of the hands of the person who has the cause of action;
- *third*, the playing field should be levelled so that an assisted plaintiff's externally provided financial support is available to secure the plaintiff's potential costs liabilities in the same way as if it were the plaintiff's own resources;
- *fourth*, generally speaking, it is likely to be more in line with the interests of justice for the opponent not to have access to the plaintiff's funding arrangements;
- *fifth*, the concepts of abuse of process and public policy are always in reserve to deal with any particular excess that may emerge in a particular case;
- *sixth*, the fear that those sleeping dogs may wake imposes its own discipline; but
- *seventh* there is a danger that funded litigation may turn into a wild beast beyond the realistic control of those particular dogs.

Endnotes

1. See for example *Re Manson; Ex parte the Official Assignee* (1897) 18 LR (NSW) (B & P) 45.
2. See now *Corporations Act 2001* (Cth), s 564; *Bankruptcy Act 1966* (Cth), s 109(10).
3. Australian Law Reform Commission, Report No 46, 'Grouped Proceedings in the Federal Court'.
4. *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41.
5. *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43.
6. See announcements at http://www.imf.com.au/announcements.asp
7. *Green v CGU Insurance Ltd* [2008] NSWCA 148.
8. The joint judgment of Callinan J and Heydon J in *Fostif* and the judgment of Heydon J in *Jeffery & Katauskas*
9. P A Keane, 'Access to Justice and Other Shibboleths', a paper presented to the Judicial Conference of Australia on 10 October 2009, accessible at http://www.jca.asn.au/attachments/2009AccesstoJustice.pdf
10. *Hall v Poolman* [2009] NSWCA 64.

Acts Interpretation Amendment Act 2011

On 27 June 2011 the Commonwealth Acts Interpretation Amendment Act 2011[1], received Royal Assent and slipped quietly into the federal body of law.

The Acts Interpretation Amendment Act 2011 is the result of Recommendation 22 in the Clearer Commonwealth Law report 1993 (House of Representatives Standing Committee on Legal and Constitutional Affairs) and a joint discussion paper issued by the Federal Attorney-General's Department and the Office of Parliamentary Counsel in 1998[2].

The Acts Interpretation Act Amendment Bill received bipartisan support after its introduction into the House of Representatives on 12 May 2011 by Attorney-General Robert McClelland. The bill was passed in the House of Representatives on 24 May 2011, introduced into the Senate on 14 June 2011 and passed in the Senate on 15 June 2011.

The attorney-general's media liaison advises that the amendments will have effect from six months after the date of royal assent, or 27 December 2011.

The provisions of the AIAA will substantially amend the Commonwealth *Acts Interpretation Act 1901*[3].

The Acts Interpretation Amendment Act 2011 (AIAA)

The AIAA contains 3 sections and 3 schedules. Section 1 gives the short title of the Act. Section 2 (1) contains a table of commencement dates for amendments to a range of Acts including the AIAA itself.

Item 2 of the table in section 2 (1) provides that the amendments to the Acts Interpretation Act 1901 will commence on either a single day to be fixed by Proclamation, or, if any of the provision(s) do not commence within the period of six months beginning on the day this Act receives the royal assent, they commence on the day after the end of that period.

It should be noted that certain amendments enumerated in the table in section 2 (1) are consequent upon either amendments to other legislation or the introduction of specific legislation. Some amendments will not take effect despite the terms of the AIAA if the legislation named in the table is not introduced[4].

Section 2 (2) provides that the information included in column 3 of the table in section 2 (1) does not form part of the Act.

Section 3 provides that the amendment or repeal of each Act specified in a Schedule to this Act is to take effect as set out in the applicable items in the Schedule concerned.

Amendments to the *Acts Interpretation Act 1901*

Schedule 1 of the AIAA contains extensive revisions, repeals and re-enactments of sections throughout the *Acts Interpretation Act 1901*, as well as modifying section 13 *Legislative Instruments Act 2003* which refers to construction of legislative instruments and the application of the *Acts Interpretation Act 1901*.

The new Overview to the *Acts Interpretation Act 1901* describes the Act as:

> a dictionary and manual to use when reading and interpreting Commonwealth Acts and instruments made under Commonwealth Acts.

The changes to the *Acts Interpretation Act 1901* ('the Act') include a revised Part 2 which co-locates and enhances definitions of words and phrases. Some definitions have been relocated within the Act without being substantively amended. In some instances the word 'the' has been removed from the start of the definition. The most significant amendments to definitions are:

- document will become consistent with definition in the *Evidence Act 1995*;
- calendar month has been simplified and reiterated for month;
- court of summary jurisdiction 'means any justice of the peace, or magistrate of a state or territory, sitting as a court of summary jurisdiction';
- Gazette will refer to the post-1976 *Commonwealth of Australia Gazette*;
- Minister or Minister of State will become 'Ministers of State for the Commonwealth'.

The AIAA adds new definitions for the following:

- Australian citizen is given the same meaning as in the *Australian Citizenship Act 2007*;
- Business day is defined as 'a day that is not a Saturday, a Sunday or a public holiday in the place concerned';

- Contiguous zone, Continental shelf, Exclusive economic zone and Territorial sea have the same meaning as in the *Seas and Submerged Lands Act 1973* and the United Nations Convention on the Law of the Sea done at Montego Bay on 10 December 1982;
- Insolvent under administration has the same meaning as in the *Corporations Act 2001*;
- Modifications is defined as 'in relation to a law, includes additions, omissions and substitutions'; and
- Penalty unit has the same meaning as in section 4AA of the *Crimes Act 1914*;
- Standards Australia will replace, where appropriate, existing references to 'Standards Association of Australia' and 'Standards Australia International Limited' with references to 'Standards Australia'.

Many definitions are relocated within the Act but remain unchanged. The definition of British possession will be moved to the *Crimes Act 1914*.

Roman numerals will be replaced with Arabic numerals and the majority of amendments remove the phrase 'unless the contrary intention appears' from numerous sections of the Act.

References to the 'king' will become references to the sovereign.

References to Ministers and ministerial functions have been revised and section 19B and 19BA Orders will apply retrospectively. Action taken by or in relation to a person purporting to act under an appointment or temporary appointment is not invalidated in certain circumstances.

A new section 13 states that all material in an Act is part of the Act and should be given appropriate weight in interpreting the terms of the Act[5]. This applies to all Acts from the commencement of the amendment.

Section 15AA is amended to provide that a court is to prefer the construction of an Act that will 'best achieve' the purpose or object of the Act.

Subsections 33(3A) and (3AB) and subsection 13(3) Legislative Instruments Act 2003 will include a definition of matter that includes things, persons and animals.

Subsection 33B(3) is amended to explicitly provide that meetings can be conducted by telephone and other methods of communication. New subsections 33B(4) and (5) allow for a meeting to be held in two or more places at the same time.

Section 34AB (2) provides that a delegation of powers, functions or duties under a given Act or part of an Act extends to a power, function or duty included in that Act or part that has come into existence after the delegation is made[6].

Section 46 (1)(b) and (c) and subsection 13(1) *Legislative Instruments Act 2003* are amended to refer to the enabling legislation 'as in force from time to time'[7].

Schedule 2 lists the consequential amendments to statutes ranging from the *Aboriginal and Torres Strait Islanders Act 2005* to the *Wine Australia Corporation Act 1980*.

The majority of the consequential amendments are minor. For example, the amendment to the *Evidence Act 1995*, which gives effect to the new section 13 *Acts Interpretation Act 1901*, reads:

> After subsection 3(1)
> Insert:
> (1A) The Dictionary at the end of this Act is part of this Act[8].

Schedule 3 contains items relevant to application and saving provisions, transitional provisions, and the making of regulations.

All practitioners are encouraged to review the AIAA to gauge the impact it will have on their areas of practice.

By Margaret MacLean Pringle

Endnotes

1. Act No. 46 of 2011.
2. *Review of the Commonwealth Acts Interpretation Act 1901*, 1998.
3. Act No. 2 of 1901
4. e.g. Section 2(1) AIAA, table item 4: Schedule 2, items 653 and 654; *Governance of Australian Government Superannuation Schemes Act 2011*.
5. *Wacando v The Commonwealth* (1981) 148 CLR 1 at 16, Gibbs CJ.
6. *Australian Chemical Refinery Pty Ltd v Bradwell*, New South Wales Court of Criminal Appeal, Street CJ, (unreported, 28 February 1986).
7. *Birch v Allen* (1942) 65 CLR 621.
8. Schedule 2, 566.

Admissibility of propensity evidence in criminal proceedings

Stubley v Western Australia [2011] HCA 7; (2011) 85 ALJR 435
Roach v The Queen [2011] HCA 12; (2011) 85 ALJR 558

These two recent High Court decisions dealt with the admissibility of propensity evidence in criminal proceedings. Although they were on appeal from Queensland and Western Australia respectively, these cases may provide some guidance regarding concepts familiar under the *Evidence Act 1995* (NSW).

Stubley v Western Australia

The decision in *Stubley v Western Australia* [2011] HCA 7 concerned the admissibility of evidence of uncharged acts of sexual misconduct under the *Evidence Act 1906* (WA). Section 31A of the Act provides that '[p]ropensity evidence or relationship evidence' is admissible if it would have 'significant probative value' and, in light of that probative value, 'fair-minded people would think that the public interest in adducing all relevant evidence of guilt [had] priority over the risk of an unfair trial.'

The case involved allegations of sexual activity without consent against a psychiatrist by two former patients. The offences were alleged to have occurred in the appellant's consulting rooms during psychotherapy appointments. The evidence at issue in the appeal was given by two other former patients of the appellant and the appellant's former receptionist, who each stated that they had had sexual relations with the appellant in his consulting rooms. At the conclusion of the hearing of the High Court appeal in October 2010, orders were made setting aside the conviction and directing a new trial. The court's reasons were published in March 2011.

The question on the appeal was whether the evidence of the non-complainant witnesses had 'significant probative value' in a context in which the appellant admitted to having sexual relations with the complainants but contended that they were consensual. The majority judgment of Gummow, Crennan, Kiefel and Bell JJ stated that the evidence of the non-complainants was capable of proving that the appellant had a tendency to engage in sexual relations with his patients during consultations, and could have affected the assessment of the complainants' evidence on that issue.[1] However, 'evidence of sexual misconduct not charged in the indictment committed against other women led in order to prove an issue that was not live in the trial' would not outweigh the risk to a fair trial.[2] The evidence 'could not rationally affect' the assessment of the remaining issues: (1) whether the complainants did not consent to sexual contact charged in the indictment;[3] (2) the plausibility of the reasons the complainants did not make earlier complaints;[4] and (3) whether the appellant had an honest and reasonable but mistaken belief that either complainant had consented to the sexual activity.[5]

For these reasons, the majority held that the evidence of the non-complainants 'did not have significant probative value', and thus 'should not have been admitted into evidence at the appellant's trial.'[6] The Court set aside the convictions and ordered a new trial, noting that the appellant's age and poor health would be matters for the Director of Public Prosecutions to take into account in the exercise of his discretion.[7]

Heydon J dissented on the basis that 'the occurrence of the acts of sexual intimacy remained a live issue' in the case.[8] Heydon J stated that 'an allegation that a psychiatrist was engaging in sexual intercourse with a female patient suffering from a mental disturbance which it was his duty to treat would seem so serious and inherently unlikely as to be startling, outlandish and far-fetched to the point of being bizarre'.[9] In contrast, 'a prosecution supported by the evidence of three other women giving similar testimony about the tendency of the accused to engage in acts of sexual intimacy with patients during consultations would be a prosecution backed up by evidence of so high a degree of probative value that the public interest had priority over the risk of an unfair trial.'[10] For this reason, Heydon J would have allowed the similar fact evidence.[11]

Roach v The Queen

The decision in *Roach v The Queen* [2011] HCA 12 considered the relationship between two sections of the *Evidence Act 1977* (Q) and the common law rule in *Pfennig v The Queen* (1995) 182 CLR 461. Section 132B of the Act provides for the admissibility of '[r]elevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed'. Section 130 states that nothing in the Act 'derogates from the power of the court in criminal proceedings to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit the evidence'. The High Court in *Pfennig* imposed a stringent rule that only if there is no rational view of the evidence consistent with the innocence of the accused can a trial judge

safely conclude that the probative force of propensity evidence outweighs its prejudicial effect.[12]

The case concerned a charge of assault occasioning bodily harm in circumstances where there had been previous assaults in the course of the relationship between the appellant and the complainant. Evidence of these previous assaults was admitted pursuant to s 132B and not excluded under any discretion preserved by s 130. On appeal to the Queensland Court of Appeal and the High Court, the principal issue was whether the trial judge should have applied the rule in *Pfennig*. Both courts dismissed the appeal.

As to whether *Pfennig* affects the application of s 132B, the joint judgment of French CJ, Hayne, Crennan, and Kiefel JJ emphasised that the provision should be read on its terms and understood in the context of its introduction into the Act. Their Honours held that '[r]elevance is the only requirement stated for admissibility' and that '[i]t may be assumed that that legislative choice was made with knowledge of the decision in *Pfennig*, which had been made some two years earlier and which effected an important change.' [13] In a separate judgment, Heydon J agreed that the clear language of s 132B had abolished the common law rule.[14]

On the question of whether *Pfennig* should be imported into s 130, the joint judgment stated that although 'the concern in *Pfennig* was as to the highly prejudicial effect that similar fact evidence of propensity may have for an accused' and 'the rule in *Pfennig* addresses that problem … it does so in a way quite different from the exercise of a discretion.'[15] French CJ, Hayne, Crennan, and Kiefel JJ stated that '[i]f the rule applied, it would not be possible for a trial judge to test for unfairness in a manner consistent with that discretion' since '[t]he rule operates in such a way that there would be no room for the exercise of any discretion'.[16] Heydon J agreed that the 'criterion of admissibility' represented by the rule in *Pfennig* could not be 'incorporated into s 130 to regulate its operation as a 'discretion''.[17]

By Simon Fitzpatrick

Endnotes

1. [2011] HCA 7 at [64].
2. Ibid at [65].
3. Ibid at [74].
4. Ibid at [80].
5. Ibid at [83].
6. Ibid at [84].
7. Ibid at [85]-[86].
8. Ibid at [141].
9. Ibid at [143].
10. Ibid.
11. Ibid.
12. (1995) 182 CLR 461 at 483 per Mason CJ, Deane and Dawson JJ.
13. [2011] HCA 12 at [31].
14. Ibid at [56]-[57].
15. Ibid at [34].
16. Ibid at [37].
17. Ibid at [63].

Federal Court Rules 2011

The Federal Court of Australia has circulated the draft amended Federal Court Rules. The new Rules are expected to commence on 1 August 2011. This note sets out a brief (and by no means exhaustive) overview of some of the key changes introduced in the new Rules.

General

The new Rules have replaced the old numbering system of Orders and Rules with a new system of Chapters, Parts, Divisions and Rules. Rule numbering takes the number of the Part and the Rule.

The new Rules are drafted with the intention of adopting plain English drafting and some supposedly archaic terms, such as 'notice of motion' and 'traverse' have been replaced with 'interlocutory application' and 'denial' respectively.

Court forms are no longer scheduled to the Rules. Forms are approved by the chief justice pursuant to rule 1.52(2) and published on the court website.

Rule 1.04 provides that the new Rules apply to proceedings commenced in the court on or after the commencement date. The new Rules will also apply to all steps taken in existing proceedings after the commencement date, unless the court orders that the old rules are to apply.

Commencing proceedings

Proceedings in the original jurisdiction of the court are commenced by originating application (rule 8.01, form 15). Originating applications are to be accompanied by a statement of claim or affidavit (rule 8.06), and on filing, will be endorsed with the first return date (rule 5.01). The originating application must be served no later than five days before the first return date (rule 8.07).

An originating application must be filed with the applicant's genuine steps statement in proceedings governed by the pre-trial procedures set out in Part 2 of the *Civil Dispute Resolution Act 2011* (Cth), which is also scheduled to commence on 1 August 2011. Rule 8.02 prescribes the information that must be included in the genuine steps statement. Further information in relation to the pre-trial protocols is set out in the next article, 'Genuine steps obligations and pre-litigation requirements'.

Originating applications may not be amended without leave (rules 8.21 and 8.22).

On receipt of an originating application, respondents must file a notice of address for service rather than an appearance (Form 10, rule 5.02), and a genuine steps statement where applicable (rule 5.03), before the first return date fixed in the originating application.

The notice of address for service (like the originating application) must comply with rule 2.16, which requires parties represented by lawyers to indicate the telephone number, fax number and email address of the lawyer. If a party is represented by a lawyer, the party agrees for the party's lawyer to receive documents at the lawyer's fax number or email address (rule 11.01). Accordingly, the rules now provide for mandatory service of documents by fax or email.

Where a respondent wishes to contest the jurisdiction of the court, the conditional appearance is replaced by filing of an application to set aside the originating application at the same time as the address for service (rule 13.01). A respondent not intending to contest the application may file a submitting notice prior to the return date (rule 12.01).

The court (including a registrar) is empowered to make a range of directions for the management, conduct and hearing of the proceeding at the first and subsequent directions hearings (rule 5.04).

Cross-claims are not filed as part of the defence but are to be filed as a separate notice of cross-claim, to be filed at the same time as the filing of a defence or otherwise with leave (rules 15.02-15.04, form 31). Cross-claims cannot be amended without leave. The rules are silent on whether cross-claimants are required to comply with the *Civil Dispute Resolution Act 2011* (Cth) when commencing a cross-claim, however rule 15.10 may operate to apply the Rules in relation to originating applications (including those relating to service of genuine steps statements) to cross-claims.

Pleadings and particulars

A defence may now be filed and served within 28 days

after service of the statement of claim (rule 16.32).

The new Rules require particulars to be provided of allegations of conditions of mind, including knowledge (rule 16.43(1)). If a party alleges that another party ought to have known of something, particulars must be given of the facts or circumstances from which the party ought to have acquired knowledge (rule 16.43(2)).

Further and better particulars will be ordered only where the opposing parties did not have sufficient knowledge of the case to be answered, and would thereby be prejudiced in the conduct of the case (rule 16.45).

Interlocutory applications

Notices of motion are now referred to as interlocutory applications.

Unlike the previous rules, interlocutory applications need not be supported by affidavit in some circumstances. Where a party wishes to rely only on correspondence or other documents the authenticity of which is not in dispute, a list of the documents and correspondence relied on may be provided to the other parties and the applicant on the interlocutory application must file the documents in court, including additional documents identified by the other parties (rule 17.02).

Discovery

The new Rule no longer provides for discovery by notice. Discovery is now available only when the Court orders, and only where necessary for the determination of the issues in the proceedings. Parties giving informal discovery will not be entitled to the costs of giving discovery (rules 20.11 to 20.12).

Parties may apply for an order for discovery. The application may only be made 14 days after all respondents have filed a defence (rule 20.13(1), (3)).

The new Rules distinguish between standard discovery and more extensive discovery. Standard discovery is defined as documents directly relevant to the issues raised in the pleadings, of which the party the subject of the order is aware after a reasonable search and that are in the relevant party's control. The concepts of relevance and reasonable search are further defined in the same way as the existing Order 15 Rule 2 (rule 20.14).

An application for discovery must stage whether the party is seeking standard discovery or the scope of the discovery sought (rule 20.13(2)). Non-standard or more extensive discovery may be sought by identifying any of the criteria for standard discovery that should not apply, any additional criteria that should apply and whether categories of discovery, electronic discovery or a discovery plan are sought. An applicant for non-standard discovery must put on an affidavit stating why the order should be made and including any the proposed categories for discovery, electronic format or draft discovery plan (rule 20.15).

Rule 20.20 provides a limitation on the continuing obligation to make discovery under the present rules. A party is not obliged to give discovery of documents created after the proceeding is commenced and subject to a claim for privilege.

Alternative Dispute Resolution

The new Rules include provisions for the referral of proceedings to Alternative Dispute Resolution (ADR). Parties are required to consider options for ADR, including mediation, as early as possible (rule 28.01). The court is empowered to make orders for reference to ADR processes and a stay or adjournment of the proceedings, and to require mediators and arbitrators to report to the court (rule 28.02). Where parties refer to the proceedings to ADR of their own motion, they must apply to the court for directions as to the future conduct and management of the proceedings within 14 days of the referral (rule 28.05).

A party is no longer able to apply to terminate an arbitration under the new Rules (rule 28.04). The court's ability to enforce the terms of awards has been enhanced under the new Rules: parties can now make applications for registration of an award made in an arbitration that was referred from existing proceedings (rule 28.13) or for an order in terms of the award where the subject matter of the arbitration falls within the original jurisdiction of the court (rule 28.14).

The new Rules also govern the court's supervision of other ADR Processes (rules 28.31-28.35).

Lastly, the new Rules introduce rules applicable to the recent amendments to the *International Arbitration Act 1974* (Cth). Rules 28.31-28.50 govern applications for stay of arbitration, recognition of local awards and enforcement of foreign awards, subpoenas and compulsory attendance before a tribunal, and confidentiality orders.

Evidence

Changes have been made to the form of affidavits under the new Rules. All documents that are not original documents or of such dimensions that they cannot be annexed must be contained in an annexure to the affidavit (and therefore filed) (rule 29.02(4)). The pages of annexures need not be signed but each annexure must be identified by a separate certificate (rule 29.02(7), (8)).

Solicitors' certificates of compliance are no longer required for the filing of affidavits.

The dictionary to the new rules defines 'filing' as filing and service, with the consequence that most documents, including affidavits, are to be filed and served. Affidavits must now be served with exhibits and annexures at least 3 days before it is intended to be relied on (rule 29.08).

The new Rules provide for the filing and service of expert reports as well as the manner in which expert evidence may be heard. Rules 23.11-23.15 duplicate the existing rules and import the requirements of practice note CM 7 as to the form of experts' reports.

Appeals

The new Rules now incorporate some of the terms of Practice Notes APP 1 and APP2 in relation to preparation of appeals to the Federal Court (rules 33.23-33.28) and appeals to the full court (rules 36.51-36.56). The more detailed provisions of the Practice Notes continue to apply.

Applications for leave to appeal from interlocutory decisions must be made within 14 days of the date that judgment is given or the order made (rule 35.03) and applications may be made orally at the time the judgment or order is made. An application for leave to appeal must be served within two days of filing (rule 35.15).

By Catherine Gleeson

Genuine steps obligations and pre-litigation requirements

Julie Soars examines whether genuine steps obligations in Federal courts and pre-litigation requirements are a cultural shift in how the courts are perceived or an unnecessary and potentially costly burden.

From 1 August 2011[1] parties to civil disputes will be required to take 'genuine steps' to resolve the disputes *before* proceedings are commenced in the Federal Court of Australia. The avowed goal of these pre-litigation requirements is to 'improve access to justice' and 'reflect a cultural shift in how the position of the courts is perceived in the justice system'[2]. The shift can be described as being away from a system of adversarial justice towards a consensus based pre-court system of resolution.

The requirements in relation to proceedings brought in Federal courts are found in the *Civil Dispute Resolution Act 2011* (Cth)[3] (CDRA) and also in corresponding changes to be made to court rules. The overall aims of the CDRA as explained in the Explanatory Memorandum to this Act (Explanatory Memorandum) are:

- to change the adversarial culture often associated with disputes;
- to have people turn their minds to resolution before becoming entrenched in a litigation position; and
- where a dispute cannot be resolved, ensuring that if a matter does progress to court, the issues are properly identified, ultimately reducing the time required for a court to determine the matter[4].

The changes will apply to civil proceedings commenced in the Federal Court and Federal Magistrates Court from 1 August 2011 (the expected date for the commencement of a proposed new set of Federal Court Rules 2011[5]). Any proposed amendments to the Federal Magistrates Court Rules have not yet been made available.

Similar requirements in NSW courts[6] are contained in amendments made to the *Civil Procedure Act 2005* (NSW)(CPA) by the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) which introduced into the CPA a new Part 2A (sections 18A to 18O) and made amendments to section 56 of the CPA, including to extend the overriding purpose of 'just, quick and cheap' to apply to civil disputes prior to commencement. The NSW amendments to the CPA were passed by the previous state Labor government but are not yet in effect and are subject to a transitional period which will expire on 1 October 2011. There is also a regulation in force exempting NSW Supreme Court matters pending the Federal provisions coming into force[7].

In Victoria provisions equivalent to those in NSW were enacted in 2010 and were expected to come into force in Victorian courts from 1 July 2011. These were repealed prior to coming into effect upon the change to a Liberal coalition government in Victoria.

The new Victorian Attorney General Robert Clark in the media release announcing the repeal of the reasonable steps requirements described them as 'heavy handed mandatory requirements' which could 'allow parties who are only interested in avoiding their responsibilities to postpone and frustrate proceedings'[8].

At the time of going to press the position in NSW is uncertain pending a public announcement by the NSW Attorney General Greg Smith SC as to whether the recently elected Liberal government will continue with the introduction of these reforms and/or as to the scope of any exclusions from the reasonable steps requirements (whether by regulation or rules of court). If the new NSW government continues with these reforms, then the requirements will apply to civil proceedings commenced in NSW courts on and from 2 October 2011 (in the NSW Supreme Court from this date only if the regulation currently excluding all proceedings in that court is repealed). It is not clear, however, whether these amendments will come into force in NSW on this date, or at all.

Given these uncertainties, this article will focus on the Federal provisions.

Lawyers groups have challenged the assumption that change is necessary, the current system is adversarial or that the culture of the legal profession is a barrier to ADR[9]. Lawyers groups have generally criticised the proposed changes as being likely to 'front-load' case preparation and as being inappropriate given their 'one-size fits all' approach[10] especially in relation to complex commercial disputes.

Barristers are potentially impacted because they are 'lawyers' subject to the CDRA[11] (and in NSW are 'legal practitioners' subject to the 'reasonable steps' obligations under the CPA). Barristers therefore need to be aware of the obligations imposed on them in relation to pre-litigation requirements and, in particular, of their potential exposure to a personal costs order if they do not advise clients of the genuine steps requirements and assist the client to comply with their genuine steps obligations.

To add to the complexity, there are differences between the Federal provisions and the proposed NSW provisions, in particular in the description of the obligation – in NSW it is a 'reasonable steps' obligation compared to the Federal 'genuine steps' obligation. The term 'genuine steps' arguably allows factors subjective to the party to be taken into account and is a novel term less certain in its meaning than 'reasonable steps'[12]. It is likely therefore that there will be differences in the development of case authority in relation to the Federal provisions and the NSW provisions (if they come into force).

Federal – 'genuine steps' to resolve disputes before certain civil proceedings are instituted

These requirements impose three new obligations/ duties:

- an *obligation on litigants* to take 'genuine steps' (in NSW it is 'reasonable steps') to clarify or narrow the issues in dispute and/or engage in alternative dispute resolution (ADR) prior to commencement of proceedings otherwise they can be subjected to a possible costs or adverse procedural orders for non-compliance (by reason of the interaction between sections 6, 7 and 12 CDRA);
- an *obligation on litigants* in Federal courts to file a Genuine Steps Statement (GSS) (it will be a Dispute Resolution Statement in NSW courts) at the time of commencement of the proceedings (sections 6 and 7 CDRA, rules 5.03 and 8.02 of the draft Federal Court Rules 2011 and forms 16 and 11 of the new draft Federal Court forms); and
- a *duty on lawyers* (as defined in the *Federal Court of Australia Act 1976* (Cth) (legal practitioners in NSW) to inform clients about these requirements (including the filing of a GSS) and advise on ADR alternatives (subjecting the lawyer to a possible personal costs order for non-compliance) (sections 9 and 12(3) CDRA).

The term 'genuine steps to resolve a dispute' is now[13] defined in s 4(1A) CDRA to be satisfied if the steps taken by a person in relation to the disputes constitute a sincere and genuine attempt to resolve the dispute, having regard to the person's circumstances and the nature and circumstances of the dispute.

Illustrative examples of genuine steps in s 4(1) CDRA include notifying the other person of the issues in dispute and offering to discuss them with a view to resolving them, responding appropriately to any such notification, providing relevant information and documents, considering or agreeing to ADR[14] and attempting to negotiate with the other person with a view to resolving some or all of the issues in dispute.

The changes do not require compulsory mediation prior to the commencement of proceedings. The obligation is to consider and use ADR (broader than just mediation – includes early neutral evaluation and expert determination), where appropriate[15]. ADR is a key, although not mandatory, component of the genuine steps requirement.

The Federal provisions were referred to a Senate Standing Committee (SSC) for inquiry and report in late 2010. The Federal Court submitted to the SSC that the changes were not suitable for much of its work including admiralty, bankruptcy, corporations, taxation and patent matters and sought to have those classes of matters excluded from the operation of the CDRA.[16]

These submissions were not accepted by the SSC which in its December 2010 Report (SSC Report) stated that it was satisfied with the proposed list of exclusions and that if the need arises to exempt further matters this could be done by regulation.[17] The SSC was also satisfied that the CDRA did not introduce mandatory pre-action protocol but was flexible and allowed the circumstances to be taken into account.[18]

On 30 June 2011 a regulation[19] was made under the CDRA which excludes from the operation of the genuine steps requirements proceedings for a sequestration order under s 43 of the *Bankruptcy Act 1966* (Cth)(where the act of bankruptcy arose under s 40(1)(g) of that Act, being a failure to comply with a bankruptcy notice based on a final judgment or order), and proceedings for an order under s 459A of the *Corporations Act 2001* (Cth) to wind up a company in insolvency where the application is based on the failure to comply with a statutory demand.

Currently excluded civil proceedings under sections 15 and 16 of the CDRA include proceedings for a pecuniary penalty for contravention of a civil penalty provision, proceedings by the Commonwealth for an order connected with a criminal offence or contravention of a civil penalty provision, proceedings for review of

Administrative Appeals Tribunal and other Tribunal decisions, *ex parte* proceedings, appellate proceedings and matters under various specified Acts.[20]

Rule 8.02 of the draft Federal Court Rules 2011 provides for the applicant's GSS (draft form 16) and rule 5.03 the respondent's GSS in response (draft form 11).

The applicant's GSS (draft form 16) requires the applicant to:

- list the issues in dispute and the date on which the issue arose;
- state whether 'genuine steps' were taken by it to resolve the dispute (or if not, explain why not) and list in tabular form the steps taken to resolve the dispute (including the date the step was taken, the respondent's response and the date of the respondent's response);
- if the applicant claims that responses of the respondent were not genuine steps, these steps need to be listed and reasons provided; and
- identify and provide details of any referral to ADR and of any issues resolved by ADR.

The respondent's GSS (draft form 11) requires the respondent to state whether it agrees with the applicant's GSS or if not, specify the respect in which it disagrees and the reasons why. If the applicant has filed a GSS, the respondent's GSS must be filed before the first return date (rule 5.03(1) of the draft Federal Court Rules 2011).

It is noted that the draft Federal Court Rules 2011 do not make provision for the filing of a GSS in respect to cross claims, the inference being that the CDRA is not considered to apply to cross claims in Federal courts.

Failure to file a GSS does not invalidate the application instituting proceedings (section 10(2) CDRA). Existing laws protecting privileged documents and in relation to the admissibility of evidence are preserved (section 17A CDRA).

Potential impact of the reforms

To the extent that the reforms reflect 'best practice' or existing obligations[21], there may be little practical impact on how many civil disputes are handled by barristers given that barristers have a general obligation to advise clients generally on the availability of ADR in any event[22].

Legal practitioners will now need to consider whether it is necessary for their clients to elect well before commencing proceedings in which court an action will be commenced if the civil dispute cannot be resolved – Federal courts or Supreme courts, to ensure compliance with the particular requirements. They will also need to ensure that accurate advice is given to clients on the applicable pre-litigation requirements (particularly given the difference in the tests – genuine steps as opposed to reasonable steps and terms such as confidentiality protection of information and documents exchanged for the purposes of the dispute only being expressly provided for in the NSW provisions[23]).

There remains a possibility that the introduction of these pre-litigation requirements may lead to forum shopping, such as commencing in the Victorian Supreme Court where it is possible to do so, to avoid the application of these requirements in Federal courts (or in NSW courts if the state amendments come into effect).

One response of lawyers to these changes may be to draft a standard form letter of advice to clients (in the case of barristers, to their instructing solicitors to be passed on to the client) in relation to these requirements, identifying the available forms of ADR and when they may be suitable, which can be amended as required for a particular matter.[24]

Alternatively, if oral advice is to be given, it would be prudent for the lawyer to keep a good file note or other record of oral advice given to clients on the requirements.

Unless it is an excluded matter, or it is not reasonable in the circumstances (for example, due to urgency or that the safety or security of any person or property would have been compromised by the taking of such steps[25]), at a bare minimum a lawyer should advise their client to send a detailed letter to the proposed defendant before commencing action, proposing any ADR that may be appropriate and containing all information and documents critical to the dispute.

Alternatively, a draft pleading containing all necessary particulars of the claim could be sent to the proposed defendant prior to commencement. Consideration would need to be given in each case as to whether

this was necessary and appropriate or was overkill and unnecessarily increasing costs.

Whether the letter pre-action will generally be sent on a 'without prejudice'[26] or an 'on the record' basis and whether more than one letter will be sent are issues left to be worked out in practice.

Adequate records need to be kept to enable the fast and accurate completion of the GSS by the relevant party.

Conclusion

It remains to be seen what effect the genuine steps requirements have on civil disputes and whether they lead to the sought after cultural shift, or as their opponents say, will only serve to add an administrative burden, increase costs and delay.

Given that the reforms did not have the support of many lawyers' representative groups, it is possible that litigation lawyers will resist the changes leading to 'lip service' compliance and opening up a potential new battleground for satellite litigation by way of interlocutory applications in which the focus is not on the issues in dispute, but on whether an applicant (or respondent) has taken genuine steps (or its lawyer advised it to do so).

The failure to exclude many matters in the Federal Court not thought to be suitable to the application of genuine steps requirements according to a number of stakeholders could add to potential costs to litigants with little expected gain (although it is noted that some bankruptcy and corporations matters have been recently excluded by regulation).

The difference in the tests as between the Federal provisions (genuine steps) and those proposed in NSW (reasonable steps) is likely to lead to potentially confusing and conflicting lines of case authority, decreasing certainty.

It is sobering to bear in mind the experience in relation to pre-action protocols in the UK. While the UK protocols are both mandatory and prescriptive and therefore arguably different in approach to the reforms proposed federally[27] and in NSW, they were an attempt to bring about a cultural change in the UK in how civil disputes (including commercial disputes) were handled and to increase access to justice. The conclusion of Lord Justice Jackson in his report of December 2009 *Review of Civil Litigation Costs* (Jackson Report) was that the general pre-action protocol should no longer apply to commercial disputes and there was no need for a specific commercial pre-action protocol[28]. Jackson noted[29] that the clear majority view amongst commercial solicitors and counsel, shared by Commercial Court judges, was that pre-action protocols were unwelcome in commercial litigation. They generated additional costs and delay to no useful purpose and this was a view shared by clients, particularly overseas clients. In Jackson's view a requirement in the relevant Court users guide for a concise letter of claim and response attaching only essential documents would be sufficient[30].

Insofar as the federal reforms go further than requiring a concise letter of claim and response and essential documents (the Jackson approach) or service before commencement of a statement of the case (the alternative approach proposed by the Federal court to the SSC[31]), they open up the possibility that they will generate additional costs and delay to no useful purpose, and will potentially be misused in interlocutory applications made in satellite litigation.

The alternative is that the Federal genuine steps requirements will increase the number of disputes that settle pre-commencement of litigation due to the use of appropriate ADR, thereby decreasing costs and reducing the need for court services. These requirements may assist litigants to narrow the issues in dispute (with corresponding costs savings) or to be aware of possible ADR options at an earlier stage, leading potentially to matters resolving earlier, with costs and efficiency savings. Lawyers may be caught up in this 'cultural shift', more readily adopting and using ADR early in disputes, including prior to commencement of proceedings.

Only time will tell what the outcome of these reforms in Australia will be.

Endnotes

1. See the Proclamation under the CDRA made on 30 June 2011 at http://www.comlaw.gov.au/Details/F2011L01408 accessed on 5 July 2011 which fixes 1 August 2011 as the date on which Parts 2 to 5 of the CDRA commence. 1 August 2011 is also the proposed date of commencement of the new Federal Court Rules 2011.

2. Report dated December 2010 of the SSC on Legal and Constitutional Affairs located at http://www.aph.gov.au/Senate/committee/legcon_ctte/civil_dispute_resolution_43/report/report.pdf and accessed on 5 July 2011 at [3.58]).
3. Passed on 24 March 2011 – the substantive sections have been proclaimed to commence on 1 August 2011.
4. Explanatory Memorandum to the CDRA located at http://www.austlii.edu.au/au/legis/cth/bill_em/cdrb2011306/memo_0.html
5. http://laredef.typepad.com/fedcourt/ and accessed on 5 July 2011 at [7].
6. They will apply to NSW courts subject to the CPA – in particular the Supreme, District and Local Courts and the Land and Environment Court.
7. Note - currently NSW Supreme Court civil proceedings are excluded by a regulation made on 1 April 2011 (located at http://www.austlii.edu.au/au/legis/nsw/num_reg/cpa2005cpapr20112011126l3m2011750.pdf and accessed on 5 July 2011) pending commencement of 'comparable provisions' in federal courts – therefore there is a possibility of later commencement in the Supreme Court as the excluding regulation will have to be repealed.
8. Located at http://vic.liberal.org.au/News/MediaReleases/tabid/159/articleType/ArticleView/articleId/2628/Coalition-Government-simplifies-civil-litigation-rules.aspx and accessed on 5 July 2011.
9. The New South Wales Bar Association '*NADRAC Issues Paper Alternative Dispute Resolution in the Civil Justice System*' March 2009 at p. 8.
10. See Law Council of Australia submissions to the SSC referred to at [3.4]-[3.5] of the SSC Report.
11. s5 CDRA.
12. See SSC Report at [3.30]-[3.37].
13. The SSC recommended that a definition be inserted – SSC Report at [3.61].
14. The existence of ADR as a key component of genuine steps was noted by the SSC in the SSC Report at [2.5].
15. Compare the approach taken in other countries such as Indonesia and Italy where compulsory mediation prior to commencement or at the time of commencement has been introduced.
16. SSC Report – appendix 3.
17. SSC Report at [3.62].
18. SSC Report at [3.59].
19. *Civil Dispute Resolution Regulations 2011* (Cth) Select Legislative Instrument 2011 No. 113 at http://www.comlaw.gov.au/Details/F2011L01409 accessed on 5 July 2011.
20. Set out in ss 15 and 16 of the CDRA, for example proceedings under the *Migration Act 1958* (Cth).
21. A 'similar' duty on lawyers to advise exists in s 37N of the *Federal Court of Australia Act 1976* (Cth), see Explanatory Memorandum at [34].
22. Rule 17A of the NSW Barristers' Rules provides: A barrister must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the barrister believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.
23. Section 18F CPA.
24. Similar to standard discovery/disclosure/costs disclosure letters.
25. Section 6(2)(b) CDRA.
26. Given the potential limitations to the use of 'without prejudice' material (the law on the use of information and admissibility of evidence is expressly preserved in the federal provisions – see s 17A of the CDRA).
27. The intention being to address in these reforms the concerns raised in the Jackson Report – see the SSC Report at [3.11].
28. Jackson Report at [2.8].
29. Jackson Report at [2.1].
30. Jackson Report at [2.7]-[2.8].
31. SSC Report at [3.26]-[3.29].

Duty of care in cases of illegality

Miller v Miller [2011] HCA 9; (2011) 85 ALJR 480

The High Court has provided a statement of the principles governing how the fact that a plaintiff acted illegally in connection with events said to give rise to liability in negligence bears upon the liability of a defendant. The judgment of the court not only clarifies whether and when a duty of care will arise in cases of illegality and joint illegal enterprise between plaintiff and defendant, but is likely to have wider implications for cases of illegality in contract and trusts and, potentially, for the criminal law.

After a night of drinking the plaintiff decided to steal a car. Shortly after the car was stolen the defendant took control of the vehicle and drove through the suburbs of Perth with the plaintiff one of nine passengers. The defendant began to drive in a dangerous manner and the plaintiff made a number of requests of the defendant to be let out of the car. The defendant drove on and subsequently the car hit a pole leaving the plaintiff a quadriplegic.

The plaintiff had taken the vehicle and both she and the defendant used the vehicle illegally contrary to s 371A of The Criminal Code (WA). The WA Court of Appeal held that the defendant owed the plaintiff no duty of care as the parties had engaged in a joint illegal enterprise, allowing the defendant's appeal.

In determining the question of how the plaintiff's illegal acts bore upon the defendant's liability in negligence, the High Court was faced with differing statements of the relevant principle from courts, including the High Court.[1] The decided cases exposed different bases upon which courts have, in some cases, denied recovery to a plaintiff who has engaged in a joint illegal enterprise, including that no duty of care should be found to exist, a standard of care cannot or should not be fixed and that the plaintiff assumed the risk of negligence.[2]

The majority concluded that, where a plaintiff sues another for damages sustained in the course of, or as a result of, some illegal act by the plaintiff, the central policy consideration is 'the coherence of the law'. The question that a court is to ask in such circumstances is 'would it be incongruous for the law to proscribe the plaintiff's conduct and yet allow recovery in negligence for damage suffered in the course, or as a result, of that unlawful conduct'.[3]

Demonstrating such incongruity, contrariety or lack of coherence requires careful attention to the statute

Photo: iStockphoto.com

that the plaintiff has contravened and the purposes of that statute. The majority held that this approach was consistent with authority[4] and consistent with the approach taken as to illegality in the context of contracts and trusts.[5]

Having decided that the relevant principle 'turns upon a search for statutory purposes'[6], the majority turned to consider the statutory purposes of s 371A of The Criminal Code, together with s 8(1) of the Code dealing with offences committed in prosecution of a common purpose. Where, in the prosecution of such a purpose an offence is committed which 'was a probable consequence of the prosecution of such purpose' each person is deemed to have committed the offence'. The majority held that where a driver of an illegally used vehicle drove dangerously, and such driving was a probable consequence of the prosecution of the joint illegal purpose, a person complicit in the illegal use would be complicit in the dangerous driving and it would be incongruous to decide that the offending driver owed the passenger a duty to drive with reasonable care. Any alternative conclusion would be inconsistent with the purpose of the statute proscribing illegal use which is to deter and punish using a vehicle in circumstances that often lead to dangerous driving.[7]

As a consequence of the above, it was clear that, when the defendant began to illegally use the car that the plaintiff had decided to steal, the defendant did not owe the plaintiff a duty of care. The majority noted that s 8(2) of the Code provided for a person to withdraw from the prosecution of an unlawful purpose by communicating that withdrawal and taking all reasonable steps to prevent the commission of the offence. The majority held that, by her requests

to be let out, the plaintiff had withdrawn from the common purpose prior to the accident and there were no reasonable steps that she could take to prevent the continued illegal use of the vehicle.[8]

The consequence of the majority finding an effective withdrawal from the unlawful common purpose was that, from the time of that withdrawal, it could no longer be said that the defendant owed the defendant no duty of care. As a consequence, the majority allowed the appeal.

His Honour set out a possible submission for the defendant that the request to stop the vehicle was insufficient to terminate the joint illegal enterprise as it could not be said she took all reasonable steps to prevent the commission of the offence in circumstances where her conduct had rendered it impossible for any reasonable steps to be taken.

While the importance of the majority judgment in *Miller v Miller* in the area of tort is clear on the face of the judgment, it was the impact of the judgment on the criminal law that appeared to trouble the dissenting judge, Heydon J. His Honour agreed with the majority that no duty of care was owed up to the time of the plaintiff's request to be let out of the car, however his Honour held that the plaintiff had failed to demonstrate that her requests amounted to a withdrawal, particularly in circumstances where the 'withdrawal point' was not substantively argued before the court or the courts below.[9]

Heydon J noted that the withdrawal point was difficult, complex and of 'very great importance in criminal law'. His Honour set out a possible submission for the defendant[10] that the request to stop the vehicle was insufficient to terminate the joint illegal enterprise as it could not be said she took all reasonable steps to prevent the commission of the offence in circumstances where her conduct had rendered it impossible for any reasonable steps to be taken.

It remains to be seen whether Heydon J is correct and the majority's brief treatment of the application of s 8(2)[11] will result in the legacy of *Miller v Miller* being felt as much in the criminal law as in the law of tort.

By Ben Koch

Endnotes

1. See *Smith v Jenkins* (1970) 119 CLR 397, *Jackson v Harrison* (1978) 138 CLR 438 and *Gala v Preston* (1991) 172 CLR 243.
2. [2009] HCA 9 at [70].
3. [2009] HCA 9 at [15] – [16].
4. In particular, *Henwood v Municipal Tramways Trust* (SA) (1938) 60 CLR 438.
5. [2009] HCA 9 at [74].
6. [2009] HCA 9 at [98].
7. [2009] HCA 9 at [93] –[94] and [101].
8. [2009] HCA 9 at [104].
9. [2009] HCA 9 at [117].
10. [2009] HCA 9 at [122] – [131].
11. [2009] HCA 9 at [103] – [106].

Control orders and 'declared organisations'

Wainohu v New South Wales [2011] HCA 24; (2011) 278 ALR 1

Derek Wainohu (centre), former Sydney president of the Hells Angels Motorcycle Club, accompanied by colleagues, arrive for hearing at the Supreme Court. Photo: Brad Hunter /Newspix.

In *Wainohu*, the majority of the High Court declared invalid the *Crimes (Criminal Organisations and Control) Act 2009* (NSW), an act that enables the making of control orders affecting members of organisations declared to be criminal.

The legislation

The Act is intended to disrupt and restrict the activities of criminal organisations and their members. It provides for a two-step process for the making of control orders.

Part 2 of the Act governs the first step, involving the appointment of a judge of the Supreme Court as an 'eligible judge' by the attorney general. The commissioner of police may, by s 6(1) of the Act, apply to an eligible judge for a declaration that a particular organisation is a 'declared organisation' for the purposes of the Act. The application must set out the grounds on which the declaration is sought and the information supporting those grounds, and be verified by affidavit of the commissioner or senior police officers.

Section 9(1) of the Act provides that a judge may make a declaration if satisfied that 'members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity' and 'the organisation represents a risk to public safety and order.'

Such a declaration may, but need not, be made after hearing submissions from affected members of the organisation. Affected members may be excluded from those parts of the hearing that concern 'criminal intelligence' or 'protected submissions' by affected persons found to be in fear of reprisal for the making of the submissions.

By section 13(1) of the Act, the rules of evidence do not apply to the hearing of any application for a declaration. By section 13(2) of the Act, the eligible judge is not required to give grounds or reasons for the making of a declaration. The state did not dispute that the making of a declaration was an administrative act.

Part 3 of the Act governs the second step. Its operation

is contingent on the making of a declaration under Part 2. Part 3 confers jurisdiction on the Supreme Court to make control orders affecting members of declared organisations. Those made subject to a control order are restricted, by section 26, from associating with other members of the organisation also subject to control orders and are, by section 27, not authorised to carry on a number of regulated occupations or activities.

Declarations and (subject to a right of appeal to the Court of Appeal) control orders are covered by a broad privative clause restraining challenge in any proceedings before a court or administrative body (the effectiveness of which is limited by *Kirk v Industrial Court (NSW).* (2010) 239 CLR 531).

Challenge by Hells Angels member

Derek Wainohu has been a member of the Hells Angels Motorcycle Club in New South Wales for over 20 years.

On 6 July 2010, the acting commissioner of police for New South Wales applied to an eligible judge for a declaration in respect of the Hells Angels. The application was supported by an affidavit of a senior police officer and 35 volumes of material concerning the activities of 47 members of the Hells Angels, including Mr Wainohu.

Mr Wainohu challenged the validity of the Act on two relevant bases: first, that it confers functions on eligible judges which undermine the institutional integrity of the court in a manner incompatible with Chapter III of the Constitution of the Commonwealth; and second, that it infringes the freedom of political communication and association implied in the Constitution.

New South Wales defended the challenge and the other states and the Commonwealth intervened.

Invalidity – impairment of the institutional integrity of the Supreme Court

The majority in separate joint judgments held that the provisions were invalid because the appointment of Supreme Court judges to perform non-judicial functions as eligible judges was incompatible with the exercise of their judicial functions.

French CJ and Kiefel J observed that there was no prohibition on the performance by judicial officers of non-judicial functions. Judges are commonly and constitutionally appointed to perform administrative functions, the most readily identifiable of which included service on administrative tribunals and the issue of warrants to search or install surveillance devices.

Gummow, Hayne, Crennan and Bell JJ confirmed that the doctrine in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 was founded on the same constitutional principle as that governing the appointment of federal judges to non-judicial positions (as expressed in *Grollo v Palmer* (1995) 184 CLR 348 and *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1), namely, the protection of the institutional integrity of courts. Institutional integrity was described by French CJ and Keifel J as the court's possession of its 'defining characteristics', including independence, open justice and procedural fairness.

A non-judicial appointment will impair a court's institutional integrity where it creates an impression that the independence of the judicial officer from the state executive government is compromised.

The majority rejected a submission by the solicitor-general for Victoria that there were no limitations on the functions that the states can confer on their judges as *personae designatae*. French CJ and Kiefel J held that appointment of state judicial officers as *personae designatae* is subject to the limitation that the appointment must not substantially impair the institutional integrity of the court. A non-judicial appointment will impair a court's institutional integrity where it creates an impression that the independence of the judicial officer from the state executive government is compromised.

French CJ and Kiefel J made clear that the *Kable* doctrine precludes the enactment of any state law authorising a persona designata appointment that is incompatible with the exercise by the judge's court of the judicial power of the Commonwealth, including appointments that may impair the institutional integrity of the state court. This limitation holds regardless of whether the appointment of a judge as eligible judge is properly

to be described as a *persona designata* appointment or not.

For French CJ and Kiefel J, the proximity of an eligible judge's function in making a declaration to the Supreme Court's jurisdiction to make a control order was significant, as was the nature of the inquiry to be undertaken by the eligible judge in making a declaration decision. In that respect, the exclusion of the obligation to give reasons in s 13(2) of the Act was critical: section 9 requires the eligible judge to make complex and contested findings of fact as to whether the organisation was involved in criminal activity, and an evaluative judgment that the organisation presents a risk to public order and safety. It is unsatisfactory that these findings, which found the jurisdiction of the Supreme Court to make control orders with significant consequences to members of the designated organisation, should be left unexplained.

French CJ and Kiefel J concluded that the absence of a requirement to give reasons in s 13(2) divorces the exercise of the eligible judge's power to make declarations from the exercise of his or her judicial functions, while creating a perception that declaration decisions are to be made by a judge. The consequence of this is to affect public perceptions of the role of the court.

Gummow, Hayne, Crennan and Bell JJ, agreed that the appointment of eligible judges was of such a nature as to create a perception that the making of declarations would be exercised judicially, while s 13(2) conferred a function that was not judicial, producing as it did inscrutable decision making. The language of section 13(2) did not permit a construction that required an eligible judge to give reasons for a declaration decision, nor could it be read down to impose any requirement to give reasons. It was of no significance to the majority that an eligible judge may provide reasons for a declaration decision despite not being required to do so.

For those reasons, sections 13(2) and 9 of the Act were held to be invalid and with them, the practical operation of Part 2 and consequently Part 3. The majority observed that the legislation was potentially capable of being saved by amending s 13(2) to require the giving of reasons (subject, if necessary, to the protection of material of the nature of criminal intelligence).

Dissent

Heydon J's dissent dealt with the broader submissions on the invalidity of Part 2 put by Mr Wainohu. Significantly, his Honour rejected the contention that the absence of rules of evidence in hearings for declarations was a basis for invalidity, observing that many statutes modify the rules of evidence without infringing the *Kable* doctrine, and that judges commonly serve on administrative tribunals in which the rules of evidence do not apply. Further, his Honour rejected a contention that the combination of removal of the rules of evidence and the requirement to give reasons, together with restrictions on the disclosure of evidence, brought about invalidity.

Gummow, Hayne, Crennan and Bell JJ, agreed that the appointment of eligible judges was of such a nature as to create a perception that the making of declarations would be exercised judicially, while s 13(2) conferred a function that was not judicial, producing as it did inscrutable decision making.

In relation to s 13(2), Heydon J agreed with the majority that there was no available construction that would impose a duty on an eligible judge to give reasons for a declaration. An attempt by the solicitor-general of New South Wales to concede that a duty existed in respect of contested applications was rejected.

Heydon J departed from the majority in taking into account the likely behavior of eligible judges when making declaration decisions. For his Honour, the fact that s 13(2) did not compel an eligible judge to withhold reasons, the availability of judicial review of declaration decisions, and the customs and traditions of judges, assembled to create a conclusion that reasons are likely to be given where the interests of justice require them. Invalidity should not follow upon

supposition of the extreme possibility that reasons for a contentious decision may not be given.

Heydon J also departed from the majority in holding that the making of a declaration did not fail the tests posed by the plurality in *Wilson*, because the making of a declaration is not a step in the process of the executive government, but rather a precursor to judicial processes in the form of control orders. Eligible judges are expressly not subject to the control of the attorney-general or another minister, and the discretion to make declarations is governed by prescribed statutory formulae rather than any political considerations, and subject to (qualified) obligations of procedural fairness. These factors brought about the conclusion that the absence of a duty to give reasons does not impair the independence or impartiality of eligible judges when making declaration decisions, particularly because a declaration does not itself affect the rights of organisation members. His Honour further questioned the utility of public confidence in the courts as a criterion of invalidity.

Finally, Heydon J accepted Victoria's submission that the *Kable* doctrine, concerned as it is with the separation of Commonwealth judicial power, does not apply to the conferral of functions on state judicial officers as personae designatae. His Honour was not satisfied that there was a reason for the doctrine to be extended to so apply.

Other submissions rejected

Gummow, Hayne, Crennan and Bell JJ (with whom French CJ and Keifel J agreed) rejected other arguments put by Mr Wainohu as to the invalidity of the Act.

First, the majority rejected the contention that Part 3 of the Act was independently invalid, holding that the conferral of jurisdiction on the Supreme Court to make control orders was subject to the usual incidents of the exercise of judicial power, and significantly, that the exercise of judicial power mandated the court's determination of whether there are 'sufficient grounds' for making the order by reference to the scope and purpose of the Act. Part 3 of the Act did not suffer the same defect as the South Australian provision invalidated in *South Australia v Totani* (2010) 242 CLR 1, in that the making of a control order was not directed by the making of a declaration by an eligible judge.

Heydon J also rejected the attack on Part 3 of the Act based on a contention that, by reason of the application for a control order being made on what was likely to be the same information as that before the eligible judge during the declaration application, the court was effectively 'directed' to the grant of an order. His Honour observed that there was nothing in the Act that prevented the subject of a control order application from expanding the material that is placed before the court, and otherwise agreed with the findings of the majority.

The court unanimously rejected the contention that the Act infringed the implied freedom of political communication and was thus beyond the legislative power of the state, because the Act was not directed at political communication or association, and sufficient protections were contained in the Act to enable control orders to be limited so as to preserve freedom of political communication or permit review of control orders that restricted political communication.

By Catherine Gleeson

A rather busy first 100 days

By Attorney General Greg Smith SC

In the first 16 days of the 55th Parliament of New South Wales, the government introduced 23 pieces of legislation.

Seven were from the portfolio of Attorney General and Justice. They ranged from a revamp of directors duties to shield laws for journalists and steps aimed at combating the menace of graffiti.

My office was also called to scrutinise other pieces of legislation and provide advice on others. We ordered a major review of the Bail Act, expanded one of the more successful diversionary programmes in the justice system – work development orders – and started convincing people that the success or failure of the justice system should not be judged purely on how many people are locked up by the state.

Then there was the task of finding new people for arguably the two most important roles in the administration of justice in New South Wales – the director of public prosecutions and the chief justice. The government settled on two members of the bar - Crown Advocate Lloyd Babb to be DPP; and the then president, Tom Bathurst QC.

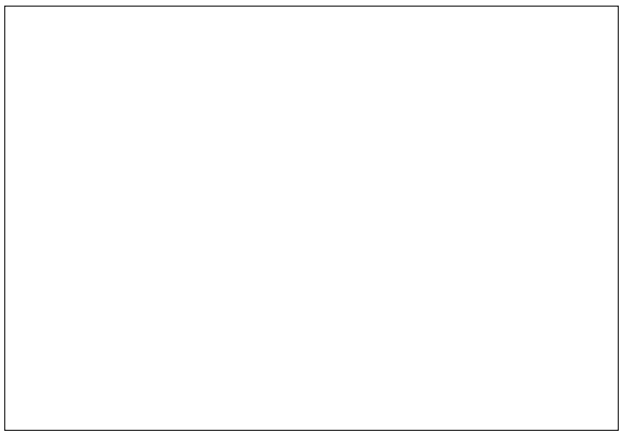
So, it's been a rather busy first 100 days.

When I was last invited to write for Bar News, it was from Opposition. The headline – 'Hard line for dangerous criminals, but what about the rest?' – accurately reflected my concerns about the NSW justice system.

...the justice system should not be judged purely on how many people are locked up by the state.

More people were being sent to prison for low to medium criminality, which might have satisfied the headline writers but did little for what were already the worst recidivism rates in the country.

It would surprise no-one that I enjoy being in government far more than opposition. Rather than complaining things should be done, you can ensure things get done.



Attorney-General Greg Smith (centre) attends the government's first cabinet meeting at Parliament House, Sydney, Monday, April 4, 2011. (AAP Image/Dean Lewins)

I would like to focus on the review of the Bail Act and Work Development Orders.

The importance of the Bail Act review was underlined by the fact the premier joined me for the announcement. It will be carried out by the former Supreme Court judge Hal Sperling QC - a member of the Law reform Commission.

The Act had been amended 17 times since it was introduced 33 years ago and has become a jumble of words that are difficult to read and understand.

A change in 2007, which allowed only one bail application unless there was a 'change in circumstances', had a dramatic effect on juveniles. In 2006, there were 3623 minors admitted to remand, but in 2008 this figure jumped to 5082.

Another change in 2009 made it slightly easier to make another bail application but contained no special provision for juveniles. Currently, only 20 per cent of those on remand end up with a sentence of detention.

Quite frankly, the Bail Act has moved away from the spirit and intent of the original legislation. This was to ensure attendance at a hearing or trial, to stop defendants from committing further offences and to prevent interference with witnesses.

While protection of the public is an important factor,

merely being charged should not mean that you end up in jail. We were getting away from a fundamental tenet of the law – the presumption of innocence.

Mr Sperling must report by November, and it is to be hoped the new legislation will be in place before the end of the year.

For a program that might be perceived in some quarters as 'soft on crime', the expanded regime of Work Development Orders also received very good reviews.

WDOs began as a pilot under the previous government and give the very disadvantaged a chance to clear their fines by engaging in unpaid work or educational programmes.

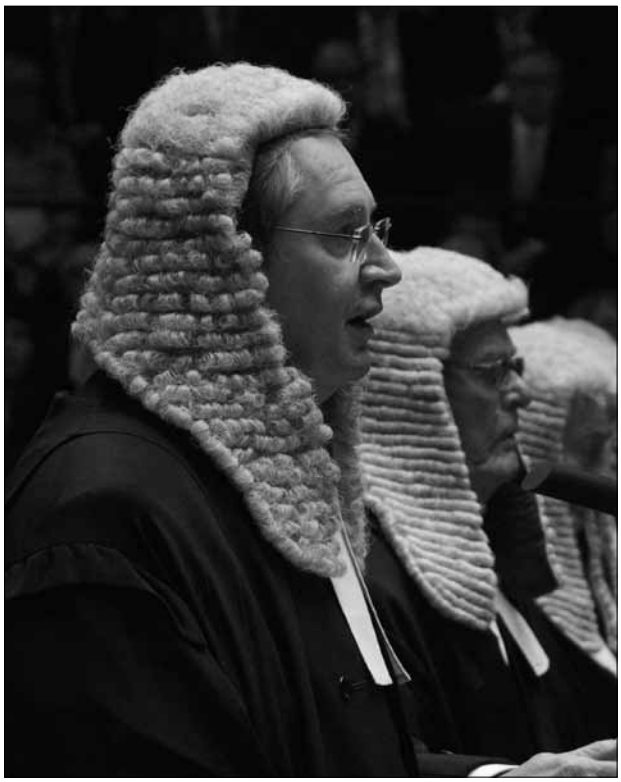
It now involves more than 220 organisations and health professionals, such as Mission Australia, Anglicare, the Matthew Talbot Hostel, Schizophrenia Fellowship and Youth Off The Streets.

At April 30, more than 700 people had been issued with WDOs and reduced $294,000 worth of their fine debt. A further $1,933,755 worth of fine debt is now under management through WDOs. The most pleasing statistic was that more than 80 per cent of participants had no further fines or penalties referred for enforcement.

...merely being charged should not mean that you end up in jail. We were getting away from a fundamental tenet of the law – the presumption of innocence.

The trial was open to the homeless, people with a mental illness, people with an intellectual or cognitive impairment and people experiencing acute financial hardship. It will now be accessible to people with serious addictions to alcohol, illicit drugs and other volatile substances.

Drug and alcohol abuse is often closely linked to criminal behaviour and helping people overcome their addictions can only have major benefits to the community.



AG Smith SC speaks on behalf of the bar at the swearing-in of Chief Justice Bathurst. Photo: Supreme Court of NSW.

In the Spring session of parliament, the pace will not slacken. I expect the government will be able to make some important announcements regarding those with mental illnesses – a major challenge for our justice system. Everything possible should be done to directing people with mental health problems out of the criminal justice system.

I look forward to keeping you informed about the government's plans and would welcome your feedback at office@smith.minister.nsw.gov.au

Everything possible should be done to directing people with mental health problems out of the criminal justice system.

Circumstantial evidence in criminal cases

By Ian Barker QC

Genesis?

I do not know just when indirect evidence became known as circumstantial evidence, but the concept has been with us for a long time. In writing his Introduction to the Indian Evidence Act published in 1872[1] Sir James Stephen observed that:

> Facts relevant to the issue are facts from the existence of which inferences as to the existence of the facts in issue may be drawn.

A fact is relevant to another fact when the existence of the one can be shown to be the cause or one of the causes, or the effect or one of the effects, of the existence of the other, or when the existence of the one, either alone or together with other facts, renders the existence of the other highly probable, or improbable, according to the common course of events.

In *Peacock v The King*[2] in 1911 Griffiths CJ relied upon the 1842 edition of *Starkie on Evidence* as authority explanatory of circumstantial evidence. In 1928 in *Taylor Weaver and Donovan*[3] Hewart LCJ observed that:

> It has been said that the evidence against the applicants is circumstantial: so it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.

I do not recall many cases where circumstantial evidence proved a proposition with the accuracy of mathematics, in spite of the urgings of prosecutors and judges, but the case points to the big issue of just how circumstantial evidence is to be treated, which I will come to.

Professor Wigmore[4] said 'the term "circumstantial" is unfortunately but inevitably fixed upon us… this class embraces all offered evidentiary facts not being assertions from which the truth of the matter asserted is desired to be inferred'. And he went on at considerable length to consider circumstantial evidence as requiring a grouping according to whether the facts constituting evidence of the act to be proved came before the act (prospectant) at the time of the act (concomitant) or after the act (retrospectant)[5].

In the end, circumstantial evidence in criminal cases permits of a simple definition, that is, evidence of a fact or facts from which a jury is asked to infer a fact in issue. But it is at that point the debate usually starts.

Similar facts, tendency and coincidence

Before the Evidence Act there was a long line of authority to the effect that circumstantial evidence demonstrating a mere propensity to commit crime, or crime of a similar kind, was inadmissible unless the evidence was relevant in some other way. The evidence of similar facts had to have a strong degree of probative force. It would usually be of acts bearing a striking similarity to the act charged, such that it would be unreasonable to suppose they occurred merely by coincidence. Such evidence might have been relevant if it bore upon the question whether the acts alleged were designed or accidental, or to rebut a defence otherwise open to the accused.

In 1892 and earlier Mr and Mrs Makin accepted the care of infants in Sydney for a fee. To them, it was sound economics to keep the fees and dispense with the infants. When charged with the murder of one baby, whose body was found buried, they found it difficult to explain the presence of twelve other buried babies in premises owned by the Makins[6]. The Privy Council held that the discovery of the other bodies could throw light upon the cause of death of the infant with whose murder the Makins were charged. They were hanged.

George Smith, tried in England in 1915, had the misfortune to lose three lovers (each of whom he bigamously married) all by drowning in a bath, all in the same bizarre circumstances[7]. He joined the Makins. Noor Mohamed the goldsmith had better luck, having lost two mistresses to cyanide poisoning. Evidence of the first death was rejected as showing no more than a propensity to commit murder[8]. In *Boardman*[9] Lord Cross used the term 'striking similarity' as a test for admission, and in *Markby*[10] Gibbs CJ at 117 said the admission of similar fact evidence was the exception rather than the rule, and observed (citing *Boardman*) that it may not be going too far to say that it will be admissible only if it is 'so very relevant that to exclude it would be an affront to common sense'. The cases were reviewed times over by the High Court of Australia in cases such as *Perry*[11], *Hoch*[12], *Harriman*[13] and *Pfennig*[14]. The list is by no means exhaustive but the common thread was that evidence of similar facts was a particular sort of circumstantial evidence which, to be admitted, had to possess a particular probative value or cogency by reason that it revealed a pattern of activity such that, if accepted, bore no reasonable explanation other than

the inculpation of the accused person in the offence charged: for example, *Hoch* at 294.

Evidence Act

The issue of propensity evidence is now of course governed by ss 97 and 98 of the Evidence Act. Section 97 proscribes the admission of evidence of character, reputation, conduct or tendency to prove a person has or had a tendency to act in a particular way or to have a particular state of mind if the court thinks the evidence would not have significant probative value. Section 98 precludes evidence of two or more related events to prove that because of the improbability of coincidence a person did a particular act or had a particular state of mind unless the evidence would have significant probative value.

It is unclear precisely what 'significant' means in this context. The effect of the legislation seems to be to make easier the reception of propensity evidence, no longer requiring the sort of tests discussed in the common law cases, notwithstanding that the onus is on the party calling the evidence to justify its reception as having significant probative value.

Section 101 requires exclusion of evidence in criminal proceedings unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant. Section 137 makes such the same provision, but without requiring 'substantial' prejudice and limiting prejudice to 'unfair' prejudice. Section 137 is mandatory in its terms.

It seems to me that the legislation does not restore the strict common law prohibition against the reception of circumstantial similar fact evidence except in special circumstances.

Fletcher[15] is an example of the ways ss 97 and 98 have introduced a new concept, not necessarily a just one. The majority in the CCA held that evidence of an uncharged sexual act, different from the acts charged, on a different person, remote in time from the offences charged, was properly admitted. It would be difficult to see the admissibility of the evidence at common law. The High Court refused special leave to appeal.

Propensity evidence is a large and diverse subject on its own; too wide for detailed attention here. In the context of this paper I simply observe that in my view the effect of the Evidence Act has been to undercut the common law to make easier the reception of propensity evidence.

Rational conclusion to be drawn

A principle once paramount to the admission of circumstantial evidence in a criminal case was that, in order to convict, the only rational conclusion to be drawn from the circumstances was the guilt of the accused.

The principle has been put in various ways. *Peacock*[16] was a medical practitioner convicted of the murder of a woman said to have died from the result of an abortion and whose body was never found. One of the issues before the High Court was whether evidence of facts led by the Crown to prove the cause of death was sufficient for a conviction. The appeal was allowed on a different ground, but in considering the strength of the circumstantial evidence Griffiths CJ cited the 1842 edition of *Starkie on Evidence* saying:

> The rules as to circumstantial evidence are nowhere better stated than in a book, somewhat old it is true, but by an undoubted authority (*Starkie on Evidence*, 3rd ed., published in 1842). I quote from page 574. Speaking of circumstantial evidence, he says:- " Fourthly, it is essential that the circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved: hence results the rule in criminal cases that the coincidence of circumstances tending to indicate guilt, however strong and numerous they may be, avails nothing unless the corpus delicti, the fact that the crime has been actually perpetrated, be first established….

The force of circumstantial evidence being exclusive in its nature, and the mere coincidence of the hypotheses with the circumstance being in the abstract insufficient, unless they exclude every other supposition, it is essential to inquire with the most scrupulous attention what other hypotheses there may be which may agree wholly or partially with the facts in evidence.

And he said (at 630):

> The rules of evidence are the same in criminal as in civil law, and the rules of logic and common sense as to what inference may be drawn from acts are the same whether the case is civil or criminal. In civil cases where the evidence is nicely balanced, the recognized practice is to leave it to the jury to say which hypothesis they accept, where there are two equally, or nearly equally, probable hypothesis. But this is certainly not the practice in criminal cases. It is practice of Judges, whether they are

> bound to give such a direction or not to tell the jury that, if there is any reasonable hypothesis consistent with the innocence of the prisoner, it is their duty to acquit.

In 1936 in *Martin v Osborne*[17] Dixon J said:

> If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference. In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed.

In 1963 Hendrikis Plomp went swimming with his wife at Southport. Only Plomp came back, his wife having drowned. He was tried for her murder and convicted. The evidence was entirely circumstantial and included his statement that he had been happily married. That was, on Plomp's part, a grave error. The evidence assumed considerable significance when it was proved that he had for some time had a mistress to whom he proposed marriage, a few days after his wife's death. His application for special leave was refused[18]. Dixon CJ cited his judgment in *Martin & Osborne*. Menzies J put the requirement for the direction as to rational conclusions on a broader basis than before, saying (at 252):

> The customary direction where circumstantial evidence is relied upon to prove guilt, that to enable a jury to bring in a verdict of guilty it is necessary not only that it should be a rational inference but the only rational inference that the circumstances would enable them to draw, was given. It was argued, however, that the direction is something separate and distinct and must be kept separate and distinct from the direction that the prosecution must prove its case beyond reasonable doubt. Notwithstanding that the applicant's counsel did find some authority to support their contention- *Reg. v Ducsharm*- that contention is unsound for the giving of the particular direction stems from the more general requirement that the guilt must be established beyond reasonable doubt.

Dawson J effectively abandoned the strict rule articulated by Griffiths CJ in *Peacock* and re-stated the generality of the requirement for the direction in *Shepherd*[19], saying:

> The learned trial judge gave the customary direction that, where the jury relied upon circumstantial evidence, guilt should not only be a rational inference but should be the only rational inference that could be drawn from the circumstances: see *Hodge's Case*; *Peacock v The King*; *Plomp v The Queen*. Whilst a direction of that kind is customarily given in cases turning upon circumstantial evidence, it is no more than an amplification of the rule that the prosecution must prove its case beyond reasonable doubt. In many, if not most, cases involving substantial circumstantial evidence, it will be a helpful direction. In other cases, particularly where the amount of circumstantial evidence involved is slight, a direction in those terms may be confusing rather than helpful. Sometimes such a direction may be necessary to enable the jury to go about their task properly. But there is no invariable rule of practice, let alone rule of law, that the direction should be given in every case involving circumstantial evidence. It will be for the trial judge in the first instance to determine whether it should be given.

And it was confirmed in *Knight*[20] where the majority said:

> In his charge, the trial judge instructed the jury to the effect that they should only find by inference an element of the crime charged if there were no other inference or inferences which were favourable to the appellant reasonably open upon the facts. A direction in those terms is often called for where the prosecution relies upon circumstantial evidence…. However it is a direction which is no more than an amplification of the rule that the prosecution must prove its case beyond reasonable doubt….

There are many other cases which touch upon the necessity for a direction about competing inferences. Although the direction may be no more than an amplification of the rule that conviction requires proof beyond reasonable doubt, it is nonetheless usually given in trials involving circumstantial evidence and is a special rule in such cases. But contrary to earlier authority it now does not have to be given in every case involving circumstantial evidence.

Links in a chain, strands in a cable (or straws in the wind)?

If you mix these metaphors with the argument about the extent to which juries should be instructed to find some circumstantial facts beyond reasonable doubt or merely on the balance of probabilities you are confronted with a judicial stew which, if not inedible, tends to be indigestible.

Pollock CB seems to have started it all in 1866, in *Exall*[21] where he said:

> It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence is a link in the chain, but that is not so, for then, if any one link breaks, the chain would fail. It is more like the case of a rope comprised of several cords. One strand of cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction , or more than a mere suspicion; but the whole taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of.

But there are cases where the chain metaphor is more apt, that is, where the evidence is in truth almost entirely relied upon by the prosecution and there are cases where it is unclear which metaphor is apt. Yet juries may still be told if they look at the whole of the evidence the case will not fail merely because of the uncertainty of some evidence or other, so the evidence can be looked at as a fraying rope rather than a breaking chain and they are told they must look at all the evidence. Out of all this has emerged the notion of intermediate facts which constitute indispensable links in a chain of reasoning towards an inference of guilt, and that some facts need proof beyond reasonable doubt and some not.

The issue became a little confused in 1983 when the High Court delivered the judgment in *Chamberlain*[22]. Gibbs CJ and Mason J said (at 536):

> It follows from what we have said that the jury should decide whether they accept the evidence of a particular fact, not by considering the evidence directly relating to that fact in isolation, but in the light of the whole evidence, and that they can draw an inference of guilt from a combination of facts, none of which viewed alone would support that inference. Nevertheless the jury cannot view a fact as a basis for an inference of guilt unless at the end of the day they are satisfied of the existence of that fact beyond reasonable doubt. When the evidence is circumstantial, the jury, whether in a civil or in a criminal case, are required to draw an inference from the circumstances of the case; in a civil case the circumstances must raise a more probable inference in favour of what is alleged, and in a criminal case the circumstances must exclude any reasonable hypothesis consistent with innocence....

It seems to us an inescapable consequence that in a criminal case the circumstances from which the inference should be drawn must be established beyond reasonable doubt. We agree with the statement in *Reg v Van Beelen* that it is 'an obvious proposition in logic, that you cannot be satisfied beyond reasonable doubt of the truth of an inference drawn from facts about the existence of which you are in doubt'.

And they went on to say (at 538):

> However, in our opinion, it must follow from the reasoning in *Reg v Van Beelen* that the jury can draw inferences only from facts which are proved beyond reasonable doubt.

And at 599 Brennan J said:

> The prosecution case rested on circumstantial evidence. Circumstantial evidence can, and often does, clearly prove the commission of a criminal offence, but two conditions must be met. First, the primary facts from which the inference of guilt is to be drawn must be proved beyond reasonable doubt. No greater cogency can be attributed to an inference based upon particular facts than the cogency that can be attributed to each of those facts. Secondly, the inference of guilt must be the only inference which is reasonably open on all the primary facts which the jury finds. The drawing of the inference is not a matter of evidence: it is solely a function of the jury's critical judgment of men and affairs, their experience and their reason. An inference of guilt can safely be drawn if it is based upon primary facts which are found beyond reasonable doubt and if it is the only inference which is reasonably open upon the whole body of primary facts

Sir William Deane would have allowed the appeal. On the subject of proof of all facts beyond reasonable doubt he did not agree with the majority, holding that it was not the law that a jury was in all circumstances precluded from drawing an inference from a primary fact unless the fact is proved beyond reasonable doubt.

He said (at 626-627):

> If a primary fact constitutes an essential element of the crime charged, a juror must be persuaded that that fact has been proved beyond reasonable doubt before he or she can properly join in a verdict of guilty. Whether or not a juror must be satisfied that a particular fact has been proved beyond reasonable doubt will, however, otherwise depend not only on the nature of the fact but on the process by which an individual juryman sees fit to reach his conclusion on the ultimate question of guilt or innocence. If, for example, the case against an accused is contingent upon each of four matters being proved against

> him, it is obvious that each of those matters must be proved beyond reasonable doubt. Indeed, it would be appropriate for the presiding judge to emphasize to the jury in such a case that even a minimal doubt about the existence of each of those matters would be greatly magnified in the combination of all. On the other hand, if the guilt of an accused would be established by, or a particular inference against an accused could be drawn from, the existence of any one of two hundred different matters, each of which had been proved on the balance of probabilities, it would be absurd to require that a jury should disregard each of them unless satisfied, either in isolation or in the context of all of the facts, that any particular one of those matters had been proved beyond reasonable doubt.

His judgment is sometimes overlooked in the debate about whether some circumstantial evidence is an indispensable link in the chain of reasoning. I will return to it.

If the majority in *Chamberlain* intended their words to be read literally, the law they declared was that inferences drawn beyond reasonable doubt must derive from facts proved beyond reasonable doubt. Such appeared to be the law on 22 February 1984.

But challenge loomed. Between 1976 and 1979 James William Shepherd conspired to import into Australia a lot of heroin. In 1988 he was tried, convicted and sentenced to 20 years. An appeal to the CCA was dismissed but the court reserved a ground of appeal that the trial judge failed to direct the jury in accordance with *Chamberlain*[23].

The reserved ground was argued before the same bench[24]. The trial judge's directions are recorded at pp.468–469. He gave the customary direction that the circumstantial evidence must be such that no other reasonable inference could be drawn, but he did not direct that to draw an inference beyond reasonable doubt the jury would have to be satisfied beyond reasonable doubt as to the facts from which the inference was drawn. In his judgment Street CJ (at 471) said:

> *Chamberlain*'s case was, in my view, an enunciation by the High Court made for the purpose of resolving the philosophical disputes that exist in relation to this topic. The law as laid down by the High Court is clear and specific. In the view that I hold, in a circumstantial case there should ordinarily be given a *Chamberlain* direction, drawing such direction from the terms of the judgments in that case and phrasing it as may be appropriate for the particular case in hand.

The chief justice went on to say it was not appropriate to put a gloss on the basic principle enunciated by the High Court in *Chamberlain*, which was that circumstantial facts were to be adjudged in accordance with the approach of the High Court in *Chamberlain*. He was supported by Campbell J, whilst Lee J dissented. But there remained the proviso. A differently constituted court held that notwithstanding the previous court's ruling as to the necessity for a *Chamberlain* direction, there was no substantial miscarriage of justice, and they applied the proviso to s 6(1) of the Criminal Appeal Act and dismissed the appeal[25]. At the same time, the judges were hostile to the finding of Street CJ and Campbell J that a *Chamberlain* direction should have been given. At p.275 Roden J, in a Roden-like way, concluded a lengthy discourse on the topic in these words:

> Paying homage to the words required of them by appellate courts, yet making sense to a jury, is the almost impossible task imposed on trial judges these days. When *Viro* (1978) 141 CLR 88 was put to rest by *Zecevic* (1987) 162 CLR 645; 25 A Crim R 163, a giant step forward was taken. I would hate to see *Chamberlain* used to reverse the process. Nor do I believe that the majority in *Chamberlain* intended to lay down a requirement that any particular form of words be used by trial judges in explaining to juries how the requirement that guilt be proved beyond reasonable doubt impacts on circumstantial cases. Their Honours were simply describing their own thought processes as they considered the circumstantial evidence in the case then before them, for the purpose of deciding the "unsafe and unsatisfactory" ground.

Esoteric debate among lawyers who delight in it, like grand masters around a chess board, and perform well at it, may have its place. But let us keep it there. What might be appropriate for multi-million dollar law suits between commercial barons who play with numbers as lawyers play with words, is not necessarily appropriate in the administration of criminal justice under our system, in which fact-finding is for juries.

The case went to yet another CCA where further grounds of appeal were argued and rejected[26]. They are not relevant here. Shepherd was granted limited special leave, and appealed on the ground the CCA had erred in applying the proviso[27]. The DPP, no doubt emboldened by the opinions of Roden J and the other judges in the second CCA, filed a notice of contention

asserting that the trial judge had not erred in failing to give the *Chamberlain* direction.

Then, quite suddenly, the law changed or perhaps, as Dawson J and Mason CJ explained, it was merely clarified. At 576 the chief justice said of his ruling in *Chamberlain* that it really should have referred to not just a fact but 'an intermediate fact as an indispensable basis for an inference of guilt' and should be understood in the sense stated by Dawson J. Dawson J sought to rescue the chief justice and the former chief justice by asserting (at 581) that:

> It is, I think, quite plain that in saying that a "fact as a basis for an inference of guilt" must be proved beyond reasonable doubt, their Honours are referring to an intermediate fact which is a necessary basis for the ultimate inference.

McHugh J was a little more direct, saying (at p.593):

> Although I think the majority in *Chamberlain* intended to assert that an inference of guilt can never be drawn unless each circumstance relied on to found that inference is proved beyond reasonable doubt, it does not follow that *Chamberlain* is an authority for the proposition that a jury must be directed to that effect.

His reasoning was that the case was concerned with whether the verdict of the jury was unsafe or unsatisfactory. It was not concerned with the direction which a jury should receive on the standard of proof to be applied.

Whether or not that reasoning is correct, it is I suppose relevant to point out that the issue which caused so much trouble was not raised at all at the trial of the Chamberlains. No such direction was asked for.

In Shepherd McHugh J said (at p.593):

> In a particular case an inference of guilt beyond reasonable doubt may not be able to be drawn unless each fact relied on to found the inference is established beyond reasonable doubt. This is likely to be the case where the incriminating facts relied on to establish the inference are few in number. But the more facts relied on to found the inference of guilt, the less likely it is that each or any fact will have to be proved beyond reasonable doubt to establish guilt beyond reasonable doubt.

He seems to be talking about individual facts, not intermediate facts as indispensable links.

This is consistent with what was said by Deane J in *Chamberlain* at pp.626–627. Although the words in the judgment of Deane J appear under the title 'Proof of Intermediate Facts' they appear to relate to individual facts as well. He seems to use 'primary facts' as interchangeable with 'intermediate facts', and his reference to proof of four matters as against proof of two hundred matters is a reference to individual facts not intermediate indispensable facts.

However. The opinions of the majority in Shepherd represent the present law, so let me try to summarise them as enunciated by Dawson J (with whom Toohey and Gaudron JJ agreed):

> In many, if not most, cases it will be helpful to tell the jury that, where the jury relies upon circumstantial evidence guilt should not only be a rational inference but the only rational inference that can be drawn from the circumstances. But this is not an invariable rule of practice or law.

In most cases the jury's ultimate conclusion must be drawn from some intermediate factual conclusion whether identified expressly or not.

Proof of an intermediate fact will depend on the evidence, usually a body of individual items of evidence and may itself be a matter of inference.

More than one intermediate fact may be identifiable.

It may sometimes be necessary to identify those intermediate facts which constitute indispensable links in a chain of reasoning towards an inference of guilt.

If it is appropriate to identify an intermediate fact as indispensable it may well be appropriate to tell the jury that the fact must be found beyond reasonable doubt before the ultimate inference can be drawn, but where the evidence consists of strands in a cable rather than links in a chain it will not be appropriate to give such a warning. It should not be given in any event where it would be unnecessary or confusing.

It will generally be sufficient to tell the jury that the guilt of the accused must be established beyond reasonable doubt and, where it is helpful to do so, to tell them that they must entertain such a doubt where any other inference consistent with innocence is reasonably shown on the evidence.

Not every fact – every piece of evidence – relied upon to prove an element by inference must itself be proved beyond reasonable doubt.

The jury may quite properly draw the necessary inference having regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt. The probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item separately.

In practice the following questions often arise:

- The identification of each individual fact which along with all other individual facts is said to constitute proof of the offence beyond reasonable doubt.
- The identification of each intermediate fact which may be an indispensable link in the chain of reasoning.
- The identification of each individual fact which, along with others, is said to constitute an essential intermediate fact.
- The identification of facts which require proof beyond reasonable doubt before an inference of guilt can be drawn from them.

The position was re-stated by Sully J in *Minniti*[28]:

> Ever since the decision of the High Court of Australia in *Shepherd v The Queen*, any case of the present kind has to be dealt with in the shadow of two contrasted forensic metaphors. The first is the "links in a chain" metaphor.

The second is the 'strands in a cable' metaphor

It appears to be now settled law that a circumstantial Crown case which is properly to be treated as a 'links in a chain' type of case will require jury directions about any so-called intermediate facts which are 'indispensable links in [the jury's] chain of reasoning towards an inference of guilt', to borrow from the court judgment (Wood CJ at CL, James and Adams JJ) in *R v Merritt* (1999] NSWCCA 29 at [70]. Such directions must identify facts having that potential significance; and the jury must be instructed that if the jury sees any such fact as constituting such an indispensable link, then the fact must be proved beyond reasonable doubt before it can be utilised as part of the chain of reasoning to an inference of guilt as charged.

It appears to be equally settled law that a circumstantial Crown case which is properly to be treated as a 'strands in a cable' type of case will not require any directions other than the conventional directions….

But Sully J identified the real problem (at 409) when he referred to the difficult concept, or principle, by which a trial judge can determine with a proper professional confidence whether he has on his hands a case calling for links in a chain direction, or strands in a cable direction.

Bruce Burrell arriving at the NSW Supreme Court in Sydney. Photo: Brianne Makin / Newspix

The problem, I think, emerged in *Burrell*[29]. The focus of the Crown case was very largely on what was said to be the disappearance of Mrs Whelan at Parramatta in a Pajero vehicle at 9.38am. The defence called evidence of sightings of Mrs Whelan long after 9.38am and not in Mr Burrell's company. The trial judge refused to direct that the evidence had to satisfy the jury beyond reasonable doubt that Mrs Whelan in fact entered the Pajero at about 9.38am driven by Burrell. She could, Barr J said, have been abducted at any time up to 4.00pm.

In *Burrell* the CCA considered *Davidson*[30], *Velevski*[31], *Hillier*[32] and *Keenan*[33]. The cases emphasise the necessity for a jury to consider all the circumstances, collectively and not piecemeal. But I do not see that as eroding the need to attach to important circumstances the requirement of proof beyond reasonable doubt. In weighing a number of circumstances together it should not be confusing for a jury to be told some or other of them should not be acted upon unless proved beyond reasonable doubt.

True it is that we will rarely know from what point in the evidence a juror will commence his or her

deliberations, but when the Crown prosecutor invites a starting point as being the most important part of the case, the evidence thereby adduced should surely require a direction that if it is to be acted upon as the Crown suggests, it should be accepted only if proved beyond reasonable doubt.

In *Merritt* there were but two intermediate facts. The court said where there are one or more facts which might be so regarded, it would usually be essential for the trial judge to identify those facts and instruct the jury that if they considered such facts were indispensable they would need to be satisfied of them beyond reasonable doubt. But that principle seems to be on the way out; at least, Spigelman CJ in Davidson sees it as a spent force.

Serratore[34] is an interesting if rare example of a judge giving a 'links in a chain' direction in respect of what he saw as four essential circumstances. The jury convicted anyway. The majority in the CCA found the trial judge (Newman J) was wrong in giving the directions, but the trial miscarried because the jury could not have been satisfied beyond reasonable doubt about two of the circumstances. Even though wrongly given, the directions should have been observed. A new trial was ordered (after which Serratore was again convicted). The irony is that if the jury at the first trial had obeyed the directions they would have acquitted.

It seems to me the issue has been unnecessarily confused by chains and cables and indispensable intermediate facts and primary facts. Accepting it is impracticable to prove every fragment of evidence beyond reasonable doubt, what is wrong with the view of Deane J in *Chamberlain*? If the circumstantial facts relied on by the prosecution are numerically small, they require proof beyond reasonable doubt. If they are numerous, they are to be considered collectively and the individual facts do not require proof beyond reasonable doubt. And I would add, whether small or large in number, any fact substantially more significant to the Crown case than others should require proof beyond reasonable doubt. And it would surely be consistent with earlier authority to require judges to direct juries that before accepting any part of any circumstantial evidence they must be satisfied that the evidence bears no reasonable hypothesis consistent with innocence.

I am afraid that judges are becoming increasingly reluctant to direct juries to treat significant circumstantial facts as requiring proof beyond reasonable doubt before taking them into account, in support of a Crown case. But as with other aspects of the administration of justice the tide continues to run against the person on trial.

Endnotes

1. Reproduced in 1909 in the NSW edition of Stephen's *Digest of the Law of Evidence* by Shaw, Macmillan 1909 (introduction p.xiv).
2. 13 CLR 619 at 628.
3. 21 Cr App R 20 at 21.
4. 3rd Ed Vol.1 par.25 at p.400.
5. Vol.1 pars.43, 51-119, 130-149.
6. (1894) AC 57. See also SC judgment 9 WN(NSW) 129.
7. (1916) 11 Cr App 229.
8. (1949) AC 182.
9. (1975) AC at 421.
10. (1978) 140 CLR 108.
11. (1982) 150 CLR 580.
12. (1988) 165 CLR 292.
13. (1989) 167 CLR 590.
14. (1994-95) 182 CLR 461.
15. (2005) 156 A Crim R 308.
16. (1911) 13 CLR 619 at 628-630.
17. (1936) 55 CLR 367 at 375.
18. (1963) 110 CLR 234.
19. (1990) 170 CLR 573 at 578.
20. (1992) 66 ALJR 860 at 863.
21. (1866) 176 ER 850.
22. (1983) 153 CLR 521 at 536.
23. (1988) 37 A Crim R 303.
24. (1988) 37 A Crim R 466.
25. (1988) 39 A Crim R 266.
26. (1989) 41 A Crim R 420.
27. (1990) 170 CLR 573.
28. (2006) 159 A Crim R 394 at 408.
29. (2009) NSW CCA 163.
30. (2009) NSWCCA 150.
31. (2002) 187 ALR 233.
32. (2007) 228 CLR 618.
33. (2009) 83 ALJR 243.
34. (1999) 48 NSWLR 101.

A lesson for prosecutors

By Peter Hastings QC

In some states of the USA prosecutors in the offices of county district attorneys participate in the thrill of the chase for suspects by working closely with investigators prior to arrest, even to the point of attending crime scenes. That has never been the practice in Australia where the necessity of the appearance of independence and objectivity has meant that any pre-arrest legal advice is given usually by advisors within the investigating agency, and prosecutors normally require a brief of evidence setting out most of the admissible evidence before advising investigators upon the commencement of proceedings. To the extent that there was beginning to develop a departure from that practice, the findings of formal inquiries in recent times into the circumstances of two well-publicised failures of prosecutions in different cities on opposite sides of the country are such that the departure should be short-lived.

In reviewing completely unrelated circumstances which took place over a decade apart, both revealed common deficiencies in the way in which the decision to prosecute was made without the availability to the prosecutor of a brief containing the available evidence set out in admissible form. The investigation headed by former NSW Justice John Dunford QC by the West Australian Corruption and Crime Commission into the conviction of Andrew Mallard for murder[1], and the inquiry by former NSW Justice John Clarke QC into the case of Dr Mohamed Haneef after he was charged in Brisbane with a counter-terrorism offence[2], consistently demonstrated that the miscarriages of justice had their origins in the circumstances in which the decision to prosecute was based upon case summaries and oral presentations provided by the investigating police.

Andrew Mallard

The circumstances of the prosecution of Andrew Mallard resulted in one of the most appalling injustices in the history of criminal justice in Australia. Mallard was convicted of the murder of a woman found deceased in a jewellery shop at Mosman Park, a suburb of Perth. He spent almost 12 years in prison until the High Court set aside the conviction on 15 November 2005 and ordered a new trial.[3] Eventually the proceedings against him were dropped.

At the time of the offence Mallard was an eccentric character who had been diagnosed as suffering from a hyper-manic phase of bipolar mood disorder during his various periods in psychiatric hospitals. He manifested all the signs of suffering from cannabis induced psychotic episodes. At the time he had no permanent place of abode but stayed with acquaintances by paying rent in the form of cannabis. As it turned out, probably the only positive outcome of his lengthy incarceration was the fact that he emerged 12 years later as someone who, when reverting to his normal state, was reasonably erudite, objective and intelligent, an otherwise unlikely outcome in view of his lifestyle prior to his arrest.

Apart from his bizarre behaviour at the time, he also suffered from the distinction of being very tall. He had been spotted in the area in which the offence was committed on the same day and early in the investigation he was nominated to the investigating police as a possible person of interest. On the day following the murder, as a result of an unrelated episode of manic behaviour, he was arrested and charged with impersonating a police officer and was remanded for psychiatric assessment in hospital. He was there spoken to by police investigating the murder but denied any involvement.

... the miscarriages of justice had their origins in the circumstances in which the decision to prosecute was based upon case summaries and oral presentations provided by the investigating police.

After his discharge he was questioned again but became hysterical and ended up biting one of the detectives on the leg. He was duly charged with that unseemly conduct, and upon his release an undercover officer was assigned to befriend him. The officer, playing the role of a fellow homeless person, duly spent the next three days in his company on the streets, according to some suggestions, plying him with alcohol and cannabis, and it may be assumed, discussing the murder with him in the hope that he may confess. He did not. The undercover operation was terminated and Mallard was arrested and questioned again during which he made a series of erratic and sometimes inaccurate statements about the circumstances of the murder. Much of what

he said about it was in the third person. In large part it was clearly a hypothesis, and given the time spent with the undercover officer, presumably based on facts which had been supplied to him. Importantly, he drew a sketch of the wrench which he said was used in the murder. Subsequent tests with a similar wrench did not produce the same pattern as the injuries sustained by the deceased (a result which infamously was never revealed to his defence).

The investigating police then met with the director of public prosecutions to seek his advice as to whether there was sufficient evidence to charge Mallard with the murder. No statements or other records were produced, although the video of his interview was played during the meeting. No notes seemed to have been taken of the meeting. The director gave advice that there was sufficient evidence but that it would be a difficult case. There is no suggestion that in so doing the director acted improperly. After the meeting police went to the hospital where Mallard was being treated and charged him with the murder.

The investigation by the CCC revealed that what occurred thereafter in bringing about his conviction, was a catalogue of misconduct, as the police and prosecution struggled to secure the conviction against him. An initial appeal to the Court of Criminal Appeal[4] and an application for special leave to the High Court[5] were both unsuccessful. Fortunately for Mallard a number of people believed him to be innocent and continued to campaign on his behalf. Notwithstanding the emergence of fresh evidence, a further appeal to the Court of Criminal Appeal failed[6] and it was not until the matter finally came to the High Court again that the conviction was overturned, largely upon the ground that there had been a failure to disclose relevant material to the defence.

Even then, it was only when a cold case review was conducted that evidence was discovered which identified the probable offender as a convicted murderer who committed suicide in custody after being named on television as the new suspect.

It cannot be said with certainty that if the decision to prosecute had been made upon a brief of evidence, it would have been different, but the requirement for the provision of a brief setting out the then available evidence in written form, would have gone a long way to preventing the inaccurate versions of the evidence later provided to the prosecution, and would certainly have curtailed the opportunities that were taken subsequently to compensate for the deficiencies in the prosecution case by altering statements and misrepresenting the prosecution evidence before the brief was finally submitted at the trial.

Dr Mohamed Haneef leaving Australia on 28 July 2007. Photo: Newspix

Dr Mohamed Haneef

The circumstances surrounding the regrettable charging of Dr Mohamed Haneef in Brisbane with a counter-terrorism offence arising from unfounded allegations of connections with earlier terrorism incidents in London and Glasgow, display a striking similarity in relation to exposing the perils of advice to prosecute being given without the benefit of the provision of a formal brief of evidence.

The Australian Federal Police and the Commonwealth director of public prosecutions had established a close working relationship during major counter-terrorism investigations and the AFP would approach the CDPP for advice in the course of an investigation and brief the CDPP on the status of an investigation. The AFP had almost immediately been receiving information concerning a connection between Dr Haneef and persons involved in the acts of terrorism, and eventually began to communicate with the CDPP concerning the evidence available. On the day that the decision to prosecute was made the prosecutor was provided with a 48 page briefing paper to read, and some supporting material. After a number of meetings with investigators, and with ASIO officers silently lurking in the background, during the day, the prosecutor advised that he thought there was enough evidence to

charge Dr Haneef, adopting in his mind, the reasonable grounds 'arrest test'. He then provided a short note to that effect and drafted an appropriate charge.

The following morning Dr Haneef was then taken to the City Watchhouse and charged. Despite the fact that inaccurate information provided by police was later conveyed to a magistrate, the magistrate granted bail. To that extent the harm from the erroneous advice was benign compared with the consequences for Andrew Mallard.

However, Dr Haneef was then held in custody as a result of the ministerial cancellation of his visa until the Federal court overturned that decision and he was released.

The Inquiry Into the Case of Dr Mohamed Haneef[6] concluded that the advice of the prosecutor was wrong. That was hardly surprising. He was misinformed as to important facts and was not provided with a transcript of a conversation between Dr Haneef and arresting officers at Brisbane airport or with a transcript of his first interview, both of which contained no admissions and exculpatory material. Nor was he told at any of the meetings with investigators of the views of senior members of the investigating team that they thought that the evidence was insufficient to warrant the institution of proceedings. There is little doubt that if the decision to prosecute had been based upon consideration of a fully documented brief of evidence, the decision would have been different.

Subsequently the CDPP amended its guidelines to make it clear that no advice on the sufficiency of evidence can be provided by a Commonwealth prosecutor other than in accordance with the prosecution policy, that is on the reasonable prospects of conviction test. The guidelines do not go further to identify the circumstances in which the advice is to be given, although in practice the only basis upon which the advice can be given is by reference to admissible evidence. What seems to have occurred is that there is now a disinclination on the part of the CDPP to provide any pre-arrest advice without the provision of a full brief of evidence.

The situation is dealt with in a little more detail in the Guidelines of the NSW Director of Public Prosecutions in which Guideline 14 stipulates that advice may be given to police as to the sufficiency of evidence 'only on receipt of sufficient material in admissible form'. It would seem that such advice is rarely given by the ODPP and police rely upon the Legal Services Section for pre-arrest assistance.

The significance of the message from the inquiries should not be missed. Earlier police royal commissions have revealed the perils of comfortable relationships between prosecutors and investigators, and the overriding duty of the prosecutor to be independent and objective is best maintained when the dealings between them are kept at arms-length, notwithstanding any inconvenience that may follow and the lack of excitement from being denied the opportunity to be part of the investigation.

Endnotes

1. *Report on the Inquiry into Alleged Misconduct by Public Officers in Connection with the Investigation of the Murder of Mrs Pamela Lawrence, the Prosecution and Appeals of Andrew Mallard and other Related Matters*, Corruption and Crime Commission 7 October 2008.
2. *Report of the Inquiry into the Case of Dr Mohamed Haneef*, The Hon. John Clarke QC, November 2008.
3. *Mallard v R* (2005) 224 CLR 125.
4. *Mallard v R* WASCA 11/9/96.
5. *Mallard v R* HCA 24/10/97.
6. *Mallard v R* [2003] WASCA 85.

Mandatory life for cop deaths

By Nicholas Cowdery AM QC

The New South Wales Government's legislation to require that a person convicted of murdering a police officer be sentenced to (natural) life imprisonment sparked much controversy – and rightly so[1].

The *Crimes Amendment (Murder of Police Officers) Bill* 2011 inserts into the *Crimes Act 1900* a new section 19B, subsection (1) of which provides:

> 19B Mandatory life sentences for murder of police officers
>
> (1) A court is to impose a sentence of imprisonment for life for the murder of a police officer if the murder was committed:
>
> (a) while the police officer was executing his or her duty, or
>
> (b) as a consequence of, or in retaliation for, actions undertaken by that or any other police officer in the execution of his or her duty,
>
> and if the person convicted of the murder:
>
> (c) knew or ought reasonably to have known that the person killed was a police officer, and
>
> (d) intended to kill the police officer or was engaged in criminal activity that risked serious harm to police officers.

Other subsections provide that this does not apply to anyone under the age of 18 years at the time of the murder or to anyone suffering from 'a significant cognitive impairment', not being a temporary self-induced impairment.

It needs to be said that this is not, in fact, a provision requiring 'mandatory' (natural) life imprisonment to be imposed for any murder of a person who happens to be a police officer. It does not cover all of the ways in which a person may commit the offence of murder (as a principal or accessory) and there are particular requirements to be met before the provision applies. Attorney General Greg Smith SC said that he hoped that the provision would never be used. Of course one hopes that the need for it to be considered would never arise; but if it does, there are some significant conditions in the provision that would need to be satisfied and those circumstances are rarely encountered.

No other Australian jurisdiction has such a provision. Mandatory sentences and minimum sentences have existed and do exist in some states and territories and they have had a sorry history.

This bill was introduced by the police minister in the Legislative Council and the government claimed that it honoured a commitment made (presumably to the Police Association) in 2002; therefore it was not part of any 'law and order auction' campaign which the attorney general had expressly eschewed in November 2010.

So is any harm done to the rule of law and the ability of the courts to do justice?

Chief Justice Brennan[2]: 'A law that purports to direct the manner in which the judicial power should be exercised is constitutionally invalid'. He included any legislated direction for the exercising of an available discretion.

Chief Justice Spigelman[3]: 'The preservation of a broad sentencing discretion is central to the ability of the criminal courts to ensure justice is done in all the extraordinary variety of circumstances of individual offences and individual offenders.'

Chief Justice Gleeson[4]: the sentencing task is 'a synthesis of competing features which attempts to translate the complexity of the human condition and human behaviour into the mathematics of units of punishment usually expressed in time or money'.

Chief Justice Spigelman (again)[5]: 'As is the case with respect to the task judges face when they come to sentence a convicted criminal, what is involved [in making parole decisions] *is a process of balancing overlapping, contradictory and incommensurable objectives. The requirements of deterrence, rehabilitation, denunciation, punishment and restorative justice do not point in the same direction. These tasks – whether sentencing or release on parole – involve a difficult process of weighing and balancing such matters.'*

And again[6]: 'Specifically, the requirements of justice, in the sense of just desserts, and of mercy, often conflict. Yet we live in a society which values both justice and mercy.'

How unrealistic it is, therefore, and unjust, to prescribe a mandatory penalty for any serious offence before it has been committed and all the circumstances are known and without knowing anything of the offender; and experience has shown that such measures do create injustice.

We have been there in New South Wales.[7] In the late

1870s and early 1880s there was public controversy about allegedly light sentences being imposed for serious offences. On 26 April 1883 the Criminal Law Amendment Act prescribed, for five categories of maximum sentences, corresponding mandatory minimum sentences: life (seven years); 14 years (five years); 10 years (four years); seven years (three years); and five years (one year). When the law was implemented, injustices quickly became apparent and after public reaction against the provisions they were repealed on 22 May 1884 – after one year and three weeks.

In its editorial on 27 September 1883 (while the legislation was still in force) the *Sydney Morning Herald* said:

> We have the fact before us that in a case where a light penalty would have satisfied the claims of justice, the judge was prevented from doing what he believed to be right, and was compelled to pass a sentence which he believed to be excessive, and therefore unjust, because the rigidity of the law left him no discretion.

We have been there again more recently. In 1996 the Crimes Amendment (Mandatory Life Sentences) Act inserted section 431B into the *Crimes Act 1900* which provided mandatory (natural) life sentences for murder (of anyone) and for some drug offences 'if the court is satisfied that the level of culpability in *the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence'*. The provision was never expressly used and it was repealed and re-enacted as section 61 of the *Crimes (Sentencing Procedure) Act 1999*. It has still not been used – life sentences have continued to be imposed under the traditional tests of worst class of offence and general sentencing principles and in accordance with other legislated provisions of general application – but the section is still there.

We are there at the national level. On 19 May 2011 in the Supreme Court of the Northern Territory in Darwin, Kelly J was forced by a mandatory minimum sentencing regime to sentence Edward Nafi[8] to an unjustly long sentence (in her Honour's view) for a repeat offence of bringing a boatload of people into Australian waters. Her Honour said:

> So far as sentencing principles are concerned, I am required to take into account such of the matters set out in s 16A(2) of the Crimes Act as are relevant and known to me. Having done so, I am required by s 16A(1) of that Act to impose a sentence which is 'of a severity appropriate in all the circumstances of the offence'. However, I am prevented from doing this by the mandatory sentencing regime in s 236B of the Migration Act. That section provides that for the offence to which you have pleaded guilty, the Court must impose a minimum sentence of five years imprisonment with a minimum non-parole period of three years. In the case of a repeat offence, the mandatory minimum sentence is eight years imprisonment with a minimum *non-parole period of five years*.

And later:

> You will be convicted and sentenced to imprisonment for eight years commencing on 15 June 2010. I fix a non-parole period of five years.
>
> Had it not been for the mandatory minimum sentencing regime, taking into account the maximum penalty prescribed for this offence and the factors I have already set out I would have considered an appropriate penalty to have been a term of imprisonment for three years with a non-parole period of 18 months.
>
> I therefore recommend that the Commonwealth Attorney-General exercise his prerogative to extend mercy to you, Mr Nafi, after you have served 18 months in prison. There is no guarantee that this will occur. It is a matter for the Attorney-General whether this recommendation is accepted.

Her Honour cited Mildren J in *Trenerry v Bradley*[9]:

> Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a Court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case.

So much more is that the case when it is not the minimum that is mandated, but *the* penalty.

Mandatory sentences for all but the most minor regulatory offences are objectionable because they remove or unreasonably fetter the court's discretion and inevitably lead to injustice. As Chief Justice Spigelman once observed, no judge wants to be an instrument of injustice. Nor does any prosecutor. And the community does not want it to occur in their name.

Mandatory sentences that discriminate between occupational groups in the community on the basis of occupation are doubly offensive. Inevitably the families and associates of murder victims from other occupations, quite reasonably, ask why 'their' victim's loss is not viewed by the law as serious enough to attract the mandatory maximum sentence. A fair question to ask is what qualifies police officers for this special treatment *post mortem* and why is the existing law inadequate?

Already in section 21A of the *Crimes (Sentencing Procedure) Act 1999* there are prescribed aggravating factors (in a long list) where '(a) the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work'. It seems quite unnecessary to single out police officers for special consideration from that list of public service providers and only in limited circumstances. There is no epidemic of police murders of the qualifying kind needing to be addressed (even if such a measure might have success in dealing with it, which is doubtful).

The prescribed standard non-parole period for the murder of a police officer, where a term of years is to be imposed, is 25 years imprisonment.

One of the traditional justifications advanced for mandatory sentencing of any kind is the need to ensure consistency in sentencing.

Sir Anthony Mason[10]:

> Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community.

But there is no indication that any worrying inconsistency has been evident in the cases of police officers (as opposed to any other types of public employees) who have been intentionally or recklessly killed while executing their duties or as a consequence of or in retaliation for executing them; so that argument does not apply. The cases of police officers Carty and McEnallay have been cited in media reports, but those cases, properly assessed, do not reveal any such problem (even if there is dissatisfaction with the final outcomes for other reasons).

There is no reason to believe that these provisions, against the background of the existing heavy penalties that are already available, would have any additional deterrent effect. There is every reason to expect, however, that in the rare case where they could apply, there would be no offer of a plea of guilty and there would be a strong impetus for negotiation of the charge and of the facts of the most thorough kind, even at the instigation of the prosecutor. That prolongs the anxiety for the families of the victims, among others.

In a submission to the attorney general the Bar Association raised as an alternative proposition (to its opposition to mandatory sentencing) the prescription of non-parole periods for such life sentences and, indeed, for (natural) life sentences generally. What an excellent idea! But it hasn't succeeded this time.

Endnotes

1. At the time of writing the bill had passed in the Legislative Council and a Greens amendment to insert a provision to enable the specification of a non-parole period had been defeated.
2. *Nicholas v The Queen* (1998) 193 CLR 173 at 188.
3. *R v Jurisic* (1998) 45 NSWLR 209 at 221C.
4. *Weininger v The Queen* (2003) 212 CLR 638.
5. Address to the NSW Parole Authorities Conference, 10 May 2006.
6. (1999) 73 ALJ 876.
7. Judge G D Woods in his 'A History of Criminal Law in NSW' (Federation Press, 2002) describes this chapter of our history in some detail.
8. SCC 21102367.
9. (1997) 6 NTLR 175 at 187.
10. *Lowe v The Queen* (1994) 154 CLR 606 at 610-611.

The changing nature of sentencing in NSW

By Chris O'Donnell

Changing times

In recent years sentence hearings in New South Wales have become increasingly demanding and formal exercises. They impose great burdens on both courts and practitioners.

Sentence hearings were simpler when I first began practising in the criminal jurisdiction over two decades ago. The crown case usually comprised a statement of facts (prepared by police) and a criminal history (if one existed). The prisoner, as offenders were then called, often did not give sworn evidence. Comparative authorities were few. Written submissions for either party were the exception rather than the norm. The crown made fewer, if any, oral submissions. Guideline judgments did not exist. Legislated lists of factors to be taken into account by sentencing judges did not exist. Sentencing judges' remarks were brief and mostly delivered ex cathedra on the day of the sentence hearing.

Much has changed in New South Wales since then. During the last twenty-five years there has been a steady legislative and judicial drive towards accountability and transparency in sentencing. This is not to say that judges or practitioners of a quarter of a century ago were unaccountable. Rather, there has been an increasing recognition of the complexity of sentencing and its vital role in society in underpinning the rule of law. This article considers some of those changes.

Transparency and accountability

Public perceptions of the criminal justice system are largely filtered through what happens in sentencing courts. This was recognised in recent comments about the purpose of remarks on sentence in *R v Lesi*.[1] In that decision the NSW Court of Criminal Appeal (NSWCCA) was critical of a sentencing judge's failure adequately to reveal his reasoning processes in his remarks on sentence.[2] The court stated that the primary purpose of remarks on sentence is to 'provide an oral explanation to the offender, the victim(s) and persons in court at the time when sentence is being passed', and to inform 'the community and an appellate court of the reason for the imposition of the sentence'.

The drive to transparency in sentencing is nowhere more apparent that in the mandated and very detailed lists of factors judges must take into account when sentencing NSW and Commonwealth offenders in s 21A[3] of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA) and s 16A[4] of the *Crimes Act 1914* (Cth). Both provisions reflect the pre-existing common law but list in elaborate detail – particularly the NSW provision – the aggravating, mitigating and other objective and subjective factors courts must take into account, where relevant, when sentencing offenders. Neither provision excludes common law principles, adding to the challenge of the task. So, well-established features of sentencing such as the importance of general deterrence must also be taken into account by judges.[5]

Public perceptions of the criminal justice system are largely filtered through what happens in sentencing courts.

Anyone unfamiliar with the complexity of modern sentencing need only read s 21A of the CSPA to see that complexity. Factors as disparate as the victim being a parking officer, inhalation of a narcotic drug, hatred of a particular disability, a breach of trust, the presence of a child, the victim being a bus driver, financial gain, emotional harm, duress, provocation, prospects of rehabilitation, a guilty plea and prior convictions must, if relevant to the offence in question, be taken into account.

More recently there have been moves by the NSW and Commonwealth legislatures to rein in sentencing judges and limit their discretion through mandatory minimum sentencing provisions and restrictions on the ability of courts to impose non-parole periods below a certain ratio of the head sentence. These moves are at odds with the legislative commands to judges in s 21A of the CSPA and s 16A of the *Crimes Act 1914* to take a multiplicity of complex and competing factors into account when sentencing offenders in order to arrive at a just result in all the circumstances. Some of the deficiencies of restrictive minimum sentence and non-parole period provisions are highlighted elsewhere in this issue in the contributions of Nicholas Cowdery QC and Dina Yehia SC. By overly limiting judicial discretion in sentencing such provisions, ironically, tend to undermine what has otherwise been the prevailing legislative and judicial trend towards transparency in sentencing and the recognition of the complexity of sentencing over the past 25 years.

Fact finding

The efficient administration of justice requires considerable scope for informality in the fact-finding task facing sentencing judges given the large number and wide range of relevant factors in each case and the large caseload of the criminal courts. This is recognised in s 16A of the *Crimes Act 1914*, for example, which uses the phrase 'known to the court' rather than 'proved in evidence'. This, it was stated by a majority of the High Court in *Weininger v The Queen*[6],

> suggests strongly that s 16A was not intended to require the formal proof of matters before they could be taken into account in sentencing. Rather, having been enacted against a background of well-known and long-established procedures in sentencing hearings, in which much of the material placed before a sentencing judge is not proved by admissible evidence, the phrase ``known to the court'' should not be construed as imposing a universal requirement that matters urged in sentencing hearings be either formally proved or admitted.

The majority in Weininger recognised the diversity of circumstances to be taken into account when sentencing, many concerning aspects of human behaviour to be judged along a line between two extremes rather than as a choice between polar opposites. Failure to prove one matter does not amount to proof of its opposite. Sentencing is a synthetic rather than a mathematical process which involves:[7]

> a synthesis of competing features which attempts to translate the complexity of the human condition and human behaviour to the mathematics of units of punishment usually expressed in time or money.

Applying a purely mathematical approach to sentencing would fail to take into account the many often conflicting and contradictory elements relevant to sentencing an offender.[8] The sentencer's task is to take account of all the relevant factors and arrive at a single result that embraces them all. The result thus achieved is said to be arrived at through an 'instinctive synthesis'.[9]

However, there may still be some need from time to time for the sentencing judge to articulate components of a sentencing calculation such as the discount for a plea of guilty or for assistance to the authorities in an arithmetic way: see the judgment of Kirby J in *Markarian v The Queen*.[10]

The legislatures in the Uniform Evidence Law jurisdictions also presume informality in sentence proceedings in s 4(2) of the UEL, which provides that the rules of evidence only apply to sentencing proceedings if the court makes a direction to that effect.

An increasing shift towards formality of sentencing proceedings is nevertheless evident in other recent High Court and NSWCCA authorities on the nature of the sentencing task and the correct approach to that task such as *The Queen v Olbrich*[11], *GAS v The Queen*[12] and *Alvares & Farache v R*[13]). Practitioners acting for both the Crown and the offender need to weigh the principles in these authorities carefully when determining case presentation at sentence hearings.

The sentencer's task is to take account of all the relevant factors and arrive at a single result that embraces them all. The result thus achieved is said to be arrived at through an 'instinctive synthesis'

In *Alvares & Farache* the applicants, who were both Commonwealth offenders, submitted that the sentencing judge had erred by giving the evidence of the remorse of the applicants only limited weight. Neither applicant gave sworn evidence at the sentence hearing. Each, however, tendered a psychologist's report which contained some hearsay evidence of expressions of remorse by the applicants without objection from the Crown. Remorse is a factor relevant to sentencing for Commonwealth offenders in s 16A(2)(f) of the *Crimes Act 1914* (Cth), although in that provision it is referred to as 'contrition'. In each case the sentencing judge gave only limited weight to the evidence of remorse because neither applicant gave evidence on sentence. The evidence of remorse could not, therefore, be tested and this meant that the sentencing judge could not make his own assessment of the extent of that remorse.

Buddin J, with whom McClellan CJ at CL and Schmidt J agreed, held that the reasoning of the sentencing judge was:[14]

> unimpeachable for the very reasons which he identified, namely that it was very difficult for him to assess the extent to which the applicants were genuinely remorseful for their conduct when they had not expressed it to him directly and thereby exposed themselves to being tested upon the issue.

It did not matter that the Crown had not objected to the hearsay material about remorse at the sentence hearing. Earlier authorities[15] suggesting that untested statements in psychologists' reports should be treated with circumspection on sentence did not stand for the proposition that in the absence of objection to hearsay material adduced on behalf of an offender evidence of remorse in a psychologist's report must be afforded substantial weight.[16]

Alvares & Farache highlights in a practical way the increasing formality of sentencing proceedings since the High Court's decision in *The Queen v Olbrich*. Olbrich established the following essential propositions:[17]

1. A sentencing judge who is not satisfied of some matter urged in a plea on behalf of an offender is not required to sentence the offender on a basis that accepts the accuracy of that contention even if the prosecution does not prove the contrary beyond reasonable doubt;
2. There is no general joinder of issue between the prosecution and the defence in sentencing proceedings;
3. Nevertheless, if the prosecution seeks to have the sentencing judge take a matter into account in passing sentence it will be for the prosecution to bring that matter to the attention of the judge and, if necessary, call evidence about it and prove it beyond reasonable doubt;
4. Furthermore, if the offender seeks to have the sentencing judge take a matter into account in passing sentence it will be for the offender to bring that matter to the attention of the judge and, if necessary, call evidence about it and prove it on the balance of probabilities;

The calling of evidence as referred to in 3 and 4 above would be required only if the asserted fact was controverted or if the judge was not prepared to act on the assertion.

The NSWCCA in its decision in *Alvares & Farache* did not state that an offender cannot get a meaningful benefit for remorse unless he or she gives sworn evidence of that remorse. However, a careful reading of the decision suggests that hearsay evidence of remorse is more likely to be accorded appropriate weight if supported by sworn evidence from the offender. This is so even where there may be a common understanding between counsel for the Crown and counsel for the defence about the weight hearsay evidence about remorse should be given. As the High Court pointed out in *GAS v The Queen*[18] such agreements between counsel do not bind the sentencing judge or circumscribe the judge's responsibility to find and apply the law.

Practitioners will, therefore, need to give careful consideration to whether to call sworn evidence from the offender to establish remorse even where hearsay expressions of remorse are not objected to by the Crown. The same consideration will undoubtedly need to be given to whether to call sworn evidence in relation to other areas of possible contention. An example arose in Olbrich itself, where the High Court held that an offender seeking to be sentenced on the basis of being a person low in the hierarchy of a drug enterprise must establish that fact as a mitigating factor on the balance of probabilities.[19]

Statements of facts

In recent years a number of sentencing and appellate courts have expressed concern over the contents of statements of facts in NSW sentencing matters. As a plea of guilty only amounts to an admission of the essential elements of the offence and does not admit matters of aggravation or deny matters of mitigation, one of the key functions of the sentencing judge is to find the facts upon which the sentence is to be passed. The statement of facts is, therefore, of the first importance. It is essential for the statement of facts to state with certainty what facts are agreed between the parties and the essential factual substratum of the offender's criminal conduct: *R v Della-Vedova*[20]; *R v Golubovic*[21].

The decision of the NSWCCA in *R v Della-Vedova*, in particular, makes it clear that it is the duty of the prosecuting authorities to refine statements of facts so that that they are not merely the product of authorities

involved in investigating crime but become the product of those who are trained, skilled and experienced in presenting evidence in court. In that case the NSWCCA was critical of the statement of facts tendered on sentence because it made extensive reference to assertions of co-offenders without distinguishing between those assertions and facts accepted as true by both the offender and the prosecution. As such, the statement of facts did not identify or make any attempt to identify the facts upon which the applicant Della-Vedova was to be sentenced.

Where there is a statement of facts which is agreed in its entirety the prosecution should not tender and rely upon additional evidence going to the objective features of the offence that could supplement or contradict the agreed facts. The NSWCCA's decision in *R v Palu*[22] is authority for the proposition that if the prosecution does adduce such additional evidence, the sentencing judge is not restricted to the agreed facts. The following description by Howie J of the sentence proceedings in *Palu* highlights the logistic difficulties confronting sentencing judges in the Sydney District Court on a Friday, the busiest sentencing day in that court, and the utility of formality in the sentencing process:

> [19] It should be observed at this point that the proceedings before his Honour were conducted in a manner that was a long way short of satisfactory. I appreciate that a Friday in the District Court can present a judge hearing, what are euphemistically called, 'short matters' with pressures to deal with those cases expeditiously and unnecessary procedural formality can result in an undue waste of valuable court time. But the matter with which the respondent was charged was clearly very serious and even his legal representative acknowledged that some type of custodial sentence had to be imposed. Yet the proceedings were constantly interrupted, the representatives of both parties were often not available when the matter was called on leaving persons with apparently little knowledge of the matter standing in their stead, and ultimately the sentencing judge had an unreasonable time constraint imposed upon him when the matter recommenced after lunch because the Crown representative was not available after 3pm as she had to interview a witness for a trial the following week.
>
> [20] A particular defect in the proceedings, which is now of significance, is that it was never made clear by the parties with any particularity at all the extent of the factual disputes that had to be resolved by his Honour. This was largely because there was a degree of procedural informality that was inappropriate once it was clear that the parties were not ad idem as to the factual basis upon which the respondent was to be sentenced or the appropriate sentencing disposition. Disputes and issues that arose were determined in an ad hoc fashion, if at all. The prosecutor, who finally had carriage of the matter, complained at one stage that she had not had access to the presentence report and was not aware of what had been said earlier in the proceedings when she was not present. Ultimately the order under s 11 was made without his Honour ever ascertaining the extent of the factual matters in dispute between the parties or attempting to resolve them.

The NSWCCA in *Palu* held that those proceedings had miscarried, upheld the appeal, quashed the sentencing orders made in the District Court and ordered that the matter be relisted before that court for redetermination.

Ideally, statements of agreed facts:

- should not be 'badged' with the logos of the police or other investigating authorities;
- should avoid expressing facts as allegations;
- should refine the evidence from witness statements and other sources into clearly articulated propositions of fact;
- should clearly indicate which of those propositions are agreed or not;
- should be as succinct as possible and not contain lengthy recitations of evidence which might appropriately be reduced into a more abbreviated and clearer narrative; and
- should, nevertheless, contain all the facts essential to setting out the factual substratum of the offender's criminal conduct.

The fact-finding task can be more challenging where there are multiple offences and multiple offenders. Offenders, not infrequently, come before sentencing courts having pleaded guilty to half a dozen or more offences and having acknowledged their guilt in respect of even more offences to be dealt with on a schedule and taken into account under NSW or Commonwealth provisions permitting that procedure.[23] In such cases sentencing courts have recently found the following format for statements of agreed facts to be convenient:

- an introduction which identifies in sub-paragraphs

each offence the offender has pleaded guilty to, the dates of the offence, the offence-creating provision and the maximum available penalty;

- the introduction could also identify in sub-paragraphs each offence which is to be taken into account on a schedule, the dates of the offence, the offence-creating provision and the maximum available penalty and the offence the offender has pleaded guilty to for which the scheduled offences are to be taken into account;
- a brief overview of the entirety of the offender's criminal conduct including a description of the offender's role and position in any hierarchy of co-offenders that exists;
- a narrative description of the facts relevant to each offence in turn, which is succinct and to the point but which, nevertheless, contains all the facts essential to setting out the factual substratum of the offender's criminal conduct with respect to each offence and which clearly identifies which of those facts are agreed and which are disputed;
- a brief chronology of the arrest and interview of the offender, if relevant; and
- a brief statement of the antecedents of the offender including whether or not the offender has a prior criminal history.

Multiple offenders

The sentencing exercise is, of course, more complicated where there are multiple offenders and parity of sentencing is a key consideration. The High Court and the NSWCCA in many decisions, such as *Lowe v The Queen*[24] and *R v Nguyen & Pham*[25], have emphasised the strong desirability of co-offenders being sentenced by the same judge and, preferably, at the same time. To this end the NSWCCA in *Dwayhi & Bechara v R*[26] has indicated the necessity for prosecuting authorities, offenders' representatives and sentencing courts alike to be more proactive in this regard:

> [44] It is necessary for sentencing Courts and prosecutorial bodies to take steps to ensure, so far as it is reasonably possible, that related offenders are sentenced by the same Judge, and preferably at the same time following a single sentencing hearing. To reinforce this message, creation of relevant Practice Notes (by the Courts) and amendment to prosecution guidelines (by the Commonwealth and New South Wales Directors of Public Prosecutions) may be considered appropriate to give effect to the statements of Courts referred to above.
>
> [45] It ought be appropriate, as well, for sentencing and appellate courts to enquire of counsel for an offender, who seeks to rely upon the parity principle, as to the steps taken by that offender or his legal representatives to ensure that he or she was sentenced by the same Judge, and at the same time, as any related offender, if the case is one where there were different sentencing judges.
>
> [46] In my view, procedures of this type will serve the public interest in consistent and transparent sentencing of related offenders which forms, after all, part of the rationale for the parity principle itself.

These remarks have broad application in light of the NSWCCA's decision in *Jimmy v R*[27] that the principle of parity can also (subject to some limitations) apply to offenders who are not co-offenders in the strict sense but, although charged with different offences, were involved in the same criminal enterprise.

Parole, ratios and guidelines

Legislative provisions motivated by the political response to calls to be 'tougher on crime' have sometimes been justified with the argument that they are designed to make sentencing more transparent. While the achievement of that objective through such provisions is debatable, they certainly make the sentencing task more complicated. An example of such a provision is s 44 of the CSPA which requires a judge sentencing a NSW offender to a term of imprisonment first to fix the non-parole period and then to fix a parole period which is not to exceed one third of the non-parole period unless special circumstances exist. However, what amounts to 'special circumstances' warranting departure from the 75/25 ratio in s 44 is not defined in the CSPA, and it has fallen to the courts to provide that definition in decisions such as *R v Way*[28].

In a similar vein the CSPA provisions requiring the imposition of a standard non-parole period (SNPP) for certain NSW offences 'unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period' have added another level of complexity to NSW sentencing and generated much appellate authority. The reasons for departing from the SNPP 'are only those referred to in s 21A' of the CSPA. However,

the NSWCCA has held that the prescription of a SNPP does not displace the principle that the fact that the offence was one that could have been dealt with in the Local Court continues to be a relevant factor when the matter is dealt with indictably and sentencing for the offence occurs in the District Court.[29] The court is required to make a record of its reasons for departing from the SNPP and to identify each factor it took into account in doing so. Yet the legislation does not state what degree of offending should attract the SNPP. This was also interpreted in Way as being intended for a middle range case where the offender is convicted after a trial.[30] So a plea of guilty might in itself justify departure from the SNPP.

A full consideration of the interpretation of these provisions is beyond the scope of this paper. They both provide fertile grounds for appeals.

Guideline judgments have been recognised by the NSWCCA as playing a useful role in sentencing in NSW since the 1998 decision in *R v Jurisic*.[31] In that decision Spigelman CJ said:

> guideline judgments should now be recognised in New South Wales as having a useful role to play in ensuring that an appropriate balance exists between the broad discretion that must be retained to ensure that justice is done in each individual case, on the one hand, and the desirability of consistency in sentencing and the maintenance of public confidence in sentences actually imposed, and in the judiciary as a whole, on the other.

Since 2001 the NSWCCA has had the power under the CSPA to give guideline judgments in sentence appeals for NSW offences on the application of the Attorney General[32] and of its own motion.[33] The NSWCCA has given guideline judgments for offences as diverse as armed robbery[34], breaking entering and stealing[35], dangerous driving[36] and driving with the high range prescribed content of alcohol[37]. Guideline judgments have also been issued with respect to the appropriate discount for a guilty plea[38] and taking additional offences into account on a 'Form 1' pursuant to s 32 and s 33 of the CSPA.[39] These decisions add another dimension to the sentencing process where applicable, although the NSWCCA has stressed that they should not fetter a sentencing judge's discretion.[40] They amount to a check or a guide, not a rule or a presumption.

However, since the High Court's decision in *Wong & Leung v The Queen*[41] it has been clear that the NSWCCA lacks the power to issue a guideline judgment for a Commonwealth offence as this would be inconsistent with s 16A of the *Crimes Act 1914*. This adds a layer of complexity to the sentencing of Commonwealth offenders in NSW.

For example, the guideline judgment in *R v Thomson; R v Houlton* with respect to guilty pleas does not apply to Commonwealth offences.[42] But the general principles stated in that case are generally applicable to sentencing for Commonwealth offences and the range of discount of 10 – 25 per cent is reasonable to adopt.[43] In Commonwealth matters the guilty plea is taken into account as a mitigating factor as it demonstrates a willingness to facilitate the course of justice. [44] Unlike the position for NSW offences, a plea of guilty to a Commonwealth offence must not, when sentencing for that offence, be taken into account as a mitigating factor for its objective 'utilitarian value' or on the basis that it saves the community the expense of a contested trial.[45]

Identifying the appropriate range of available penalties is also more difficult in Commonwealth matters in the absence of guideline judgments, as a recent series of decisions indicates.

In *DPP (Cth) v De la Rosa*[46] the NSWCCA identified a need for assistance from comparative sentencing authorities from jurisdictions other than NSW in response to the submission that the sentence imposed on the respondent for a drug importation offence was manifestly inadequate. The court conducted its own research and identified and reviewed a number of decisions of sentencing courts throughout Australia in relation to drug importation offences which were additional to those referred to by counsel.

However, in the recent decision of *Hili & Jones v The Queen*[47] a majority of the High Court stated that consistency in Commonwealth sentencing:[48]

> is not demonstrated by, and does not require, numerical equivalence. Presentation of the sentences that have been passed on federal offenders in numerical charts, bar charts or graphs are not useful to a sentencing judge. It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were. Presentation in any of these forms suggests, wrongly, that the task of a sentencing judge is to interpolate the result of the instant case on a graph that depicts the available outcomes. But not only is the number

> of federal offenders sentenced each year very small, the offences for which they are sentenced, the circumstances attending their offending, and their personal circumstances are so varied that it is not possible to make any useful statistical anaylsis or graphical depiction of the results. The consistency that is sought is consistency in the application of the relevant legal principles. [at 48 and 49].

The High Court majority went on to say that in her judgment in *De la Rosa* Simpson J accurately identified the proper use of information about sentences that have been passed in other cases, namely that:[49]

> a history of sentencing can establish a range of sentences that have in fact been imposed. That history does not establish that the range is the correct range or that the upper or lower limits to the range are the correct upper or lower limits'. Past sentences 'are no more than historical statements of what has happened in the past. They can, and should provide guidance to a sentencing judge … and stand as a yardstick against which to examine a proposed sentence. [at 54].

In its recent decision in *R v Holland*, the NSWCCA was careful to state its earlier decision in *De La Rosa*, while providing a useful tool in the nature of a yardstick for a sentencing judge faced with a similar type of offence, was not a guideline judgment and that:[50]

> it would be wrong to sentence an offender by seeking out the 'category' into which they fit and imposing a sentence which is thought to be appropriate for an offence which happens to have the characteristics found in that category.

Conclusion

These remarks in Holland highlight the importance of the sentencing judge's discretion in each case. Undoubtedly there will be further changes affecting sentencing in future years. It is to be hoped that those changes will respect the vital importance of judicial discretion in the sentencing process and the complex range of factors – both objective and subjective – relevant to that process.

Endnotes

1. [2010] NSWCCA 240.
2. Ibid at [36]-[37].
3. Introduced in 2002.
4. Introduced in 1990.
5. See *R v Way* (2004) 60 NSWLR 168; *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370.
6. (2002) 212 CLR 629 at [22]–[24].
7. Ibid at [24].
8. *Markarian v R* (2005) 228 CLR 357.
9. *Wong & Leung v The Queen* (2001) 207 CLR 584.
10. [2005] 228 CLR 357 at [138].
11. (1999) 199 CLR 270.
12. (2004) 217 CLR 198.
13. [2011] NSWCCA 33.
14. Ibid, at [47].
15. *R v Qutami* (2001) 127 A Crim R 369; *R v McGourty* [2002] NSWCCA 335; *R v Elfar* [2003] NSWCCA 358.
16. *R v Alvares & Farache* (supra) at [58].
17. (1999) 199 CLR 270 at [25]-[27].
18. *GAS v The Queen* (supra) at [30]-[31].
19. *The Queen v Olbrich* (supra) at pp 280-282.
20. [2009] NSWCCA 107.
21. [2010] NSWCCA 39.
22. (2002) 134 A Crim R 174 at [21].
23. s 32 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and s 16BA *Crimes Act 1914* (Cth).
24. (1984) 154 CLR 606 per Brennan J at 617.
25. [2010] NSWCCA 238 at [13].
26. [2011] NSWCCA 67 at [44]-[46], per Johnson J, Whealy JA and Hidden J agreeing.
27. [2010] NSWCCA 60; 240 FLR 27.
28. (2004) 60 NSWLR 168.
29. *Bonwick v R* [2010] NSWCCA 177.
30. *R v Way* (supra) at [68].
31. (1998) 45 NSWLR 209.
32. CSPA s 37.
33. CSPA s 37A.
34. *R v Henry* (1999) 46 NSWLR 346.
35. *R v Ponfield* (1999) 48 NSWLR 327.
36. *R v Jurisic* (supra).
37. Attorney General's Application under s 37 of the CSPA (No 3 of 2002) (2004) 61 NSWLR 305.
38. *R v Thomson & Houlton* (2000) 49 NSWLR 383.
39. Attorney General's Application under s 37 of the CSPA (No 1 of 2002) (2002) 56 NSWLR 146.
40. *R v Whyte* (2002) 55 NSWLR 252.
41. *Wong & Leung v The Queen* (supra) (2001) 207 CLR 584.
42. *Tyler v R; R v Chalmers* (2007) 173 A Crim R 458 at 476.
43. *R v Bugeja* [2001] NSWCCA 196 at [24] – [28]; *R v Otto* (2005) 157 A Crim R 540 at [69], per Hall J (Hidden J agreeing).
44. *Cameron v The Queen* (2002) 209 CLR 339 at 343; [11]–[14]; *Tyler v R; R v Chalmers* at 476. Nb. A guilty plea may also be some evidence of remorse and an acceptance of responsibility.
45. *Cameron v The Queen* at 343; *Tyler v R; R v Chalmers* at 476. This is contrary to the position under *R v Thomson; R v Houlton* (2000) 49 NSWLR 383 and the *Crimes (Sentencing Procedure) Act 1999* (NSW).
46. [2010] NSWCCA 194.
47. [2010] HCA 45.
48. Ibid at [48]-[49].
49. Ibid at [54].
50. *DPP (Cth) v De La Rosa* (supra) per McClellan CJ at CL at [3].

Applications for costs after unsuccessful prosecutions

By Russell Sweet

1. Introduction

The aim of this paper is to equip criminal lawyers to make an application for professional costs incurred by an accused person to be paid by the state, upon a criminal charge being withdrawn by the prosecution or dismissed by the court.

It has been my experience that many lawyers are unaware of the statutory provisions that can be relied upon by an advocate for an accused person when charges brought against him by the prosecution are either withdrawn by the prosecution or dismissed by the court that will result in an accused person obtaining an order for costs.

Legal fees incurred in defending criminal cases are often substantial.

It therefore follows that, in discharging one's professional duty to a client, it is necessary that the criminal law practitioner be thoroughly conversant with the circumstances in which he or she can make an application for costs and, further, be aware of the statutory provisions and decided cases that are applicable in ensuring that an application for costs is properly prepared and presented to a court.

2. Statutory provisions

There are two statutes that contain provisions that give a court a discretion to make a costs order, upon a criminal prosecution failing or being withdrawn. The *Criminal Procedure Act 1986* and the *Costs in Criminal Cases Act 1967* contain such provisions.

It is proposed to deal with the provisions in each of these Acts that allow for such an application to be made, to examine the circumstances in which such an application can be made and to examine cases decided in which each of the statutory provisions are considered in order to provide assistance to practitioners firstly; as to when an application for costs can be made and secondly; to ensure that such an application is properly presented, backed by appropriate authorities, in order to maximise the likelihood of a court exercising its discretion to make an order for costs in favour of the accused person.

Section 213 of the *Criminal Procedure Act 1986* provides as follows:

> 213 A court may at the end of summary proceedings order that the prosecutor pay professional costs to the Registrar of the Court, for payment to the accused person, if the matter is *dismissed* or *withdrawn*. [Emphasis added].

Nevertheless, the discretion provided for in Section 213 of the *Criminal Procedure Act 1986* is circumscribed by Section 214 of the *Criminal Procedure Act 1986*.

That Section provides as follows:

> 214 Professional costs are not to be awarded in favour of an accused person in summary proceedings unless the Court is satisfied as to any one or more of the following:
>
> (a) that the investigation into the alleged offence was conducted in an unreasonable or improper manner;
>
> (b) the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner;
>
> (c) the prosecutor unreasonably failed to investigate (or investigate properly) any relevant matter of which it was aware or ought reasonably to have been aware and which suggested either that the accused person might not be guilty or that, for any other reason, the proceedings should not have been brought;
>
> (d) that because of other exceptional circumstances relating to the conduct of the proceedings by the prosecutor, it is just and reasonable to award professional costs.

Sections 116 and 117 of the *Criminal Procedure Act 1986*, which are restricted in their application to committal proceedings, are almost identical to section 213 and 214 of the *Criminal Procedure Act 1986.* Similarly, section 257C which gives the Supreme Court the power to award costs to an accused person in summary proceedings before that Court, is almost identical to section 214 of the *Criminal Procedure Act 1986.*

The second statutory provision in which the advocate for an accused person can rely upon to support his or her Application for Costs is section 2 of the *Costs in Criminal Cases Act 1967*. That section provides as follows:

> 2. Certificate may be granted
>
> 1.The Court or Judge or Magistrate in any proceedings relating to any offence, whether punishable summarily or upon indictment, may:
>
> (a) where, after the commencement of the trial in the proceedings, a defendant is *acquitted* or *discharged* in relation to the offence concerned, or a direction is

given by the Director of Public Prosecutions that no further proceedings be taken, or ...

Grant to that defendant a certificate under this Act, specifying the matters referred to in Section 3 and relating to those proceedings.' [Emphasis added].

Nevertheless, in order to attract the discretion pursuant to Section 2 in the *Costs in Criminal Cases Act 1967*, the discretion to do so is restricted by Section 3 of the *Costs in Criminal Cases Act 1967*.

Section 3 of that Act provides as follows:

3.Form of Certificate

1. The Certificate granted under this Act shall specify that, in the opinion of the Court or Judge or Magistrate granting the Certificate:

(a) if the prosecution had, before the proceedings were instituted, been in possession of all of the relevant facts, it would not have been reasonable to institute the proceedings, and

(b) that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances.

Section 3A of the *Costs in Criminal Cases Act 1967* is as follows:

3A Evidence of further relevant facts may be adduced

(1) For the purpose of determining whether or not to grant a certificate under section 2 in relation to any proceedings, the reference in section 3 (1) (a) to 'all the relevant facts' is a reference to:

(a) the relevant facts established in the proceedings, and

(b) any relevant facts that the defendant has, on the application for the certificate, established to the satisfaction of the Court or Judge or Magistrate, and

(c) any relevant facts that the prosecutor, or in the absence of the prosecutor, any person authorised to represent the Minister on the application, has established to the satisfaction of the Court or Judge or Magistrate that:

(i) relate to evidence that was in the possession of the prosecutor at the time that the decision to institute proceedings was made, and

(ii) were not adduced in the proceedings.

3. Legislative provisions and the common law position regarding such an application for costs

An award of costs is commonly regarded as a means of penalising or discouraging any improper or unreasonable behaviour on the part of an informant in a prosecution and to make prosecutors more publicly accountable for their actions and to bring about a greater level of efficiency in the investigation and prosecution of criminal proceedings.[1]

Sections 116,117, 212 213 and 257C of the *Criminal Procedure Act 1986* and the provisions of the *Costs in Criminal Cases Act 1967* are examples of reforming legislation with a beneficial purpose, designed to confer valuable privileges upon persons who are acquitted in criminal prosecutions instituted against them.[2]

The common law position was that the Crown neither paid nor received costs.[3]

It is apparent that, by reason of the passage of the *Costs in Criminal Cases Act 1967* and sections 116, 117, 213 214 and 257C of the *Criminal Procedure Act 1986*, parliament has determined that the common law right of the Crown not to pay or receive costs should no longer be the law.

The provisions of such reforming legislation should not be narrowly construed so as to defeat the achievement of its general purposes.

Although the judicial officer dealing with an application for a certificate need not be the trial judge, it is always preferable for such an application to be made to the judicial officer who determined the original proceedings on its merit.[4]

Costs orders are made against the Crown in favour of accused persons not to punish the Crown or a prosecutor but to compensate the accused.[5]

4. The preparation of a costs application

Section 116 of the *Criminal Procedure Act 1986* sets out the circumstances in which costs can be awarded to an accused person at the end of committal proceedings. That provision gives a magistrate discretion to order that the prosecutor pay professional costs to the registrar, for payment to the accused person if:

- the accused person is discharged as to the subject matter of the offence or the matter is withdrawn; or

- the accused person is committed for trial or sentenced for an indictable offence which is not the same as the indictable offence the subject of the Court Attendance Notice.

The circumstances in which a magistrate can make an order for costs at the conclusion of committal proceedings are set out in section 117 of the *Criminal Procedure Act 1986* which is identical to section 214 of the *Criminal Procedure Act 1986*.

Section 213 of the *Criminal Procedure Act 1986* gives the court the power, at the end of summary proceedings, to order that the prosecutor pay professional costs to the registrar of the court for payment out to the accused person if the matter is dismissed or withdrawn.

However, the discretion to order costs in such circumstances is circumscribed by the matters set out in section 214 of the *Criminal Procedure Act 1986*.

Moreover, section 257C of the *Criminal Procedure Act 1986* provides that a court may at the end of proceedings that are before the Supreme Court in its summary jurisdiction, where the Supreme Court has jurisdiction to hear and determine those proceedings in a summary matter, order that the prosecutor pay to the registrar of the court for payment to the accused person the professional costs of the accused person. This is so if the accused person is discharged, or the matter is dismissed because the prosecutor fails to appear, or the matter is withdrawn, or if the proceedings are for any reason invalid.

Like sections 116 and 213 of the *Criminal Procedure Act 1986*, section 257C is circumscribed by section 257D of the Act, subsection 1 of which is identical to sections 117 and 214 of the Act.

In preparing an application for costs pursuant to section 116, 213 or section 257C of the *Criminal Procedure Act 1986,* it is necessary that an advocate carefully examine the provisions of section 214(1)(a), (b), (c) and (d) in the case of a summary trial, or alternatively sections 117(1)(a), (b), (c) and (d) in the case of making an application for costs at the end of committal proceedings, in preparing submissions which would result in a court exercising its discretion to make an order for costs in favour of an accused person.

It is convenient to deal with the provisions of section 214(1)(a), (b), (c) and (d) individually.

4.1 That the investigation into the alleged offence was conducted in an unreasonable or improper manner

It is not necessary, in order to satisfy a court that the provisions of 214(1)(a), namely that the investigation into the offence was conducted in an unreasonable or improper manner, for the accused to prove that the investigation 'fell grossly below optimum standards'.[6]

It is difficult to isolate the principles to be applied in determining whether or not an investigation into an offence was conducted in an unreasonable or improper manner. Each case will turn on its own facts.

4.2 That the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner

It has been held that a party does not institute proceedings without reasonable cause merely because that party fails in the argument put to the court.[7] However, a proceeding will be instituted without reasonable cause if it has no real prospect of success or was doomed to failure.[8]

Moreover, it has been held with the question as to whether or not, at the time a proceeding was instituted it had 'no real prospects of success or was deemed a failure' is a question that is required to be determined as a matter of objective fact.[9] Moreover, it has been held that one way of testing whether a proceeding is instituted 'without reasonable cause' is to ask whether, upon the facts apparent to the applicant at the time of instituting the proceeding there was no substantial prospect of success.[10] Moreover, it has been held that in determining whether a prosecutor unreasonably failed to investigate, or to investigate properly any relevant matter, a court has to consider if the facts which it could be said the prosecutor failed to have sufficient regard to were facts that it ought reasonably to have been aware of and would have suggested the proceedings should not have been brought.[11]

The question of whether or not the proceedings were instituted without reasonable cause has to be answered by reference to the quality of the evidence which the police had gathered, with an eye not only to enquiries which had been made but also to those which should have been made.[12]

The reasonableness of a decision to institute proceedings

is not based upon the test the prosecution agencies throughout Australia use as a discretionary test for continuing to prosecute, namely, that a reasonable jury would be likely to convict. The test cannot be a test of reasonable suspicion which might justify an arrest and it cannot be the test which determines whether prosecution is malicious.[13]

There is authority to support the proposition that a decision to institute proceedings is not based upon the test that prosecution agencies throughout Australia use as the discretionary test for continuing to prosecute, namely whether there is any reasonable prospect of conviction. Equally the decision is not governed by the test of whether a jury would be reasonably likely to convict. Similarly it has been held equally that the test cannot be a test of reasonable suspicion which must justify an arrest and it cannot be the test which determines whether the prosecution is malicious.[14]

Furthermore, there is authority to support the proposition that, in the ordinary course of events, a prosecution may be launched where there is evidence to establish a *prima facie* case but that does not mean it is reasonable to launch a prosecution simply because a *prima facie* case exists. There may be cases where there is contradictory evidence and where it is reasonable to expect a prosecutor to make some evaluation of that evidence.[15]

Moreover, there is authority to support the proposition that the section calls for an objective analysis of the whole of the relevant evidence, and particularly the extent to which there is any contradiction of expert evidence concerning central facts necessary to establish guilt, or inherent weakness in the prosecution case and that matters of judgment concerning credibility, demeanour and the like are likely to fall on the other side of the line of unreasonableness, being matters quintessentially within the realm of the ultimate fact finder, whether it be judge or jury.[16]

Accordingly, the fact that a prosecution may be launched where there is evidence to establish a *prima facie* case does not mean that it is reasonable to launch a prosecution.

In this context it is important to bear in mind that in *R v Pavy (1997)* 98 A Crim R 396 at 401 the Court of Criminal Appeal (Hunt CJ at CL, Smart and Badgery-Parker JJ) unanimously held that:

> The legitimate interest which the community has in serious crimes being prosecuted by the Director of Public Prosecutions is not disputed. That cannot, in our judgment, make it reasonable as between the Crown and the accused/applicant *to prosecute in the face of significant weaknesses in the Crown case of which the Crown acting reasonably, ought to have been aware*. [Emphasis added].

4.3 The proceedings should not have been brought

It is important, when making a submission under this sub-section, to ensure that submissions are made about what matters a prosecutor unreasonably failed to investigate and to concentrate on investigations that should have been made and which suggested that the accused person might not be guilty or that, for any other reason, the proceedings should not have been brought.[17]

The decision of Howie J in *DPP (Cth) v Neamati* demonstrates the need for an advocate, when preparing submissions pursuant to section 117(1)(c), 214(1)(c) or 257D(1)(c) of the *Criminal Procedure Act 1986,* to concentrate on presenting an argument as to why it was that a prosecutor unreasonably failed to investigate a matter of which it should have been aware or, alternatively, to concentrate on preparing a list of reasons why it is asserted that the proceedings should not have been brought.

The preparation of such a list of points or argument upon those points requires the advocate to thoroughly analyse the evidence that has been presented by the prosecution.

A good example of a situation where it can be asserted that the prosecution failed to investigate a matter properly is in a sexual assault case where the evidence of the victim is uncorroborated and the evidence of that victim contains significant weaknesses being inconsistencies or matters that are contradicted by other evidence or where, for example, the victim has an extensive criminal history involving matters of dishonesty.

In such a case, where the evidence of the victim is not accepted by the court or jury and the case is dismissed or withdrawn, it is clearly open to the defence to assert that, in the event that the veracity of the victim had been thoroughly considered by the prosecution, the quality of the victim's evidence was such that there

was significant weaknesses in it of which the Crown, acting reasonably was aware, or alternatively, ought reasonably to have been aware which suggested that the accused person might not be guilty, which material would bolster an argument that the proceedings should not have been brought for those reasons.

4.4 That it is just and reasonable to award professional costs

The application of the sub-section requires 'other exceptional circumstances' that specifically relate to the 'conduct of the proceedings by the prosecutor.'

However, hopefully, a submission based on section 214(1)(d) that there were 'exceptional circumstances' relating to the 'conduct of the proceedings by the Prosecutor' will be rare.

5. The assessment of costs under the Criminal Procedure Act 1986

In the event that the court concludes that it is appropriate for it to exercise its discretion, to order the payment of costs pursuant to section 213 of the *Criminal Procedure Act 1986*, the situation is that the court can proceed to assess the costs in the matter.

Section 213(2) provides that the amount of professional costs is the amount that the magistrate considers to be 'just and reasonable'.

In order to provide evidence to the court as to the amount of professional costs that is 'just and reasonable', an affidavit should be put on annexing to it all bills forwarded to the accused together with the costs of the hearing on the day that the charge was withdrawn or dismissed. The court can then consider the material contained in the affidavit of the solicitor, together with the bills annexed to it, in determining whether the amount claimed for professional costs, as set out in that affidavit, are 'just and reasonable'.

6. Making an application for costs where proceedings are adjourned

Section 216 of the *Criminal Procedure Act 1986* gives the court a discretion, in proceedings where there is a summary trial, to order costs on an adjournment if the court is satisfied that the other party has incurred additional costs because of the unreasonable conduct or delays of the party against whom the order is made.

Section 257F of the *Criminal Procedure Act 1986* contains an identical provision which applies in the case of an adjournment of proceedings in cases that are heard in the Supreme Court, in its summary jurisdiction, where that court had jurisdiction to hear and determine those proceedings in a summary manner.

Section 118 of the *Criminal Procedure Act 1986*, allows an application for costs to be made on an adjournment of committal proceedings.

Sections 118, 216 and 257F of *Criminal Procedure Act 1986*, all of which allow for costs to be made on an adjournment, are almost identical to each other.

It is important to be aware that the court has a discretion to order costs on an adjournment if it is satisfied that the other party has incurred additional costs because of the unreasonable conduct or delays on the part of a prosecutor.

Examples that come to mind are a case having to be adjourned because the police have failed to prepare a brief in time and a situation where a hearing commences and has to be adjourned because of the unavailability of a witness who was not subpoenaed by the prosecution.

7. The application pursuant to section 2 of the *Costs in Criminal Cases Act 1967*

Section 2 of the *Costs in Criminal Cases Act 1967* gives a court the power where, after the commencement of the trial in the proceedings, the defendant is acquitted or discharged in relation to the offence concerned or a direction is given by the director of public prosecutions that no further proceedings be taken or, where on appeal the conviction of the defendant is quashed, to grant a certificate specifying the matters set out in section 3 of the Act.

Section 3 of the *Costs in Criminal Cases Act 1967* provides that certain matters shall be specified in the certificate.

> 3. Form of Certificate
>
> 1.The Certificate granted under this Act shall specify that, in the opinion of the Court or Judge or Magistrate granting the Certificate:
>
> (a) if the prosecution had, before the proceedings were instituted, been in possession of all of the relevant facts, it would not have been reasonable to institute the proceedings, and
>
> (b) that any act or omission of the defendant that

> contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances.

The task of the court, when dealing with an application under Section 2 of the *Costs in Criminal Cases Act 1967*, is to ask the hypothetical question, whether, if the prosecution had evidence of all of the relevant facts immediately before the proceedings were instituted, it would not have been reasonable to institute the proceedings.[18]

This task is to be viewed with the benefit of hindsight (the omniscient crystal ball) looking at the situation at the time of the acquittal and not *at the time that the criminal proceedings were commenced*.[19]

In *Ramskogler v The Director of Public Prosecutions of New South Wales [1995] NSWSC 10* Kirby P, with whom other members of the Court of Appeal agreed, indicated that a judge considering an application for a certificate under sections 2 and 3 of the Act should divide his or her task into two categories being the 'facts' aspect and the 'reasonableness' aspect, and that these considerations require that some care be taken in considering the two steps mandated by parliament.[20]

The judicial officer considering an application, pursuant to section 2 of the Costs in Criminal Cases Act, must determine what were 'all the relevant facts' and assume the prosecution to have been 'in possession of evidence of' all of them and must determine whether, if the prosecution had been in possession of those 'relevant facts', before the criminal proceedings were instituted, 'it would not have been reasonable to institute them'. The judicial officer considering the matter must consider the position on the 'relevant facts' as at the date that he considers the matter, with the benefit of hindsight, not the situation at the time that the police charged the accused. An applicant for a certificate must succeed on both the 'facts issue' and the 'reasonableness issue'.[21]

The applicant for a certificate bears the onus of showing that it was not reasonable to institute the proceedings. It is not for the court to establish, nor for the court to conclude, that the institution of proceedings was, or would have been in the relevant circumstances reasonable. [22]

The task of the court in dealing with an application under the *Costs in Criminal Cases Act 1967* is to ask the hypothetical question whether, if the prosecution had evidence of all the relevant facts immediately before the proceedings were instituted, it would not have been reasonable to institute the proceedings. [23]

7.1 The facts issue

The task of the court, when dealing with an application under the *Costs in Criminal Cases Act 1967,* is, firstly, to address the 'facts issue'. Considerable care needs to be taken by an advocate in preparing an application for costs under the Act to isolate 'all the relevant facts' that it is submitted that the court should consider at the first stage of the inquiry, namely, ascertaining *'*all the relevant facts'.

In order to prepare such an application it is necessary to be familiar with the meaning of the words *'all the relevant facts*'.

The meaning of the words *'all relevant facts'* is the subject of authority.[24] It has been held that 'all relevant facts' means:

> all the relevant facts as they finally emerge at the trial; the facts in the prosecution case and the facts in the accused's case together with those that emerge from cross examination of the prosecution witnesses' or from evidence called by the accused.[25]

It is important to remember that, when considering the 'facts issue', an accused person can adduce evidence of matters that were not before the court at the hearing, pursuant to section 3A of the *Costs in Criminal Cases Act 1967* which is headed 'Evidence of further relevant facts may be adduced'.

An example of 'further relevant facts' is the material contained in the court file or correspondence from the defence to the prosecution making a submission that, having regard to the weaknesses in the prosecution case, the case should be no billed.

7.2 The reasonableness issue

In *Solomons v District Court of New South Wales*[26] the High Court confirmed that the onus is on the defendant to establish that, in the light of evidence now available, it would not have been reasonable to institute proceedings.

In considering the question of 'reasonableness', it must be remembered that the authorities establish that the primary test to be applied in determining whether a certificate should be granted is – if the prosecution had

been in possession of all the relevant evidence as it is now known before the proceedings had begun, would it have been reasonable to institute proceedings, and that the 'institution of the proceedings' refers to the time of arrest or charge, not to some later stage such as committal for trial or finding of a Bill. [27]

The authorities support the proposition that in considering an application for costs under the *Costs in Criminal Cases Act 1967,* the court needs to determine whether or not, with the benefit of hindsight or the omniscient crystal ball, it would have been reasonable for the police to charge the accused at the time he or she was in fact charged.[28]

An advocate preparing submissions on an application in which a certificate is sought, pursuant to section 2 of the *Costs and Criminal Cases Act 1967,* therefore needs to concentrate on the question of whether or not it was reasonable for the police to charge the accused at the time he or she was in fact charged and to formulate a list of reasons as to why it is alleged, by the defence, that it was not reasonable for the police to charge the accused at the time at which he or she was charged.

The reasonableness of a decision to institute proceedings is not based upon the test the prosecution agencies throughout Australia use as a discretionary test for continuing to prosecute, namely, that a reasonable jury would be like to convict. The test cannot be a test of reasonable suspicion which might justify an arrest and it cannot be the test which determines whether the prosecution is malicious. [29]

The question of whether or not the proceedings were initiated without reasonable cause has to be answered by reference to the quality of the evidence which the police had gathered, with an eye not only to enquiries which had been made but also to those which *should* have been made.[30]

The fact that a prosecution may be launched where there is evidence to establish a *prima facie* case does not mean that it is reasonable to launch a prosecution; there may be cases where there is contradictory evidence and where it is reasonable *to expect a prosecutor to make some evaluation of that evidence.* [31]

Moreover, Section 3 calls for an objective analysis of the whole of the relevant evidence, particularly whether or not there is an inherent weakness in the prosecution case, or matters of judgment concerning credibility.[32]

It is important to bear in mind that, in circumstances where the evidence of a victim is uncorroborated, it can often be argued that it was incumbent upon the prosecution to determine the reliability and veracity of the evidence of the victim, particularly where the evidence of the victim contains inconsistencies which would support a submission that, because of those inconsistencies, it was not reasonable for the accused to be charged at the time the proceedings were instituted against him or her because of significant weaknesses in the evidence of the victim of which the Crown was aware or ought reasonably to have been aware.

Criminal cases often consist of the evidence of the victim, the evidence of the accused together with a number of police officers. Many such cases are 'word versus word'. Circumstances may arise where the 'word' of the Crown's principal witness is seriously in question or where the evidence of a Crown witness is uncorroborated, which should result in the advocate for the accused making an application for costs if the accused is acquitted or the proceedings are withdrawn by the prosecution. [33]

It has been held that it is fundamentally important in our system of criminal justice, where the prosecution has a wide discretion as to whether or not to institute or continue proceedings that the director of public prosecutions exercises his discretion with appropriate professional rigour.[34]

8. Conclusion

A certificate granted by a court under the *Costs in Criminal Cases Act 1967*, in relation to the costs that were incurred by the accused in defending the proceedings, enables the accused to make an application to the director general of the Attorney General's Department for payment from the Consolidated Fund for costs incurred in the proceedings to which the certificate relates.

The granting of a certificate by the court does not guarantee that the accused will receive reimbursement for any costs incurred by him or her throughout the course of the proceedings in defending the charge which was withdrawn or of which the accused was acquitted.

Such a decision is made by the director general after he or she has considered the contents of any certificate, granted by the court, in the exercise of its discretion

conferred by the *Costs in Criminal Cases Act 1967*.

It is because of the uncertainty as to whether or not a certificate granted under the *Costs in Criminal Cases Act 1967* will actually result in payment to an accused person, that it is preferable to attempt to persuade the court to exercise its discretion pursuant to Sections 116, 213 or 257D of the *Criminal Procedure Act 1986* to make an order for costs in favour of the accused for the legal costs incurred by him or her.

Unfortunately, in a criminal trial, that proceeds in either the District Court or the Supreme Court sections 116, 213 and 257D of the *Criminal Procedure Act 1986* have no application.

In proceedings of that sort the only statutory provision upon which an accused can rely to support an application for costs, in the event that they are acquitted or the charge against them is withdrawn by the prosecution, is the *Costs in Criminal Cases Act 1967* which, as set out above, results in a court issuing a certificate which may or may not result in the director general of the Attorney General's Department actually paying the costs thrown away by the accused as a result of the unsuccessful prosecution or a prosecution that was withdrawn.

Clearly, this is an unacceptable situation and one that requires immediate intervention from parliament so that the right to make an application for costs by an accused person in an indictable matter is exactly the same as that which currently exists in the committal proceedings, summary trials in the Supreme Court and summary trials in the Local Court.

Similarly, an important difference between the *Costs in Criminal Cases Act 1967* and the *Criminal Procedure Act 1986* is that it is only in a costs application, made pursuant to the *Costs in Criminal Cases Act 1967*, that the task of the court is to consider the question of whether or not it was reasonable to institute the proceedings with the benefit of hindsight or the 'omniscient crystal ball'. Clearly, parliament would be well advised to give consideration as to whether or not it is appropriate to apply such a test in a costs application made pursuant to the relevant provisions of the *Criminal Procedure Act 1986*.

In preparing an application for costs, whether under the *Costs in Criminal Cases Act 1967* or the *Criminal Procedure Act 1986*, it is important to look carefully at the statutory provisions and to formulate arguments as to why the court should exercise its discretion to make an order in favour of the accused upon criminal proceedings against him or her either being withdrawn, dismissed or being the subject of a verdict of 'not guilty' by a jury.

The facts in every case in which an application for costs is made by an accused person need to be carefully analysed so as to present arguments, in the case of an application under the *Criminal Procedure Act 1986*, as to whether or not and why:

(a) The investigation into the alleged offence was conducted in an unreasonable or improper manner.

(b) The proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner.

(c) The prosecutor unreasonably failed to investigate (or investigate properly) any relevant matter of which it was aware or ought reasonably to have been aware and which suggested that the accused person might not be 'guilty' or that, for any other reason, the proceedings should not have been brought.

(d) That, because of other exceptional circumstances relating to the conduct of the proceedings by the prosecutor it is just and reasonable to award professional costs to the accused person.

The consideration of these questions and the presentation of submissions as to matters (a)-(d) above are central to the matter that must be carefully considered by an advocate, namely, the isolation of points that can be used, after consideration of all of the evidence in a case, to support a submission that some or all of the factors listed in (a)-(d) above are made out.

Moreover, it is important for the advocate to be aware that, in the event that a submission is made that the professional costs of an accused person should be paid by reason of the provisions in the *Criminal Procedure Act 1986*, the task of the *assessment* of those costs falls upon the court exercising such a discretion and that, in these circumstances, affidavit evidence must be available to enable the court to assess those costs.

Such affidavit evidence should include, as annexures to that affidavit, all costs and disbursements incurred by an accused person in defending the proceedings up

until the time that the order for costs, in favour of the accused, was made by the court.

It is unfortunate that it is only in the case of an application for costs pursuant to the *Criminal Procedure Act 1986,* that the court can immediately then proceed to assess those costs. There is no parallel provision under the *Costs in Criminal Cases Act 1967* where, even if a certificate is granted, the discretion as to whether or not to pay out to an accused person rests solely with a non judicial body, namely, the director general of the Attorney General's Department. Such an anomaly arguably needs to be immediately addressed by parliament.

Moreover, when preparing an application for costs pursuant to the *Costs in Criminal Cases Act 1967,* the central issue is whether or not if the prosecution had, before the proceedings were instituted, been in possession of all relevant facts, it would not have been reasonable to institute the proceedings.

In considering this question it is necessary, by reason of the authorities, to consider firstly: the facts issue; and, secondly: the reasonableness issue; together with any further relevant facts which may not have been the subject of evidence during the hearing but which are relevant on the costs application.

The professional costs that will be incurred by an accused person in defending a prosecution case brought against him or her by the state will be considerable.

Accordingly, the ability of the advocate to recognise the circumstances which would activate the discretion of the court in making an order for costs in favour of the accused is an important part of the role of an advocate in criminal proceedings as is the necessity to carefully consider arguments that can be presented to support an application for costs.

Endnotes

1. Second Reading Speech Justices (Cross) Amendment Bill (Hansard Legislative Assembly 10 April 1991 at 1827 – speech of Attorney General Mr Dowd). See also the comments of Pain J in *Port Macquarie-Hastings Council v Lawlor Services Pty Limited*; *Port Macquarie-Hastings Council v Petro (No 7)* [2008] NSWLEC 75 (21 February 2008 per Pain J).
2. *Nadilo v Director of Public Prosecutions* (1995) 35 NSWLR 738 at 743 per Kirby P; *Allerton v Director of Public Prosecutions* (1991) 24 NSWLR 550 (at 559-560) per Kirby P, Meagher JA, Handley JA; *Mordaunt v Director of Public Prosecutions & Anor* [2007] NSWCA 121 per McColl at [36(a)].
3. *R v His Honour Judge Kimmins ex parte Attorney General* [1980] QD R 524 per Douglas J; *Attorney General for Queensland v Holland* (912) 15 CLR 56 at [49] and *Affleck v The Queen* (1906) 3CLR 608.
4. *R v Manley* [2000] NSWCCA 196; per Wood CJ at CL at [4], per Sully J (at [49]); *Solomons v District Court of New South Wales* (2002) 211 CLR 119 per McHugh J (at [47]) (footnote 42). *Mordaunt v Director of Public Prosecutions & Anor* per McColl JA at [36(b)].
5. *Latoudis v Casey* (1990) 170 CLR 534 at 542–543.
6. *JD v DPP and Ors* [2000] NSWSC 1092 (30 November 2000).
7. *Regina v Moore; ex parte Federated Miscellaneous Workers' Union of Australia* (1978) 140 CLR 470 per Gibbs J at 473.
8. *Kanan v Australian Postal and Telecommunications Union* (1992) 43 IR 257 per Wilcox J; see also *Bostik (Australia) Pty Limited v Gorgevski (No 2)* (1992) 36 FCR 439; *Nilsen v Loyal Orange Trust* (1997) 67 IR 180.
9. *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Nestle Australia Limited* (2005) 146 IR 379 at [4] citing *Spotless Services Australia Limited v Marsh SDP* [2004] FCA FC 155 at [13]. *Port Macquarie-Hastings Council v Lawlor Services Pty Limited; Port Macquarie-Hastings Council v Petro (No 7)* 4 [2008] NSWLEC 275 (21 February 2008) Pain J.
10. *Kanan v Australian Postal & Telecommunications Union* (1992) 43 IR 257 at 264.
11. *Port Macquarie-Hastings Council v Lawlor Services Pty Limited*; *Port Macquarie-Hastings Council v Petro (No 7)* 4 [2008] NSW LEC 275 (21 February 2008) [supra] at para 63.
12. *In DJ v DPP* [supra] Hidden J [at para 28].
13. *Manley* per Wood CJ at CL [at 12], *Regina v Hatfield* [supra], *Mordaunt* [supra] at para 36[h].
14. See *R V Manley* [2000] NSWCCA 196 (26 May 2000) per Wood CJ at CL at paras 11 and 12 when his Honour referred to McFarlane (Supreme Court of New South Wales 12 August 1994 (unreported).
15. *Fejsa* (1995) 82 A Crim R 253; *Pavy* CCA (NSW) 9 December 1997 (unreported) and *NSW Treasurer v Wade* CA (NSW) 16 June 1994 (unreported).
16. *McFarlane* [supra] [at para 14].
17. See *DPP(Cth) v Neamati* [2007] NSWSC 746.
18. *Allerton v Director of Public Prosecutions* (pp.559-560).
19. *Pavy* (1997) 98 A Crim R 396.
20. *Ramskogler* [supra] Kirby P [at para 28].
21. *Treasurer in and for the State of New South Wales v Wade & Dukes* (Court of Appeal, 16 June 1994, (unreported) BC9402561) per Mahoney JA (with whom Handley and Powell JJA agreed) *Ramskogler v Director of Public Prosecutions & Anor* [supra].
22. *Mordaunt v DPP* [supra] per McColl JA [at 36(d)].
23. *Mordaunt v DPP* [supra] per McColl JA [36(e)].
24. *R v Tooes* [2008] NSWSC 291 (4 April 2008) Studdert AJ; *R v Williams* (1970) NSWLR 81.
25. *R v Tooes* [supra] [at para 5] per Studdert AJ.
26. *Solomons v District Court of New South Wales* [2002] HCA 47.
27. *Pavy* [supra].
28. *R v Cardona* (2002) NSWSC 823 per Hidden J and Pavy [supra].
29. *Manley* per Wood CJ at CL; at [12], *Regina v Hatfield* [supra] *Mordaunt* [supra] [para 36(h)].
30. *DJ v DPP* [2000] NSWSC 1092 per Hidden J at para 28.
31. *McFarlane* [supra], *Manley* per Wood CJ at CL at [12].
32. *Manley* [supra] per Wood CJ at CL at [14].
33. *R v CPR* [2009] NSWDC 219 (19 August 2009) per Goldring DCJ at 33-36 and at 39-40.
34. *R v CPR* [2009] NSWDC 219 (19 August 2009) per Goldring DCJ at 39-40. See also *R v KT* [2009] NSWDC 224 (23 July 2009) per Bennett SC DCJ; *Presland v DPP* [2009] NSWDC 178 (10 July 2009) Norrish QC DCJ [para 42].

Trial by jury or trial by ordeal?

By Phil Boulten SC

Jury trials are still the cornerstone of criminal justice. The form and function of the jury has altered little for centuries. It has, no doubt, always been a stressful experience for serving juries, but the source of the stress now comes from different quarters.

Juries in criminal cases date back to the thirteenth century. Then they were quite different beasts. The proceedings were initiated by an accusation made by the grand jury, or the jury of presentment. Once a charge was laid by the grand jury, the same jurors formed the jury of trial. What hope did the accused have when the jury was both the accuser and the arbiters of the facts?

During the fourteenth century the practice developed of adding extra jurors to the grand jury to provide fresh opinions at the trial. In 1352, a statute gave the accused the right to challenge any of the indicting jury who were called for duty at the trial.

Initially, the jury were both judges and witnesses. They were called on to act on their own knowledge – often nothing more than village gossip. They were entitled to seek information from 'sources entitled to credit'. So, the jury had a double dose of pressure. Not only did they have the stress of deciding the case, they had to provide the evidence as well.

Unsurprisingly, juries' use of gossip and hearsay was often shown to be unsatisfactory. This led to the right of the Crown to call witnesses to give evidence at the trial. Note, though, it was only the Crown who could call witnesses until the seventeenth century when the first defence witness was called in a criminal trial.

Until Victorian times, jury trials were disposed of during a single sitting which might last for as long as 48 hours. A trial rarely lasted longer. In the trial of Lord Cochrane in 1814 the defence opened after midnight, after 15 hours of evidence, and the court adjourned at 3 am until 10 am when the prosecution brought a case in reply. No doubt snoozing juries were commonplace.

Even in the 1880s, London murder trials were routinely heard and determined on one day, the court continuously sitting for more than 12 hours. Sentence was often imposed immediately following a guilty verdict, commonly after midnight.

Until 1870, the jury were placed under enormous pressure to reach speedy agreements by being confined without food, fire or water. Indeed, in the seventeenth and eighteenth centuries, if a jury had not reached a verdict by the end of a circuit sittings, they were detained and taken by cart to the next town's sittings to continue their deliberations.

On one occasion it is said that during a long jury retirement, the bailiff was asked for a glass of water. The bailiff came into court and asked Mr Justice Maule if he might give the juryman water. 'Well,' the judge replied, 'it is not meat and I should not call it drink; Yes. You may'.

Pressures on juries to return verdicts have become much more subtle in the modern era. Twentieth century jury trials bore only some comparison to their ancestors. In New South Wales, both in Sydney and in country districts, Quarter Sessions trials were, for the most part, heard and determined in days, not weeks, and jury deliberations were usually confined to hours, not days. This was so when I had my first exposure to District Court jury trials as a solicitor in the late 1970s and early 80s.

Back then, s 65 of the Jury Act provided that,

> Where the jury upon the trial of any felony or misdemeanour have retired more than six hours, if it be found, after examination on oath of one or more of them, that they are not likely to agree, the court or judge may discharge them.

It was actually quite uncommon for juries to deliberate for more than six hours and, where they did, subtle and sometimes not-so-subtle pressure was applied by the trial judge to obtain a verdict.

Up until the 1970s, juries were sequestered. Usually they slept in dormitories (segregated by sex) under the control of the sheriff. In more recent times, when a trial judge ordered the sequestration of a jury, they were often bussed to hotels. When I was a younger barrister it was a relatively common sight to see the Kingsford Smith Transport minibus shuttling between Taylor Square and the Koala Motor Inn in Oxford Street with jurors on board.

But even where the jury was not locked up, there was significant pressure to reach a quick verdict. On the day that deliberations were due to commence, the jurors would arrive, without much forewarning that, should they not reach a verdict by 4.00pm they may be required to stay on. The jury would often be sent out

late in the afternoon fully expecting to be sent home shortly after 4.00pm as they had on every other day of the trial only to find themselves still locked in the jury room well past 5.00pm and nothing said to them at all. They quickly got the idea and verdicts were often delivered at 5.15pm without further prompting.

If the jury was still deliberating about 6.00pm, the trial judge would send in the sheriff to take orders for dinner. This step also operated to resolve outstanding issues. But it was relatively common to receive verdicts as late as 9.00pm when the prospect of a night in the Motor Inn was becoming more likely. It was common enough to have to come back on Saturday morning for a verdict.

Judges would often call a deliberating jury into court to ask how they were going or to invite them to seek assistance. Trial counsel would often seek the discharge of an apparently deadlocked jury soon after six hours had expired.

Over the last 20 years, though, trial judges in New South Wales have taken quite a different approach. Now juries are told that they can have as long as they like, to set their own sitting hours and to feel under no obligation to return speedy verdicts whatsoever. It is entirely regular to have to wait days for a verdict – even when the evidence has only taken one or two days. Juries now deliberate for weeks at a time with very little judicial prompting to reach a verdict more quickly.

This approach is not universal. Practitioners in other states and territories are surprised at how patient judges are here with our juries. In most other Australian states, week-long jury deliberations are rare. In Queensland, Supreme Court juries are still quite commonly sequestered and verdicts are usually delivered within a day or so.

The NSW approach has generally been regarded as being much more considerate of jurors. But I don't think I'm the only one who becomes increasingly agitated by a jury's apparent difficulty in reaching a verdict as time marches on. As a jury reaches the end of its first week deliberating and spills into another, one cannot help wondering what the atmosphere is like in that jury room.

When the court convenes and jurors are present, you often see red faces, hunched shoulders, scowls and tears. There is visible evidence of the pressure cooker at work.

In April 2010 the attorney general of Western Australia approved the publication of a very insightful survey of juries in that state that had been conducted by Associate Professor Judith Fordham, a well-regarded practising criminal trial barrister. The publication of the Fordham study, *Juror Intimidation?*, provides a useful and rare view into jury room deliberations. The report was prompted by concerns that a number of high profile jury trials had resulted in acquittals in circumstances where juror intimidation was suspected. Of course, suspicion fell onto the associates of the accused, in one case a notorious outlaw motorcycle gang. But the results of the survey failed to uncover any actual intimidation by corrupt conduct from lawyers, their clients or criminals. Rather, the most common and real form of intimidation that jurors experienced was found to be at the hands of fellow jurors in the jury room.

This is a matter of some real concern, It is also hardly surprising. The ordinary dynamics of any committee or small group meeting suggest it is likely that one or two powerful personalities will play a dominant role in the group's deliberations. Many trial lawyers can recount war stories of audible brawls from jury rooms, broken furniture and sobbing jurors. The longer that juries are left to deliberate without careful judicial guidance, the more likely it is that verdicts will be delivered because of jurors' capitulation to pressure. I suspect that most such verdicts result in conviction, not acquittals.

Some simple and informal practices could guard against verdicts by oppression. The jury's deliberations could be broken by 'time out' at the direction of the trial judge – say five or ten minutes per hour. The judge could convene the court a number of times during the course of the day to simply remind the jury that they are entitled to assistance if they need it. After a reasonable time, a judge could proactively ask the jury if they were having difficulties with their deliberations – much as judges used to 20 years ago.

The burden of deliberating upon a verdict is heavy enough. People are not used to being locked up with each other for days at a time, let alone with a view to forcing, not just consensus, but unanimity of opinion. Deliberating for days and then weeks is a modern form of deprivation of liberty, not too dissimilar to the denial of food, fire and water.

Looking inside the jury room

The following paper was presented by the Hon Justice Peter McClellan, CJ at Common Law at a Young Lawyers seminar on 5 March 2011.

Trial by Jury

The common law has used juries to decide factual issues for centuries. Although its role and method of functioning has evolved over time, and it is not without its critics, the jury has proved to be an enduring institution. Until recently it has not been possible, at least outside of the United States of America, to evaluate the effective working of juries. Appeal courts sometimes have to try and put the 'pieces' of the trial together by examining the transcript, particularly jury questions, and the decision on various courts where the indictment contains more than one. But this is patchy and may give an incomplete picture of events.

The common law rule of jury secrecy, known as the exclusionary rule, prohibits a juror from discussing the deliberations in the jury room.[1] The origin of the rule is uncertain. Boniface attributes a spiritual dimension to it. He suggests that:

> Its historical justification may lie in a belief of ancient jurists that 'when jurors went into the confines of the jury room the presence of God led them to the proper verdict'. Attempts to investigate jury deliberations would therefore be questioning the judgment of God.[2]

The rule is now entrenched. Public policy considerations require that the verdict of the jury should be final. Discussing their deliberations may provoke controversies about the outcome. The rule ensures that 'jurors or former jurors are not subjected to pressure [or] harassment'[3], and that deliberations and discussions are 'full and frank.'[4] Of particular significance is the perception that silence protects public confidence in the justice system.[5] The position is otherwise in the United States of America where 'jurors may appear on popular talk-shows, give media interviews or indeed publish books.'[6] And many do.

It is important to understand that in most jurisdictions only a limited number of criminal trials take place with a jury. In New South Wales less than four percent of criminal trials are conducted with a jury.[7] The number is greater in the United Kingdom,[8] although pressure on government finances is likely to bring change.

The law assumes that a verdict delivered in the presence of all the jury has been assented to by each member.[9] It cannot be rebutted by evidence from jurors which would contradict this assumption.[10] The rule has led to some unusual results.

In *Vaise v Delaval*[11] the court refused to admit evidence from two jurors that the jury had made their decision by tossing a coin. In *Nanan v The State*[12] the accused was convicted and sentenced to death. As it happened after the trial the foreman swore an affidavit in which he said that when he delivered the verdict he had mistakenly agreed that the verdict was unanimous when in fact the jury were split 8:4.[13] The Privy Council ruled that the affidavit was not admissible.[14] Although their Lordships acknowledged that the 'misapprehension in the present case … may [be said to be] … of a fundamental kind' they emphasised that other 'misapprehensions' by the jury as to the law or the facts may also lead to an erroneous verdict.[15] Whatever the misapprehension may be, evidence of it is not admissible.[16] I wonder if Nanan's death sentence was commuted.

…contemporary curiosity about the working of juries, which is similar to our curiosity about the effectiveness of many of society's institutions, has led to a number of studies of the deliberative processes in the jury room.

The law has confined the obligation of secrecy to what actually happens in the jury room. In *R v Young*[17] the Court of Appeal set aside a verdict that had been arrived at after three members of the jury had come together in an hotel room to seek assistance of a ouija board.[18] The court accepted evidence of the invocation of the supernatural to assist some jurors, but only because it took place in a hotel room.[19] If it had happened in the jury room, the evidence would not have been accepted.[20] The supernatural forces would not have been allowed to operate.

Notwithstanding the strictures of the secrecy rule, contemporary curiosity about the working of juries, which is similar to our curiosity about the effectiveness of many of society's institutions, has led to a number of studies of the deliberative processes in the jury room. The findings do not permit conclusions of universal relevance but a body of interesting material has begun to emerge. Studies have been undertaken in New Zealand, the United Kingdom, New South Wales, Western Australia and Tasmania. The findings are of interest to both supporters and critics of trial by jury.

New Zealand

The New Zealand Law Commission carried out a study which was completed in 1999. Published under the title 'Juries in Criminal Trials' the stated purpose of the study was to address an identified gap in the research literature that examined how juries actually work.[21] The study looked at 48 jury trials from numerous urban and provincial courts throughout New Zealand.[22] 312 jurors were interviewed.[23] The offences tried ranged from murder to attempted burglary.[24] The data was collected through questionnaires and semi structured interviews, both before and after the trials.[25]

The study revealed that the judge's summing-up has 'rather less significance than is often imagined

The study concluded that overall the jury decision process was 'characterised by a very high level of conscientiousness when attempting to understand the law and apply it to the facts.'[26] The authors found that there was 'little evidence that juries were tempering the rigidities of the law by applying their own 'common sense' or by bringing to bear their own brand of justice.'[27] However, the study did find that jurors displayed 'widespread misunderstandings about aspects of the law which persisted through to and significantly influenced jury deliberations.'[28] The authors stated that only 27 per cent of the total trials did not reveal 'fairly fundamental misunderstandings of the law at the deliberation stage.'[29]In addition to this, jurors had reported problems in disentangling evidence.[30] This was said to be due to the complexity of the evidence or the poor way in which it was presented.[31] Jurors described the evidence as 'vague, muddled, confusing and contradictory.'[32] Questioning by counsel was often described as being 'confusing' or 'difficult to follow.'[33] The implication was that jurors were required to reconstruct a fragmented 'story' or 'narrative' based on a 'partial recollection of earlier evidence.'[34] The lack of clarity in the evidentiary narrative impeded the jurors' understanding of facts and the evidence before them.

The study also looked at jurors' response to legal terminology. Common problems were identified with jurors having trouble with the ingredients of the offence, the meaning of intent, understanding the concept of 'beyond reasonable doubt', 'the balance of probabilities' and the wording of the indictment, particularly where there were multiple and alternative charges.[35] Many of the jurors stated that they were uncertain of the meaning of beyond reasonable doubt.[36] They 'variously interpreted it as meaning 100 per cent, 95 per cent, 75 per cent and even 50 per cent.'[37]

The authors stated that only 27 per cent of the total trials did not reveal 'fairly fundamental misunderstandings of the law at the deliberation stage.

The study revealed that the judge's summing-up has 'rather less significance than is often imagined.'[38] Jurors were also found to have based their decisions on irrelevant considerations such as the impact on the community or the accused's family.[39] The authors said: 'it is … quite likely that (the jurors) interpreted the law incorrectly so as to fit with the verdict they wished to reach, and then persuaded the majority to that view.'[40]

The authors made suggestions for reform. To increase juror comprehension they suggested three areas for change. They included: 'summaries of the law in writing'; 'instructions on the law in the form of a flowchart or sequential list of questions'; and 'providing an opportunity for the jury to seek clarification before deliberations.'[41]

As part of the study, an experiment was conducted using summaries of the law broken down into constituent parts.[42] A majority of jurors (62.2 per cent) responded positively to this approach.[43] They reported that summaries alleviated problems in absorbing oral directions.[44] Jurors had similar responses to flowcharts that listed a series of questions which they were required to answer which identified elements of an offence.[45]

The United Kingdom

In 2004 the United Kingdom Home Office published a study entitled 'Jurors' perception, understanding, confidence and satisfaction in the jury system: a study in six courts.'[46] This study involved 361 jurors who were both interviewed and asked to answer written questionnaires.[47] The study produced many positive

findings in relation to jurors' confidence in the jury system particularly the deliberation process. The study found that confidence of jurors in the system after service on a jury went up in 43 per cent of the jurors, it remained the same in 38 per cent and went down in 20 per cent of jurors.[48] The authors commented that in relation to those who lost confidence in the system, this did not mean that their confidence was low.[49] Their confidence may have been very high to begin with.[50] The inverse may be true for those whose confidence increased.[51] Examination of the factors that promoted confidence revealed some interesting findings. 131 jurors cited justice through diversity; 79 jurors referred to fairness and 75 jurors listed juror commitment as the reason why their confidence rose.[52]

Justice through diversity reflects the democratic aspiration that many jurors associated with jury trials.[53] Trial by one's peers and the 'randomness of jury selection' was seen as 'important in establishing impartiality while giving the decision-making process a sense of balance.'[54] A decision made by a group comprised of a cross section of the community was viewed as necessary to ameliorate individual prejudices and biases, which were particularly apparent in the deliberation process.[55] With respect to fairness, the diversity of opinions between jurors was emphasised.[56] Jurors viewed this diversity 'as being linked to honesty and the openness of those involved in the trial process.'[57] One juror reported 'that the jury trial system is one of the most difficult systems to corrupt and that is one of the real strengths and it is important that it is the everyday person who judges his peers.'[58] Experiencing the dedication and conscientiousness of jurors increased confidence in the jury system.[59] One juror said:

> The jury system was new to me and it clarified quite a lot. I was impressed with the independence of the court from the police and the way that individual juries functioned. I appreciated the process more and felt that the rights given to the defence were very well worked through.[60]

It was not all good however. The study concluded that 39 per cent of jurors found legal terminology difficult to understand, 15 per cent struggled with legal or factual information and 14 per cent found technical evidence complicated.[61] Many jurors found the term 'beyond reasonable doubt' confusing and unclear.[62] One juror described his experience in these terms:

> It is much more difficult than I would have thought to prove someone guilty and what I didn't realise is that 'beyond reasonable doubt' and being 'absolutely sure' were two different things … and there are things such (as) 'inadmissible evidence' which I did not understand and this made me realise how complex the law is.[63]

Another view expressed by a juror was that 'some jurors are arriving at a view without understanding the information.'[64]This study, as with others, was dependent upon the responses of jurors after the trial in which they were involved had been completed. The accuracy of the responses and in particular the preparedness of a juror to admit they did not understand the evidence or legal directions is a difficulty recognised by researchers.[65] There is also the problem of a juror who believes they understood the facts or the law when the reality may be otherwise.[66]

Many jurors found the term 'beyond reasonable doubt' confusing and unclear.

The Lord Chief Justice of England, Lord Judge has expressed concerns about a contemporary juror's capacity to absorb information. Writing extrajudicially he observed that:

> Most [of our young] are technologically proficient. Many get much information from the internet. They consult and refer to it. They are not listening. They are reading. One potential problem is whether, learning as they do in this way, they will be accustomed, as we were, to listening for prolonged periods. … [O]rality … is at the heart of the [adversarial] system.[67]

Another study was conducted in the United Kingdom in 2010. It was carried out by Cheryl Thomas. The results are interesting. She reported under the title 'Are Juries Fair?' She carried out her research using a mock trial.[68] She used a simulated assault which was filmed.[69] Two questions were put to the group of theoretical jurors: 'did the defendant believe it was necessary to defend himself and did he use reasonable force?'[70] Of the 797 jurors only 31 per cent correctly answered both questions, 48 per cent correctly answered one question and 20 per cent failed to correctly answer

both questions.[71] The jurors came from three different locations in England.[72] Significant differences were revealed. I make no comment but merely report the information. Jurors from Blackfriars and Winchester demonstrated relatively high levels of understanding of the judge's directions with 69 per cent: 68 per cent respectively.[73] However, 'most jurors at Nottingham (51 per cent) felt the directions were difficult to understand'.[74]

New South Wales

The New South Wales Bureau of Crime Statistics and Research (BOSCAR) conducted a study of jurors across 112 criminal trials in NSW.[75] The study was undertaken between July 2007 and February 2008. Of a prospective pool of 1,344 jurors, 1,225 participated in the survey.[76] The jurors were required to respond to a short structured questionnaire.[77] The authors cautioned the reader to be careful when considering the responses acknowledging that the jurors 'may not have been entirely candid in their responses about their levels of comprehension or they may believe that they understood the instructions when perhaps they did not.'[78]

Jurors aged between 18 and 34 years were 'at least twice as likely as jurors aged 35 years or more to say that they understood only 'a little' or nothing of the judge's instructions on the law.

57.5 per cent of jurors said they understood everything with 27.9 per cent responding that they understood nearly everything, and 14.4 per cent said they understood most things the judge said.[79] What is of particular interest is the reported response to the phrase 'beyond reasonable doubt.' 55.4 per cent of the jurors surveyed believed that the term meant 'sure … the person is guilty' and 22.9 per cent believed that it meant 'almost sure … the person is guilty.'[80] According to the authors:

> There was a significant relationship between the type of offences before the court and jurors' self-reported understanding of the concept [of] beyond reasonable doubt. Jurors who heard trials dealing with adult or child sexual assault offences were 1.4 times more likely than jurors hearing trials dealing with offences other than sexual assault offences to understand the concept to mean 'pretty likely' or 'very likely' the person is guilty.[81]

In relation to the judge's directions as to the law, jurors were asked two questions: 'to what extent did you understand the judge's instructions on the law?' and when 'would you have preferred to receive the judge's instructions on the law?' 47.2 per cent of jurors reported that they 'understood completely' the judge's directions while 47.7 per cent of the jurors said that they 'mostly understood'.[82] There were significant differences depending on the age of the jurors.[83] Jurors aged between 18 and 34 years were 'at least twice as likely as jurors aged 35 years or more to say that they understood only 'a little' or nothing of the judge's instructions on the law.'[84] Jurors aged 35 years and above were 1.2 times more likely than younger jurors to say that 'they understood 'completely' the judge's instructions.'[85]

Tasmania

There has been a recent study in Tasmania. Although the juror comprehension component of the report has not been published, the authors Professor Kate Warner and his Excellency Peter Underwood, the former Chief Justice of Tasmania, have publicly discussed some of its conclusions.[86] The study confirmed that jurors have difficulty understanding common legal terms.[87] One observation reported in *The Australian* is troubling. The authors apparently observed that:

> several jurors placed no weight on oral evidence in the belief that oral evidence alone could not determine guilt. One juror believed it was improper for counsel to continually put to witnesses that they were not telling the truth. Another juror had believed the fact the case had been mentioned in a lower court meant that the defendant had already been found not guilty.[88]

The ultimate report may prove to be interesting reading.

Western Australia

The final report to which I will refer this morning comes from Western Australia. It was concerned with juror intimidation.[89] The study reviewed questionnaires from

913 jurors who had cumulatively sat in 218 metropolitan and country trials.[90] The authors also interviewed 130 jurors.[91] The authors did not define juror intimidation, but instead asked jurors whether, during the course of the trial in which they participated, they experienced pressure which they believed was either appropriate or inappropriate.[92] The jurors were asked whether they had changed their vote before a verdict was given, and if they regretted that, and the 'effects of jury duty on their emotional and physical wellbeing.'[93]

The authors concluded that the incidence of juror intimidation 'were disturbingly high and had the potential to prevent a 'true verdict.''[94] However I should emphasise that the instances of juror intimidation from external sources outside the jury room were very low.[95] The concern was with events taking place in the jury room. The report concluded that around 13.4 per cent of metropolitan district court jurors felt uneasy, threatened or unsafe during the trial.[96] A similar response came from Supreme Court jurors.[97]

The authors concluded that pressure and intimidation had led to jurors changing their original decision which they regretted after the jury's decision had been announced: '23.6 per cent of jurors [said that] they changed their votes during deliberations. … Of those who changed their votes, 19.2 per cent regretted it.'[98] Of those who changed their vote, 20.1 per cent cited pressure from various sources, both appropriate and inappropriate, which included other jurors: '73.8 per cent of those who felt pressured felt pressured by the other jurors.[99] Of those, 27 per cent felt very pressured and 49.2 per cent thought the pressure was inappropriate.'[100]

The authors concluded that the incidence of juror intimidation 'were disturbingly high and had the potential to prevent a 'true verdict'.

Experienced trial judges will tell you that juries mostly get it right. For critics of the system the concern is with the cases where they get it wrong. There has been a change in attitude to the jury's verdict since the *Chamberlain* case.[101] Courts are more ready to accept that juries may get it wrong reflected in the High Court's affirmation of the role of the appellate court when considering whether a conviction can be supported having regard to the evidence.[102] I have said previously that the reality is that juries acquit but judges convict.[103] A reasonable doubt which the appellant judge has is one which the jury should have had.[104]

A juror catches up on some texting. Photo: iStockphoto.com

Despite the importance of maintaining the sanctity of the jury's deliberations we can be certain that research into the functioning and effectiveness of juries will continue. The research increasingly reveals the human dynamic which operates within the jury room. The process is of course similar to our everyday experience of group activities and decision-making by committees. The Western Australia study confirms as our everyday experience suggests it should that in any group of people there will be some who have greater influence over the decision of the group than others.

It is not difficult to predict that the task for juries will become more difficult in the future.

It is not difficult to predict that the task for juries will become more difficult in the future. Evidentiary issues will increase in complexity. This will be a product of both increasing scientific knowledge and an increase in the prosecution of complex corporate and finance related crimes. The demand from appellate judges for accuracy of language in explaining the law and the requirement to give an increasing number of warnings to the jury to take care will make the task of absorbing the judge's directions more difficult for the average juror.

A common conclusion from the studies is that the language of the law and the means by which it is communicated to jurors involve complexities which the average person may not be able to deal with in the course of an individual trial. We can all think of examples.[105] Over 20 per cent of jurors in the Home Office study felt that a more fulsome explanation of the law was necessary in addition to a plain English summary of the charges.[106] In Thomas' study a random selection of jurors were provided with a one-page *aide memoire* that summarised the judge's verbal directions on the law.[107] Those who received the written summary were more successful in answering the judge's original two questions relating to the guilt of the accused than those who only received oral instructions.[108]

Experienced trial judges will tell you that juries mostly get it right. For critics of the system the concern is with the cases where they get it wrong.

The research has not looked at the cost of jury trials. In many trials time is taken with lengthy examination of witnesses, the playing of extensive electronic intercept and other surveillance material or the presentation of scientific and statistical information by forensic experts. It comes as no surprise that jurors become bored or confused, inevitably leading them to defer mechanistically to the opinion of an expert or even relinquish their decision-making power.[109] This is particularly so in cases involving expert and DNA evidence.

Some researchers have suggested that jurors place a disproportionate emphasis on DNA evidence by 'falsely 'exalt[ing] the infallibility of forensic evidence.''[110] In a study undertaken by Rhona Wheate last year, she interviewed jurors involved in two criminal trials in the Australian Capital Territory, specifically addressing the importance those jurors placed on expert evidence.[111] Wheate found that the majority of jurors felt that DNA evidence was 'very important' when reaching a verdict with many jurors viewing such evidence as 'more important than other evidence in the trials.'[112] Wheate, suggests that this imbalance in the rational worth of DNA evidence may be related to the impact of the television program *Crime Scene Investigation*.[113] Wheate and others authors have colloquially termed this impact the 'CSI effect'. [114] The suggestion is that the popularisation of forensic science by the media and television has created the impression that when forensic evidence is used it is 'irrefutable and always leads to convictions.'[115] In a study undertaken by Findlay, he observed that jurors 'constantly rated [DNA evidence] above the actual forensic impact it had in the construction of the prosecution case.'[116] 'Popular wisdom [would seem] … to override probative value.'[117] This pre-trial forensic knowledge has the benefit of mediating the 'objective complexity of the evidence and of the nature of its presentation within specific trial contexts.'[118] Studies have shown that jurors are more likely to find an accused guilty than not guilty when DNA evidence is tendered.[119] This is particularly so in homicide and sexual assault cases.[120]

It must be acknowledged that there is a sense of unreality in what we ask jurors to do. Lord Justice Moses described the problems in his recent paper entitled 'Summing Down the Summing Up.'[121] He described summing up as 'a lecture in a foreign language about foreign subjects.'[122]

He said:

> The concepts are alien, far removed from the problems they have to confront in every day life…people in their daily drift are not called on to distinguish direct from circumstantial evidence. Everyday routine, in everyday life, does not require people to distinguish between inference and suspicion and few if any in their everyday lives ask themselves whether they are driven to a conclusion.[123]

Lord Justice Moses recognised that at least in England the complete abolition of jury trials was out of the question.[124] Nevertheless he suggested several reforms to move the jury from what he described as the 'anachronistic' days.[125] He drew upon an earlier report of Sir Robin Auld who recommended that at an early stage of the trial the jurors should be given written summaries of the issues in the trial which have been prepared by counsel and overseen by the judge.[126] As the trial unfolds Lord Justice Moses suggested that 'the judge should summarise in writing, with the help of the advocates, what has occurred thus far, a list of witnesses,

a word or two as to what issue the evidence went to and any direction which has been given in relation to those witnesses.'[127] Sir Robin also encouraged the use of written directions when summing-up. He believed that the factual issues in dispute and elements of the offence should be reduced to a written form with a series of questions that would 'lead logically to a verdict of guilty or not guilty.'[128]

The Auld report was published in 2001 but it seems, at least in England, to remain controversial. Lord Justice Moses reinforced his argument by reference to a coronial inquest where the coroner is required to report, when a jury has been empanelled, '[the] jury's conclusion on the central issues as to *by what means* and *in what circumstances,* a deceased met his death. The coroner does so by framing questions.'[129] Lord Justice Moses states that this could 'be done in criminal cases.'[130] He suggested that this may 'alte[r] the tedious rhythm of passive observation' and reduce the issues for the jury to consider to questions that are crucial to their deliberation process.[131]

Some of this is old news in Australia. Justice Eames from Victoria undertook the task of finding better ways of communicating with jurors.[132] Many judges at least in New South Wales use written directions.[133] But there is little doubt that as we learn more about the workings of the jury room, both judges and advocates will be required to respond to ensure that the process remains both efficient and effective.

Last year the Director of Public Prosecutions, Mr Nicholas Cowdery QC gave evidence to a parliamentary enquiry into judge alone trials. He was asked this question:

> In one submission reference is made to Richard Dawkins and his experience serving on a trial. He is of the view that if he were innocent he would prefer a judge-alone trial, but were he guilty he would prefer a jury trial. Do you have any observations in that regard?[134]

His response was telling:

> … I agree. It is a bit of a flippant remark, really, but juries are known to bring in merciful verdicts of not guilty in circumstances where the offence has in fact been proven. Our system is flexible enough to cope with that—it has for centuries—whereas a judge would not operate that way. A judge would be much more constrained, I suspect, to apply the law strictly and not to import that human quality of compassion or whatever it might be. If I were facing a trial and I was not guilty and I believed that the case could not be proved against me, yes, I would probably favour a judge-alone trial rather than take the risk that the jury might get it wrong.[135]

It was a significant step to allow researchers into the jury room. We must all ensure that the information gained is wisely used. Although no human decision-making process will get it right all the time, we must do what we can to minimise the errors.

Endnotes

1. Dorne Boniface, 'Juror Misconduct, secret jury business and the exclusionary rule', (2008) 32 *Criminal Law Journal* 18, 24–28.
2. Ibid 24.
3. See: *Shrivastava v The State of Western Australia (No 2)* [2011] WASCA 8 [25] (Pullin JA) citing *R v Rinaldi* (1993) 30 NSWLR 605, 612–613 (the court).
4. *R v Skaf* (2004) 60 NSWLR 86, 92 (Mason P, Wood CJ at CL and Sully J).
5. See: *Shrivastava v The State of Western Australia (No 2)* [2011] WASCA 8 [25] (Pullin JA) citing *R v Rinaldi* (1993) 30 NSWLR 605, 612–613 (the court).
6. See: Robyn Lincoln and Debra Lindner, 'Judging Juries' (2004) 10(1) *The National Legal Eagle* 8, 9 <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1072&context=nle>; William Bagley, 'Jury Room Secrecy: Has the Time Come to Unlock the Door?' (1998) 32 *Suffolk University Law Review* 481, 495–496. Bagley writes that:'[i]n recent years … members of the media have challenged court imposed limitations on their First Amendment right to gather information about the factors that led to a jury's decision. Courts have dealt with these challenges by balancing the media's First Amendment right with the defendant's Sixth Amendment right to a fair trial. One of the core issues of this balance revolves around the historical view of the criminal trial as an open process. Although the public's right of access to criminal trials is not a Constitutional absolute, a court must still provide a compelling reason for prohibiting media access to the proceedings. Accordingly, courts have reluctantly taken steps over the past several decades that have expanded the scope of trial coverage'. The media's right to access jurors is not absolute. It must be tempered by the defendant's right to a fair trial as provided by the Sixth Amendment. The courts have favoured a presumption of openness concerning media access to juries. The onus rests on the defendant to demonstrate that a compelling reason to the contrary exists before the presumption can be rebutted. For an interesting discussion of the media's right to access juror names prior to empanelment see: *United States v Wecht* 537 F.3d 222 (3d Cir. 2008) and Kaitlin Picco, 'By Any Other Name: The Media's First Amendment Right of Access to Juror Names *United States v Wecht* 537 F.3d 222 (3d Cir. 2008)' (2009) 82 *Temple Law Review* 561.
7. See: New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2009* (2010 New South Wales Bureau of Crime Statistics and Research) 3, 11 <http://www.lawlink.

nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/ccs09.pdf/$file/ccs09.pdf>.

8. Roger Matthews, Lynn Hancock and Daniel Briggs, *Jurors' perceptions, understanding, confidence and satisfaction in the jury system: a study in six courts* (Home Office Online Report 05/04, 2004) 10 <http://rds.homeoffice.gov.uk/rds/pdfs2/rdsolr0504.pdf>.
9. *Ellis v Deheer* (1922) 2 KB 113, 121 (Aitkin LJ).
10. *Burrell v R* (2007) 190 A Crim R 148, 216 (McClellan CJ at CL).
11. *Vaise v Delaval* (1785) EngR 12; (1785) 99 ER 944. Similar actions have occurred more recently in the United Kingdom when a concerned juror provided a letter to the trial judge after the verdict was given but before sentence was passed. In *R v Mirza; R v Connor and Rollock* (2004) 1 A.C. 1118 it was argued that the jury secrecy rule was incompatible with article 6(1) of the *European Convention on Human Rights*. The court dismissed the appeal confirming the sanctity of juror secrecy in the common law world. Evidence of juror misconduct that was raised after a conviction was inadmissible (per Slynn LJ of Hadley at 1146). The juror's letter had indicated that: 'There was talk of trying to reach a verdict by the tossing of a coin, this was quickly given short shrift' (per Slynn LJ of Hadley at 1141).
12. *Nanan v The State* (1986) AC 860.
13. *Nanan v The State* (1986) AC 860, 867 (Goff LJ).
14. Ibid 872 (Goff LJ).
15. Ibid.
16. Ibid.
17. *R v Young (Stephen)* [1995] QB 324.
18. *R v Young (Stephen)* [1995] QB 324, 334 (Taylor LCJ).
19. Ibid., pp.311-332.
20. Ibid., p.330.
21. New Zealand Law Commission, *Juries in Criminal Trials, Part Two, A Summary of Research Findings,* Preliminary Paper, Paper No. 37, Vol 2, (November 1999).
22. Ibid., p.2.
23. Ibid.
24. Ibid.
25. Ibid.
26. Ibid., p.53.
27. Ibid.
28. Ibid.
29. Ibid.
30. Ibid., p.24.
31. Ibid.
32. Ibid.
33. Ibid.
34. Ibid.
35. Ibid., p.54.
36. Ibid.
37. Ibid.
38. Ibid., p.56.
39. Ibid., p.52.
40. Ibid., p.70.
41. Ibid., p.62.
42. Ibid.
43. Ibid., p.62.
44. Ibid.
45. Ibid., p.62–63.
46. Matthews, Hancock and Briggs above n 8.
47. Ibid., p.18.
48. Ibid., p.45.
49. Ibid.
50. Ibid.
51. Ibid.
52. Ibid., p.46.
53. Ibid.
54. Ibid., p.47.
55. Ibid.
56. Ibid.
57. Ibid., p.51.
58. Ibid., p.48.
59. Ibid., p.50.
60. Ibid., p.51.
61. Ibid., p.37.
62. Ibid., p.38.
63. Ibid.
64. Ibid., p.43.
65. Ibid., p.12.
66. Ibid.
67. Lord Chief Justice Igor Judge, 'Jury Trials', (Speech delivered to the Northern Ireland Judicial Studies Board Lecture, Belfast, 16 November 2010), 3 <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/speech-lcj-jury-trials-jsb-lecture-belfast.pdf>.
68. Cheryl Thomas, *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Ministry of Justice, 2010) i <http://www.justice.gov.uk/about/docs/are-juries-fair-research.pdf>.
69. Ibid.
70. Ibid., p.7.
71. Ibid, p.36.
72. Ibid.
73. Ibid.
74. Ibid.
75. Lily Trimboli, *Juror Understanding of Judicial Instructions in Criminal Trials, Crime and Justice* Bulletin No 119 (NSW Bureau of Crime Statistics Research, 2008) <http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb119.pdf/$file/cjb119.pdf>.
76. Ibid., p.1.
77. Ibid., p.2.
78. Ibid., p.11.
79. Ibid., p.14.
80. Ibid., p.4.
81. Ibid., p.4.
82. Ibid., p.9.
83. Ibid.
84. Ibid.
85. Ibid.
86. See: Chris Merritt, 'Jurors get it wrong without a guiding hand', *The Australian* (online), 26 November 2010 <http://www.theaustralian.com.au/business/legal-affairs/jurors-get-it-wrong-without-a-guiding-hand/story-e6frg97x-1225961141747>.
87. Ibid.
88. Ibid.
89. Judith Fordham, *Juror Intimidation: an investigation into the prevalence and nature of juror intimidation in Western Australia*, (Department of the Attorney General, 1 April 2010 as edited on 7 April 2010) <http://www.department.dotag.wa.gov.au/_files/juror_intimidation.pdf>.
90. Ibid 37.

91. Ibid 43.
92. Ibid 32.
93. Ibid.
94. Ibid 118.
95. Ibid 58–62.
96. Ibid 74.
97. Ibid 74.
98. Ibid 56–57.
99. Ibid 58, 62.
100. Ibid 62.
101. See: *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521, 537-8 (Gibbs CJ and Mason J) and David Hamer, 'The Continuing Saga of the Chamberlain Direction: Untangling the Cables and Chains of Criminal Proof' (1997) 23(1) *Monash University Law Review* 43.
102. *Weiss v R* (2005) 224 CLR 300, 314–315 (the court).
103. Justice Peter McClellan, 'The Australian Justice System in 2020', (Speech delivered to the National Judicial College of Australia, Canberra, 25 October 2008).
104. *Weiss v R* (2005) 224 CLR 300, 317 (The Court).
105. A good example is the phrase 'hypothesis consistent with innocence' which Hunt AJA in *El Hassan v R* [2007] NSWCCA 148 [33] (Hunt AJA) criticised as being 'decidedly non-jury friendly language.'
106. Matthews, Hancock and Briggs above n 8, 41.
107. Thomas above n 68, 38.
108. Ibid.
109. Fordham above n 89, 28.
110. Rhonda Wheate, 'The Importance of DNA evidence to juries in criminal trials' (2010) 14 *The International Journal of Evidence and Proof* 129, 130 citing Kimberlianne Podlas, ''The CSI Effect': Exposing the Media Myth', (2005) 16 *Fordham Intellectual Property, Media and Entertainment Law Journal* 429, 430.
111. Rhonda Wheate, 'The Importance of DNA evidence to juries in criminal trials' (2010) 14 *The International Journal of Evidence and Proof* 129.
112. Ibid 141.
113. Ibid 142; For a summary of 'Crime Scene Investigation' see *Podlas* above n 110, 430. Podlas writes that Crime Scene Investigation 'rests on 'the notion that blood, hair, saliva, skin, et cetera are forensically designed to tell an investigator what has happened without having any witness to a crime.' [Crime Scene Investigation uses] this intrinsic narrative to design a program where forensic evidence 'speak[s] for those who cannot speak for themselves.'' Commenting on the coverage of Crime Scene Investigation, Jane Goodman-Delahunty and Lindsay Hewson in Improving jury understanding and use of expert DNA evidence (Technical and Background Paper, No 37, Australian Government, Australian Institute of Criminology, 2010), 5 <http://www.aic.gov.au/documents/C/2/6/%7BC26C0965-E841-49E4-B7F9-98C925564F9A%7Dtbp037_002.pdf > noted that '[in 2007 Crime Scene Investigation] was the most popular television program with 84 million viewers worldwide.'
114. See: Wheate above n 111; Goodman-Delahunty and Hewson above n 113.
115. Goodman-Delahunty and Hewson above n 113, 6.
116. Mark Findlay, 'Juror Comprehension and the Hard Case–Making Forensic Evidence Simpler' (2008) 36 *International Journal of Law, Crime and Justice* 15, 22.
117. Ibid.
118. Ibid 24.
119. Goodman-Delahunty and Hewson above n 113, 6.
120. Ibid 2.
121. Lord Justice Alan Moses, 'Summing Down the Summing Up' (Speech delivered at the Annual Law Reform Lecture, The Hall, Inner Temple, London, 23 November 2010). <http://www.judiciary.gov.uk/NR/rdonlyres/FF4F1CA7-2DDD-437B-96D0-0CA0014933AB/0/speechmosesljsummingdownsummingup.pdf>.
122. Ibid 4.
123. Ibid.
124. Ibid 1.
125. Ibid 12.
126. Robin Auld, *Review of the Criminal Courts of England and Wales* (Lord Chancellor's Department, London, September 2001) Chapter 11 [22] and [50] <http://www.criminal-courts-review.org.uk/ccr-00.htm>.
127. Moses above n 121, 8.
128. Auld above n 126, Chapter 11 [50].
129. Moses above n 121, 9.
130. Ibid.
131. Ibid 8.
132. See: Geoffrey Eames, 'Towards a better direction – Better communication with jurors' (2003) 24 Australian Bar Review 35.
133. Ibid 55.
134. Report of Proceedings Before Standing Committee on Law and Justice, 'Inquiry into Judge-Alone Trials under Section 132 of the Criminal Procedure Act 1986', Sydney, 11 August 2010, 17 (Ms Sylvia Hale).
135. Report of Proceedings Before Standing Committee on Law and Justice, 'Inquiry into Judge-Alone Trials under Section 132 of the Criminal Procedure Act 1986', Sydney, 11 August 2010, 17 (Nicholas Cowdery QC).

A guide to criminal appeals in New South Wales

By Wendy Abraham QC

Criminal appeals are a creature of statute.[1] Accordingly, an assessment of whether there is a basis to appeal is determined by the terms of the relevant legislation.

Clearly this topic is far too broad to be addressed fully in a paper of this nature, and consequently it provides no more than a brief overview relating to appeals in indictable matters. The provisions referred to herein apply to state offences and, by virtue of s 68 (1) of the *Judiciary Act 1903*, to Commonwealth offences (unless otherwise indicated).

Appeals lie to the Court of Criminal Appeal pursuant to the *Criminal Appeal Act 1912* (the *Act*)[2] (and the Rules), and in some circumstances, pursuant to the *Crimes (Appeal and Review) Act 2001*. There are four principal circumstances in which an appeal may be instituted:

- either party may appeal against an interlocutory judgment or order;[3]
- the Crown may appeal against a verdict of acquittal in limited circumstances;[4]
- a convicted person may appeal against that conviction on a question of law alone[5] or with leave of the court (or a certificate from the trial judge) on questions of fact, mixed fact and law or any other ground that is considered sufficient by the court;[6]
- either party[7] can appeal against any sentence passed.

The Court of Criminal Appeal is a court of error; in order to succeed, the moving party must establish error, and an adverse consequence thereof.

Importantly, an appeal is not an avenue to simply re-argue the case rejected below, or to argue the case again on a different basis.[8] As the court recently emphasised:

> The Criminal Appeal Act 1912 does not exist to enable an accused who has been convicted on the basis of one set of issues to have a new trial under a new set of issues which he could and should have raised at the first trial ...This ground, and a number of other grounds relied upon ... have the flavour of an 'armchair appeal', where counsel not involved in the trial has gone through the record of the trial in minute detail looking for error or possible arguments without reference to the manner in which the trial was conducted. (citations omitted)[9]

The CCA has never regarded itself as bound by its previous decisions, although it only departs from previous decisions with caution and only if it is satisfied that justice requires it to do so. Unlike the Court of Appeal, it does not require a grant of leave before an earlier decision is re-examined.[10] Ordinarily the court comprises three judges[11] however, as a matter of practice when it is to be argued that a previous decision ought to be overturned often a bench of five is convened.[12]

The Court of Criminal Appeal is a court of error; in order to succeed, the moving party must establish error, and an adverse consequence thereof.

It is also worth noting in relation to Commonwealth offences that, when construing and applying Commonwealth legislation, appellate courts apply a rule of comity with respect to decisions of intermediate appellate courts of other states dealing with the same legislation unless the reasoning is plainly incorrect.[13]

In practical terms an offender has 28 days in which to file a notice of intention to appeal which then allows six months in which to file the appeal grounds and the written submission in support of those grounds. An extension of time can be granted.[14] The written submission is of particular importance in this jurisdiction as the CCA will typically list three to four appeals for hearing on the one day.[15]

Bearing those general principles in mind the following addresses the four situations referred to above.

Interlocutory appeals – s 5F *Criminal Appeal Act* 1912

Essential to an appeal pursuant to s 5F of the *Act* is the existence of an 'interlocutory judgment or order,' a term not defined in the *Act*. Interlocutory orders by their very nature are designed to facilitate final judgments.[16] The issue is whether there is a final determination of the rights of the parties. The court looks at the 'character and effect' of the decision.[17]

For an appeal by an accused, rulings on the admissibility of evidence do not constitute judgments or orders,[18]

although if the argument involves a constitutional issue that may 'transform its nature' into a judgment or order for the purposes of the provision.[19]

However the Crown may appeal against a ruling on admissibility if the decision 'eliminates or substantially weakens the prosecution's case.'[20] Whether the impugned decision or ruling has that effect raises a jurisdictional issue.[21] The court must assess the Crown case in order to determine whether or not the excluded evidence substantially weakens it.[22] The Crown bears the onus of satisfying the court that this is the effect (or the accumulated effect)[23] of the impugned decision(s) or ruling(s).[24] A case which is otherwise likely, even very likely, to succeed, may still be substantially weakened if evidence of cogency or force is withheld.[25]

Appellate courts are always reluctant to fragment the criminal trial process and as such leave is only granted infrequently.[26] It is generally considered that, once commenced, criminal proceedings should be allowed to follow their ordinary course.[27] Against that background leave will only be granted where the decision the subject of the challenge is attended with sufficient doubt as to warrant consideration at that stage or where the interests of justice otherwise require it.[28] In practical terms, in an appropriate case, leave is more likely to be granted to the Crown (as it has no right of appeal against an acquittal by the jury). Of course if leave is refused to an accused his/her appellate rights are preserved and if convicted an appeal can then be instituted.

Accordingly interlocutory appeals are ideally suited to issues which go to the heart of the proceedings (for example an argument as to the validity of the indictment). If such an appeal is instituted, counsel must be prepared to argue its merit within days of its filing as the trial below is not necessarily adjourned to enable an appeal to be heard, particularly if a jury has been empanelled.

An appeal against an acquittal – s 107 *Crimes (Appeal and Review) Act 2001*

Since December 2006, an appeal by the attorney general or director of public prosecution against, *inter alia*, an acquittal of a person 'by a jury at the direction of the trial judge' or an acquittal from a trial without a jury is available, but only on a ground which involves a question of law alone.[29] That first aspect, directed acquittals, applies to both state and Commonwealth offences.[30] However, as s 80 of the *Constitution* requires trial by jury for Commonwealth offences, the second aspect does not arise in federal prosecutions.

The concept of 'a question of law alone' is referred to below in relation to a different provision, but generally is a question that can be answered without reference to the facts.[31]

The court may either confirm or quash the acquittal; it cannot proceed to convict.[32] It has a discretion whether to order a retrial, although it should not do so if a retrial would render a verdict of guilty unsafe and liable to be overturned on appeal.[33]

Appellate courts are always reluctant to fragment the criminal trial process and as such leave is only granted infrequently.

Enacted at the same time was a provision which abolished double jeopardy in limited circumstances (so as to allow a retrial after a person has been acquitted).[34] This provision is yet to be used here, although a similar provision in the UK has recently been applied which has resulted in the court overturning an acquittal for murder and ordering a re-trial.[35]

Appeal against a conviction – s 5(1)(a) and (b), s 6(1) and (2) Criminal Appeal Act 1912

While an appeal against a conviction typically occurs where an accused has been found guilty after a trial, in very limited circumstances there can be an appeal against a conviction which resulted from a guilty plea.[36]

There are two practical considerations in instituting an appeal. First, s 5(1) of the Act requires an applicant to obtain leave to appeal against his conviction unless the ground(s) of appeal involves 'a question of law alone.' Unlike some other jurisdictions the issue of obtaining leave is addressed during the hearing of the appeal rather than in a separate process.[37] The necessity to address the issue has been the subject of remarks by the court in circumstances where there has been a failure to do so.[38] The court considers that the requirement for leave should not be treated as a mere formality.

Secondly, Rule 4 of the *Criminal Appeal Rules* requires the grant of leave where the ground of appeal complains about a direction or the admissibility of evidence where no objection was taken below. The Rule does not constitute 'some mere technicality which may simply be brushed aside'. The failure to take a point at trial, including seeking a direction, will often indicate that the point was not considered to have been important in the circumstances of the trial. Unless there is a convincing reason why the matter was not raised at trial, and unless there is a possibility of a real injustice, the court considers that an accused should be held to what was done at trial.[39]

Section 6 of the *Act* involves a two stage process. The appellant must establish one of three circumstances:

(i) the verdict was unreasonable or cannot be supported (ii) by the evidence (in which case a verdict of acquittal is entered); or

(iii) there was a wrong decision on a question of law; or

(iv) there was, for any other reason, a miscarriage of justice.

An appeal is ordinarily decided on the evidence before the trial court although there is some scope in limited circumstances for 'fresh evidence' to be adduced in the CCA.

If either (ii) or (iii) is established, the issue of the proviso arises: the court may dismiss the appeal if it considers no substantial miscarriage of justice has actually occurred.

As to the first limb of s 6, the principles are well established. The appellate court must conduct its own independent examination of the evidence to determine if it was open to the jury/judge to convict,[40] paying due regard to the advantage the jury had in seeing and hearing the witnesses. On all arguments alleging error, but on this limb in particular, it is important to remember as the High Court in *Hillier v The Queen* stated, 'neither at trial nor on appeal, is a circumstantial case to be considered piecemeal.'[41]

Of course, as to the second limb, a wrong decision on a question of law can only arise where there has been a decision; if there has been no ruling or decision below there may be no 'wrong decision' and this aspect would not apply. In those circumstances reliance is often placed on establishing the third limb.

While many fall within the third limb, establishing an error or irregularity is not sufficient: it must constitute a miscarriage of justice.[42] This limb encompasses a wide variety of errors and irregularities.[43]

Section 6 of the Act is the 'common form' appeal provision reflected in the corresponding legislation of each State. Not surprisingly its application has been the subject of many judicial pronouncements, in recent years most particularly as to when and how the proviso is to be applied. It is for the Crown to establish that the proviso ought to be applied. In *Weiss v The Queen*[44] (and a number of cases thereafter)[45] the High Court has emphasised that it is the statutory language which is to be applied; the question is whether the Court considers 'no substantial miscarriage of justice has actually occurred'.[46] That necessarily involves a consideration of the nature of the error in the context of the trial and the possible effect it may have had on the outcome. That includes the terms of the direction, the evidence and the issues at trial.[47] *Weiss* identified that a necessary, although not necessarily sufficient step to the application of the proviso, is for the appellate court to undertake its own independent assessment of the evidence on the whole of the record, making due allowance for the natural limitations that exist in proceeding in that manner, to determine whether the appellant was proved to be guilty of the offence beyond reasonable doubt.[48] It follows that one circumstance where the proviso may not be engaged is if the appellate court is not so satisfied.[49] There may be some errors or irregularities which, by their very nature would render the proviso inapplicable, regardless of the strength of the evidence or whether an appellate court concluded that the appellant had been proved guilty beyond a reasonable doubt.[50]

An appeal is ordinarily decided on the evidence before the trial court although there is some scope in limited circumstances for 'fresh evidence' to be adduced in the CCA.[51] The circumstances are summarised in *R v Abou-Chabake*[52]. Where an acquittal is sought and the further evidence is of such cogency that innocence is shown to the court's satisfaction, or the court entertains a reasonable doubt as to guilt,

the guilty verdict will be quashed and the Appellant discharged regardless of whether the evidence is fresh. However, where a new trial is sought, that outcome will only be achieved where the evidence is fresh, credible and, in the context of the evidence given at trial, it is likely to have caused the jury to have entertained a reasonable doubt about the guilt of the accused or, put another way, there is a significant possibility that the jury acting reasonably would have acquitted the accused.[53]

However, it is insufficient to establish simply that counsel was not aware of it below, there may be an issue of whether with due diligence the evidence ought to have been known. Issues to be addressed are how the information could have been used and what, if any, effect would it have had on the verdict.

An application for special leave is significantly different from and more difficult to obtain than what is ordinarily required to obtain leave to appeal to a state appeal court. The application must have a 'special feature'. The High Court is not a Court of Criminal Appeal.

Appeal against sentence – s 5(1)(c), s5D, s 6(3) *Criminal Appeal Act* 1912

As with an appeal against conviction, in relation to an appeal against sentence it is also insufficient to merely establish error, as the court will nonetheless dismiss the appeal if it is of the opinion that no lesser sentence is warranted,[54] or on a Crown appeal exercise its discretion not to intervene.[55]

Probably the most frequently alleged ground on an offender's appeal is that the sentence is manifestly excessive, although this will only succeed if on the facts and applying correct legal principles, it was not open to the sentencing judge to impose the sentence pronounced. The appellate court is not considering what sentence it would have imposed. However, if a discrete error is established, the court will decide whether no lesser sentence is warranted, which is clearly a different task to manifest excess. On this latter aspect the court can take into account evidence as at the date of the hearing of the appeal, and can therefore take into account events that have occurred since sentence was imposed. The resentencing is to occur by reference to the relevant legal principles and facts as they exist at the time of resentencing.[56]

There have always been particular considerations relevant to Crown appeals against sentence which reflect the role of the Crown; it is only where there is a specific error which ought to be corrected which may include that the sentence imposed is manifestly inadequate so much so that the court intervenes to maintain standards of punishment appropriate for the offending. Of significance is that in recent times the concept of double jeopardy as it applied to Crown appeals has been abolished,[57] although there still exists a discretion in the court to refuse to intervene even if error (including inadequacy) is established.[58]

Conclusion

There is only *one* opportunity to appeal against a conviction or sentence: if the appeal is refused a further application cannot be made at a later stage. The CCA has no power to reopen an appeal once judgment had been delivered and the orders perfected.[59] However amendments to the *Criminal Appeal Rules* now permit the court on an application or on its own motion to set aside or vary an order within 14 days as if the order had not been entered.[60] It follows that if, upon receiving judgment, it is apparent there is an error, steps must be taken immediately to address it.

Unless there are grounds to seek special leave to the High Court from the judgment, there is no other avenue to pursue. Although there is a right to apply for special leave, that application of itself is not an appeal.

The criteria on which the High Court grants special leave are set out in s 35A of the *Judiciary Act 1903,* which specifies that in considering an application for special leave the Court may have regard to any matters it considers relevant but *shall have regard* to whether the application relates to a question of law 'that is of public importance, whether because of its general application or otherwise', or whether the Court is required 'to resolve differences of opinion between different courts' and 'the interests of the administration of justice, either generally or in a particular case, require

consideration by the High Court of the judgment to which the application relates'.

It follows that simply a complaint about a factual finding in an individual case or that a sentence imposed is excessive[61] will not be sufficient. An application for special leave is significantly different from and more difficult to obtain than what is ordinarily required to obtain leave to appeal to a state appeal court.[62] The application must have a 'special feature'.[63] The High Court is not a Court of Criminal Appeal.[64]

The High Court has repeatedly emphasised its reluctance to grant leave on applications from interlocutory judgments even if the application raises important questions for consideration.[65] There must be some exceptional or special circumstances.[66] It is to be noted that the court has no authority to receive evidence which was not before the court below[67]. Rather, as a court of error, it determines whether there was error on the part of the court below, considering the material which was before that court.

If 'new' grounds come to light after an appeal the only avenue of redress is to seek a reference to the CCA or an inquiry pursuant to the *Crimes (Appeal and Review) Act 2001*.[68]

Endnotes

1. *Grierson v The King* (1938) 60 CLR 431 at 436; *Commissioner for Railways NSW v Cavanough* (1935) 53 CLR 220 at 225; *Gipp v The Queen* (1998) 194 CLR 106 at [117]; *Byrnes v The Queen* (1999) 199 CLR 1 at [84]
2. For a history of the criminal appeal process see *Conway v The Queen* (2002) 209 CLR 203; *Weiss v The Queen* (2005) 224 CLR 300
3. S 5F *Criminal Appeal Act* 1912
4. *Crimes (Appeal and Review) At 2001* s 107
5. S 5(1)(a) *Criminal Appeal Act* 1912
6. S 5(1)(b) *Criminal Appeal Act* 1912
7. Crown: s5, s5DA; accused S 5(1)(c) *Criminal Appeal Act* 1912
8. And see: *Gately v The Queen* (2007) 232 CLR 208 at [77]; *Crampton v The Queen* (2000) 206 CLR 161 at [14] – [20][156] – 163]; *Heron v The Queen* (2003) 77 ALJR 908 at [5][10][60]
9. *Darwiche v R* [2011] NSWCCA 62 at [170] and see: *R v Abusafiah* (1991) 24 NSWLR 531 at 536; *R v Fuge* (2001) 123 A Crim R 310 at [40] – [45]; *Ilioski v R* [2006] NSWCCA 164 at [155]
10. *R v Mai* (1992) 26 NSWLR 371
11. Although it can be comprised of two judges for an appeal against sentence: s 6AA *Criminal Appeal Act* 1912
12. For example: *Onuorah v R* (2009) 76 NSWLR 1; *Swansson v R* (2007) 69 NSWLR 406
13. *R v Parsons* [1983] 2 VR 499 at 506; *Australian Securities Commission v Marlborough* (1993) 177 CLR 485; *R v Gent* (2005) 162 A Crim R 29 at [29]
14. s 10 *Criminal Appeal Act* 1912. If the offender fails to file a notice of appeal or application to appeal within the 6 months the notice of intent will lapse. An application to the Court for an extension of time would be required: see *R v Lawrence* (1980) 1 NSWLR 122 at 148 in relation to the principles to be applied in determining the application. Where there is any considerable delay exceptional circumstances will be required. And see *R v Gregory* [2002] NSWCCA 199 at [41]
15. The requirements for written submissions see: Practice Note SC CCA 1 at [19]; the submission shall contain a brief statement in narrative form of the Crown case and the case raised for the Appellant, the terms of the appeal grounds should be set out in full, pages references to transcript relating to any evidence referred to, appropriate citations of authorities relied upon.
16. *R v Saunders* (1994) 72 A Crim R 347
17. *R v OM* [2011] NSWCCA 109; *R v Cheng* (1999) 48 NSWLR 616 at [9] – [14]; *Dao v R* [2011] NSWCCA 63
18. *Cheikho v R* (2008) 75 NSWLR 323; *R v Steffan* (1993) 30 NSWLR 633 at 636 – 639; *R v Bozatsis* (1997) 97 A Crim R 296 at [10][17]
19. *Cheikho v R* (supra) at [25] – [33]
20. S 5F(3A) *Criminal Appeal Act* 1912
21. *R v Shamouil* (2006) 66 NSWLR 228 at [27]
22. *R v Shamouil* (supra) at [29]
23. *R v Nguyen* [2010] NSWCCA 97
24. *R v Shamouil* (supra) at [30]
25. *R v Shamouil* (supra) at [37]
26. *Gedeon v Commissioner of the NSW Crime Commission* (2008) 236 CLR 120 at [23] and see *R v Steffan* (1993) 30 NSWLR 633 at 644 - 645; *R v Einfeld* (2008) 71 NSWLR 31 at [23] – [25]
27. *Rozenes v Beljajev* (1995) 1 VR 533 at 571 Special leave to appeal to the High Court from this judgment was refused. And see: *Sankey v Whitlam* (1978) 142 CLR 1 at 24-25; *R v Iorlano* (1983) 151 CLR 678 at 680; *Yates v Wilson* (1989) 168 CLR 338 at 339 and see *Agius v R, Abibadra v R, Jandagi v R, Zerafa* [2011] NSWCCA 119 at [10]; *R v Einfeld* (supra); *Cheikho v R* (2008) 75 NSWLR 323 at [172] – [174]
28. *Agius v R, Abibadra v R, Jandagi v R, Zerafa v R* (supra) at [10]; *R v Dinh* (2000) 120 A Crim R 42 at [34]; *R v Steffan* (supra) at 644 - 645
29. S 107 (2) *Crimes (Appeal and Review) Act* 2001
30. *R v LK* (2010) 241 CLR 177
31. For discussions as to what amounts to a question of law alone see: *Rasic v R* [2009] NSWCCA 202 at [12]; *Williams v The Queen* (1986) 161 CLR 278; *R v Bunting and Wagner* (2005) 92 SASR 215 at [171] (the Court of Criminal Appeal adopted the reasons in this regard of Perry J: *R v Bunting and Wagner* (2004) 92 SASR 146 at [671] – [698]); *R v Vaughan* (2009) 105 SASR 532 at [29]-[30]
32. S 107 (7)
33. *R v PL* (2009) 261 ALR 365
34. Section 99 - 100, An application can be made to the Court of Criminal Appeal for an order for a retrial, in relation to an offence where the maximum penalty is life imprisonment on the basis of '*fresh and compelling evidence,*' or if the maximum penalty is 15 years or more on the basis that the acquittal was '*tainted.*' An order can be made if either of those two circumstances are established and it is in the interests of justice that the order be made.
35. *R v Dobson* [2011] EWCA Crim 1256
36. *Elmir v R* (2009) 193 A Crim R 87
37. For example South Australia and Victoria
38. *Rasic v R* (supra) ; *Carlton v R* [2008] NSWCCA 244 at [10] – [12]; *Krishna v DPP* (2007) 178 A Crim R 220
39. *R v Tripodina* (1988) 35 A Crim R 183

40. *M v The Queen* (1994) 181 CLR 487 at 493 – 494 and see *Nguyen v The Queen* (2010) 85 ALJR 8
41. (2007) 228 CLR 618 at [48]
42. For example: *Nudd v The Queen* (2006) 80 ALJR 614 at [24][25]; *Cesan v The Queen* (2009) 236 CLR 358 at [81] – [89], [112] – [122]
43. Cases which have fallen within (or it was argued they fell within) that category include errors in procedure (for example empanelling the jury, the validity of the indictment), the conduct of counsel (for example incompetent or breach of Crown duties by a prosecutor), the conduct of the trial judge (for example sleeping), the conduct of the jury (for example accessing the internet etc), admissibility of evidence, directions to the jury in summing up.
44. (2005) 224 CLR 300
45. For example: *Cesan v The Queen* (supra); *Gassy v The Queen* (2008) 236 CLR 293; *Nudd v The Queen* (supra); *Darkan v The Queen* (2007) 227 CLR 373
46. *Weiss v The Queen* (supra) at [31] – [35][42]; *Cesan v The Queen* (supra) at [123]; *Gassy v The Queen* (supra) at [34]
47. *Gassy v The Queen* (supra) at [34]; *AK v Western Australia* (2008) 232 CLR 438 at [52] – [55]; *Glennon v The Queen* (1994) 179 CLR 1 at 8
48. *Weiss v The Queen* (supra) at [41] – [44][46]; *Cesan v The Queen* (supra) at [124]; *AK v Western Australia* (supra) at [53] – [55]; *Gassy v The Queen* (supra) at [18]
49. *Weiss v The Queen* (supra) at [46]; *Gassy v The Queen* (supra) at [18]
50. *Weiss v The Queen* (supra) at [45]; *Darkan v The Queen* (supra) at [94]); *Nudd v The Queen* (supra) at [6][7] (for example if there is a failure of process or departures from the requirements of a fair trial or a failure to observe the conditions of a fair trial); *Gassy v The Queen* (supra) at [18][33] For example; *AK v Western Australia* (supra) (this Court concluded that the failure to comply with s 120 (2) of the *Criminal Procedure Act* which required a reasoned decision, but no reasons were given in relation to a central issue, it could not be said that there was no substantial miscarriage of justice: at [59])
51. S 12 *Criminal Appeal Act* 1912
52. (2004) 149 A Crim R 417 at [63] Kirby J with whom Mason P and Levine J agreed
53. For example see: *Mickelberg v The Queen* (1989) 167 CLR 259; *Mallard v The Queen* (2005) 224 CLR 125
54. s 6(3) *Criminal Appeal Act* 1912
55. s 5D(1) *Criminal Appeal Act* 1912
56. *Baxter v R* (2001) 173 A Crim R 284; *R v Simpson* (2006) 53 NSWLR 704
57. S 68A *Crimes (Appeal and Review) Act* 2001; *R v JW* (2010) 199 A Crim R 486; *R v Carroll* (2010) 200 A Crim R 284
58. *R v JW* (supra) at [141]
59. *Burrell v The Queen* (2008) 238 CLR 218
60. *Criminal Appeal Rules* R50C and see: *R v Green and Quinn* [2011] NSWCCA 71
61. *Radenkovic v R* (1990) 170 CLR 623
62. *Morris v R* (1987) 163 CLR 454 at 475
63. *Morris v The Queen* (supra)
64. *Liberato v The Queen* (1985) 159 CLR 507; *Warner v The Queen* (1995) 69 ALJR 557
65. *R v Elliott* (1996) 185 CLR 250 at 257 for a recent application see: *Abibadra v The Queen, Jandagi v The Queen, Zerafa v The Queen, Aguis v The Queen* [2011] HCA Trans 171
66. *Rozenes v Beljajev* (1995) 1 VR 533 at 571 Special leave to appeal to the High Court from this judgment was refused. And see: *Sankey v Whitlam* (1978) 142 CLR 1 at 24-25; *R v Iorlano* (1983) 151 CLR 678 at 680; *Yates v Wilson* (1989) 168 CLR 338 at 339; *Gedeon v The Commissioner of the NSW Crime Commission* (2008) 236 CLR 249 at [23] – [25] This exception may apply in cases brought at an early point of time involving questions of law that emerge from undisputed facts: *Chief Executive Officer of Customs v Jiang* (2001) 111 FCR 395 at [12]
67. *Eastman v The Queen* (2000) 203 CLR 1 at [9], [18],[69],[111],[184],[290]; *Mickelberg v The Queen* (supra)
68. For example: *Kearns v R* [2011] NSWCCA 103; *GAR v R* [2010] NSWCCA 163; *R v JJT* (2006) 67 NSWLR 152; *Mallard v The Queen* (supra)

Reflections of a criminal barrister

By Anthony J Bellanto QC

I always cringe when I hear the expression 'criminal barrister'. It arouses within me something unsavoury. I prefer the description 'a barrister who does criminal work'.

It sounds passé but it doesn't feel like 44 years. That's the wonderful thing about the law – every case is different, every client is different, each judicial officer is different and our opponents are different. There are always new challenges, which sharpen one's mental processes and there is the never ending quest to do your best. Against this canvas, the necessary hard work is all part of the finished product that enriches and invigorates.

Of course all this doesn't overcome the three questions that are seared into a barrister's soul.

- Will I be as busy next year?
- Why hasn't the phone rung?
- I've just lost – I'm a failure – will I ever get another brief?

My admission as a barrister was moved by my late father and seemed at the time a seamless transition from law school. There was no real discussion or debate – it was assumed that a barrister was my lot in life which was a far cry from the stony faced and impatient careers adviser who my late mother took me to in 1957 at the age of 15 after failing exams. 'Put out of your head being a lawyer or a doctor. You won't survive. Try a trade instead.' This was a defining moment for me which I have never forgotten, and it helped me carve out my career path, determined to succeed, however long it took and strange as it may sound, I am still learning. One thing I have learned is with common sense, honesty and hard work you can attain the seemingly impossible.

I entered my first chambers with the fresh anticipation of a new barrister at Phillip Street in 1967. The building is now demolished but it was on the northern side of Martin Place.

The days, weeks and months passed with an empty desk and empty shelves until I salvaged superseded books and loose parts all to create the appearance of a half-busy barrister. Now we have moved full circle with the paperless office and electronic libraries.

I received my first real break from Sam Wolfe, a solicitor for the NRMA whose son Terry became a crown prosecutor. Sam gave me their traffic work appearing for members summonsed for traffic offences. This and tenancy work gave me exposure around the Magistrates Courts which I think is so important for a new barrister. It put me into the cut and thrust of litigation at a basic level.

For my first few years at the bar I did Legal Aid work appearing for clients who were mostly in custody. Instructions were difficult, very rarely made sense and acquittals were rare. I took advice from my pupil master Neville Wran (as he then was) to take whatever came my way, whatever it may be, and in whatever jurisdiction. This was good advice although there were testing times – the fear of the unknown was ever present.

One forgettable experience was at a country sitting of the Supreme Court. Vin Wallace QC was the prosecutor, a formidable opponent determined to secure a verdict of guilty. I was called into chambers before the empanelment and the judge, as was his custom indicated the benefits of a plea of guilty, however my client was determined to fight on, which we did. The prosecutor opened to the jury alleging murder in these terms, with a hint of warm approval from his Honour, and pointing to my client:

> This court being the most superior trial court in this state has come to your beautiful town, whose peace and tranquillity has unfortunately been ruptured by the criminal conduct of this man.

It didn't get any better.

After nine months or so I purchased a room on 9th Floor, Wentworth Chambers from Ken Torrington (Stuart's father) who had been appointed to the District Court. My room was opposite Phil Woodward QC and Lester Meares QC who later went on to the Supreme Court and from whom I learnt career building lessons. They showed me courtesy and gave me the encouragement that a young barrister needs. I would often attend court and watch them in action together with other senior silks at the time such as Michael McHugh, Clive Evatt, Tom Hughes, Jack Smyth and Alec Shand.

Next door to me on Wentworth Chambers was Gordon Johnson whose career before the bar included jackeroo, labourer, beekeeper, oyster farmer, glassblower and builder. The NSW District Courts became his area to cajole, intimidate, incite, enrage and get paid for these

talents, provided he avoided being arrested. He was quite fearless.

Gordon and Lester Meares introduced me to hockey which I played regularly thereafter in a team comprising barristers and solicitors known as the Legal Eagles, although we played under the colours of Gordon. There was also the annual Barristers v Solicitors hockey match where Anna Katzmann (as she then was) performed so well as our goalie and saved the bar from many defeats. These games were not for the fainthearted. On one occasion Peter Graham (as he then was) (also from the 9th Floor, Wentworth Chambers) broke Justice Kevin Holland's nose (without malice). On many Saturdays the team would meet at the Green Gate Hotel at Killara enjoying a beer and talking about what might have been. We did better as we all got older even though we were playing ever younger opponents – something about experience over age.

In the early days when I had nothing to do I would often go around the courts and listen to cases. I have seen two silks on opposite sides of the bar table actually kicking each other in a fit of pique. I saw Clive Evatt QC on his hands and knees with white socks showing, using a crumpled pocket handkerchief to wipe up water that he had spilt on the floor during his opponent's address.

The three years I spent in Hong Kong from 1975 to 1978 gave me an opportunity to prosecute as a member of the Attorney General's Chambers. When I left Australia, the general advice was 'not a good move'. When you come back no one will know you and you will have no practice. After my return people would often say 'I haven't seen you around for a few months. Where have you been?' Although the decision to go was weighed up with many factors in mind, at the end of the day it was an intuitive feeling that made the difference. So, with many decisions in life, I think if one is true to oneself you know in your heart what the right move is and once you make the decision everything seems to fall into place – the intuitive synthesis as it is now described; *Cameron v The Queen* (2002) 209 CLR 339.

On my return to Australia I accepted an appointment as a crown prosecutor and the following seven years again brought me enormous satisfaction and a different perspective on the practice of criminal law. I replaced John Nader at Penrith District Court when he was appointed to the Northern Territory Supreme Court.

Most new judges to the District Court were required to do a term at Penrith and in those days one of them was a judge who had a hyphenated name who spoke with a rather cultured English accent although I don't think he was English. One of his favourite pastimes was to identify somebody in the public gallery in the back of the courtroom who was chewing and he'd ask: 'You there, are you masticating in my court?'

The startled recipient kept chewing and looked down to his groin. This brought the judge much pleasure.

My time with the crown was extremely enjoyable and I made friends with many practitioners with whom I still have a fond association today.

One of my most memorable moments as a crown prosecutor was when I called an offender for sentence and my father came into court and announced his appearance on his behalf. It was *not* a duel at twenty paces, though. He knew how to get his way when he referred to me as 'the very learned and fair crown prosecutor'. He had never spoken to me in such glowing terms before.

I joined 5th Floor, Selborne Chambers in 1984 and on arriving I immediately caught up with my old mate Dennis Wheelahan QC and thereafter we shared many enjoyable times as members of the floor. It was whilst on a conference in Darwin that we met Justice Ian Gzell who at that stage was looking for chambers in Sydney having decided to move from the Brisbane Bar where he had chambers with David Jackson QC. Our floor had a vacancy and was anxious to have such an eminent silk.

Having returned to the private bar in 1984 I had a case in Campbelltown with Peter Kintominas as my junior. There was substantial pre-trial legal argument. We prepared our authorities and Peter was to have a copy of the cases for the bench available on the Monday morning. I arrived at court and he had lined up the reports from one end of the bar table to the other. I said, 'Why didn't you simply prepare photocopies?' to which he replied, 'I love the smell of leather in the morning.'

I once aspired to be a Carson asking Oscar Wilde 'Did you kiss him?' or Burket in the burning car case requesting the unhappy metallurgy expert to oblige him with the co-efficient of expansion of brass. But there are few early stumpings for the cross-examiner. The process

in its true form can be lengthy and complex. Like a great musical composition, the introductory passage, its largo, accelerando, marcato and its artfully devised climax. Whilst this is the theory, the volume of work going through the courts today denies most aspiring advocates the opportunity to fully hone such skills.

My goal is to keep trying and keep improving. I am enjoying what I do as much today, if not more than earlier in my career. The acquiring of wisdom is a wonderful thing. To draw on experience introduces that something extra to a case which I have been privileged to impart.

Ada Evans Chambers deserves recognition. Opened by Justice Mary Gaudron, the first female Justice of the High Court of Australia in November 1998, the chambers are a testament to the feminist struggle of Ada Evans, the first woman to be admitted to the New South Wales Bar (in 1921). Her admission was the result of a change in the law to recognise her as a 'person'. Section 2 of the *Women's Legal Status Act 1918* reads 'A person shall not by reason of sex be deemed to be under any disability or subject to any disqualification … d) to be admitted to practise as a barrister … of the Supreme Court of New South Wales … any law or usage to the contrary notwithstanding.'

I was privileged to lead the floor for ten years. Mary Gaudron returned for the tenth anniversary. The chambers stand as an avenue for young and aspiring barristers who may not have the financial backing to have a room on the more established and expensive floors.

I strongly believe barristers should be members of chambers. Chambers life brings many rewards, not only of a collegiate nature but the opportunity to discuss legal issues, talk about one's victories, judges, magistrates and opponents, and to gloss over the losses. The 'aspirational bar' at the southern end of town provides many advantages. Close proximity to the courts, ease of parking, and a vibrant city life. The Commonwealth and state DPP are close at hand and the Supreme, Federal and High Court are a pleasant walk through Hyde Park.

I have been fortunate and honoured to lead three sets of chambers. Samuel Griffith Chambers is a fine example of the burgeoning talent downtown.

Reflecting on the changes in legal practice, in one sense there has been no change at all. There is still relatively limited input into addressing the causes of crime. I believe the views of experts in the field, researchers, practitioners, etc should be given more weight, rather than populist reactive responses.

I lament this lack of foresight and the failure to 'break the cycle'. I also lament courtroom design and function. One repeatedly enters court with DVDs to be played only to find the equipment malfunctions or is in limited supply. I lament the media scrums outside court in high profile cases and the oft asked question to victims of crime – 'How do you feel?'

I have serious concern, not only as a lawyer, but as a citizen of Australia that we are not addressing in meaningful terms the causes of crime and implementing programs to address it. I firmly believe that education is the key and it should be part of any school curriculum, e.g., how to live in society and the consequences of antisocial conduct, whether it be drug related (including alcohol), gratuitous violence, fraud or traffic offences.

I also hope we will never see the end of trial by jury in criminal matters.

I am concerned that there is currently a move to mandatory sentence for the murder of a police officer. This approach as research indicates has no deterrent effect and only makes more complex the already difficult task of sentencing.

Until the human race works out how to respect each other and follow a moral code (which seems unlikely) then we face the prospect of criminal conduct. The answer is not to legislate for and impose heavier penalties and build more gaols, but to address the causes of crime in respect of which in my experience there has been lamentable inaction.

The development of the regional criminal bar

By William Walsh and Ian Nash

Over the years, there has been an emergence and recognition of regional bars in New South Wales. This has been an important development as it has meant that citizens and solicitors in the regions have had access to barristers who live and work in the area and hence are familiar with the community psyche and problems of the 'locals'. Members of the regional bars have played, and continue to play, an important role in the administration of the criminal law in various country courts.

The establishment of the Office of the Director of Public Prosecutions in 1987 saw crown prosecutors being appointed to various regional centres on a permanent basis as DPP offices were established in those cities. In more recent times, a small number of public defenders similarly have been appointed permanently to country areas.

Crown prosecutors have played a major role in the administration of criminal justice in regional New South Wales. For many years, crown prosecutors travelled from Sydney to appear in the Supreme and District courts in various regional towns. Even with the establishment of 'permanent' crowns outside the metropolitan area, from time to time crown prosecutors still travel long distances to various regional courts. The same applies to the 'regional' public defenders.

The private bar has also established itself outside Sydney. In addition to Newcastle and Wollongong, solicitors in areas surrounding Lismore, Coffs Harbour, Dubbo, Wagga Wagga, Albury and, of course, Orange enjoy access to local barristers.

Criminal justice and a sense of community

Most would agree that country towns, even the bigger regional centres, enjoy a stronger sense of community than metropolitan areas. While some parts of Sydney have fostered an identity in which local issues are debated and pursued, generally a sense of community is either limited or non-existent.

The opposite is true of country towns. Along with the support that residents offer each other, people have a tendency to closely follow local issues. The trait is fostered by what is an almost uniformly strong regional press. Even smaller country towns like Cowra (*The Cowra Guardian*), Molong (*The Molong Express*) and Grenfell (*The Grenfell Record*) have their own newspaper.

Criminal Appeal in Dubbo

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❑ APPEAL: Syringe bandit Stanley Fernando is led to court for the Crown's appeal.

Dubbo in 2000.

The Crown claimed the sentence of six years jail, with a non-parole period of three years, was "mani-

During a 17-day period from July 30 2000, Stanley John Fernando, 21, committed armed robberies of the Ashwood Country Club, RSL Motel, West Dubbo Post Office, Just Jeans in Orange and an attempted armed robbery at the Endeavour Court Motel.

When he was arrested in the backyard of an east Dubbo home he attempted to strangle the police officer and take his service pistol, before finally being overcome.

Chief Justice Spigelman said courts must protect members of society, such as taxi drivers, motel receptionists and service station attendants, against "this particular kind of crime".

He also noted the "particular terror" which a liquid-filled syringe "inflicts" upon victims of crime.

Justice Spigelman, along with Justice James Wood and Justice David Kirby, in the CCA's historic first sitting in Dubbo.

During the hearing the Crown contended that the sentencing judge should have taken into account that Mr Fernando was on bail and parole when the offences were committed - a point that was not raised when the sentencing judge listed aggravating circumstances of the crimes.

However defence counsel Andrew Haesler argued it would have been "painfully obvious" to the sentencing judge that Mr Fernando was subject to the condition.

The sentence, handed down last March, was appropriate because the judge "attempted to make a balance that was in the community interest and ... in the interest of the

Weekend Liberal, Saturday, 9 February 2002, p.5.

The pages of local papers are usually well stocked with tit-bits about the goings-on at the courthouse, particularly if the matter is criminal. Cases that would not rate a mention in the Sydney press often feature prominently. In Lismore in 2004 Chief Justice Spigelman, while opening a sittings of the Court of Criminal Appeal said:

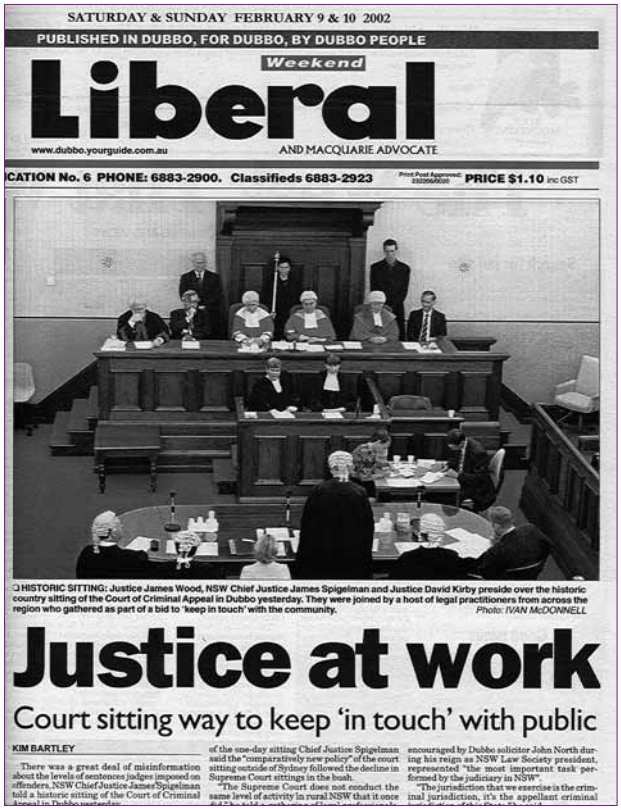
> I have no doubt that the regional media report more fully and comprehensively than the citizens of Sydney get, where the reporting tends to be very highly concentrated on exceptional, controversial cases.

Clients are often as concerned with the publicity their matter will attract as they are with advice about the merits of defending it or the likely penalty. While more often than not little can be done, sensitivity to the issue is useful.

A related consequence is the awareness that some local judicial officers have of community concerns and the coverage their decisions receive. Quite properly deterrent sentences are sometimes imposed in relation to offences of immediate local concern with the expectation that the message will be broadcast.

Country circuit 'closures'

A major blow to regional New South Wales occurred in the 1990s when a decision was made on so-called 'bureaucratic efficiency grounds' to remove sittings of the District Court from a large number of country towns. As a result, a large number of towns lost their District Court sittings. These were not tiny towns but towns with populations from 3000 to 10,000. Despite opposition by regional barristers and the Bar



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HISTORIC SITTING: Justice James Wood, NSW Chief Justice James Spigelman and Justice David Kirby preside over the historic country sitting of the Court of Criminal Appeal in Dubbo yesterday. They were joined by a host of legal practitioners from across the region who gathered as part of a bid to 'keep in touch' with the community. Photo: IVAN McDONNELL

Justice at work

Court sitting way to keep 'in touch' with public

KIM BARTLEY

There was a great deal of misinformation about the levels of sentences judges imposed on offenders, NSW Chief Justice James Spigelman told a historic sitting of the Court of Criminal

of the one-day sitting Chief Justice Spigelman said the "comparatively new policy" of the court sitting outside of Sydney followed the decline in Supreme Court sittings in the bush.

"The Supreme Court does not conduct the same level of activity in rural NSW that it once

encouraged by Dubbo solicitor John North during his reign as NSW Law Society president, represented "the most important task performed by the judiciary in NSW".

"The jurisdiction that we exercise is the criminal jurisdiction, it's the appellant criminal

Weekend Liberal, Saturday, 9 February 2002, p.1.

Association, the 'closures' went ahead. This decision denied easy access to justice to thousands of citizens across New South Wales.

The Supreme Court no longer has proclaimed regular sittings in country towns. The Supreme Court comes to the country on a 'needs basis'. The District Court, which in this day and age is the main criminal trial court in New South Wales, continues to have defined regular sittings. The 'loss' of the Supreme Court coming to certain country towns has resulted in the demise of the traditional ceremonial opening of the Supreme Court sittings in country towns - with a church service, formal procession and ceremonial sitting. Such opening ceremonies were a timely reminder to the community and to the legal profession of the importance of the administration of justice in a local community. In more recent years, a few District Court judges, on their own initiative, have 'organized' ceremonial openings of the District Court in some country towns to mark the commencement of the Law Year. This symbolic aspect of superior court sittings in country areas is discussed further below.

With the closure of so many District Courts in regional New South Wales, citizens were required to travel long distances to the nearest District Court now located in a major regional town. However, such citizens have little or no access to public transport unlike their counterparts in the Sydney, Newcastle and Wollongong areas.

But there were other significant effects of these 'closures'. No longer would accused persons in those towns, which lost their District Court sittings, be tried by a jury of their true fellow citizens but by citizens of a major regional centre. The jury's important local knowledge was lost. In addition, the 'closed District Court towns' were faced with the cost and inconvenience of having not only the accused but witnesses, police and doctors having to travel from their town to the major regional centre to give evidence. For example, the Cobar sittings were abolished and the sittings transferred to Dubbo – a round trip of 600 kilometres. Given that there are only a limited number of police and doctors in each country town, the loss of such personnel whilst giving evidence in another centre is a significant burden to any local community. And, of course, there is the additional cost of such an exercise.

To a lesser extent, some smaller towns in New South Wales, over recent years, have lost their Local Court sittings.

The symbolic importance of the presence of the superior courts

The closures referred to above also need to be seen in the context of the symbolic importance of the presence of superior courts to local communities.

Between 2000 and 2006 the Court of Criminal Appeal sat in a number of regional centres including Bathurst, Wagga Wagga, Dubbo and Lismore. It was an initiative of the then Chief Justice Spigelman who was on the bench on each occasion. The significance of such occasions is reflected in the speeches made at the ceremonial sittings that marked their opening. On more than one occasion the then chief justice noted the importance of bringing the face of justice to the broader community. At Bathurst in 2006 he said:

> Nothing is more significant in terms of public confidence in the administration of justice than the direct exposure to criminal justice and in particular, criminal sentencing.

The director of public prosecutions at the time, Cowdrey QC, speaking on behalf of the bar at the opening of the

Court of Criminal Appeal in Dubbo

Warm welcome for ju

Representatives of Dubbo's traditional owners welcomed three Supreme Court judges to the west yesterday before sharing coffee and cakes with them in the city's historic court-house described by one of the visiting judiciary as a "little architectural gem".

After accepting the judges' invitation to morning tea, the Aboriginal spokesmen and women requested a photo shoot in the grounds of the Brisbane Street complex.

The judges cheerfully agreed before returning inside to begin a historic sitting of the NSW Court of Criminal Appeal.

Before NSW Chief Justice James Spigelman, Justice James Wood and Justice David Kirby smiled for the camera, they had presided over the ceremonial opening of the court which attracted a big roll-up of local and out-of-town legal practitioners, both solicitors and barristers.

Local magistrate Tom Hodgson, Judge Finnane of the District Court and Gerry Peacocke, representing the city council, joined the Supreme Court judges sitting along the bench.

The event, a forerunner to only the third time that the Court of Criminal Appeal has sat outside of Sydney, also drew NSW Law Society president Kim Cull to Dubbo.

With numerous dark suits contrasting against the red of the judges' attire, the proclamation was read as a small number of the general public filtered

ONLINE AUCTION

WARM WELCOME: Russell Ryan, NS Spigelman, Narrell Boys-Peckham, Jus David Kirby and Will Burns.

Weekend Liberal, Saturday, 9 February 2002, p.4.

Wagga Wagga sittings of the Court of Criminal Appeal in 2000, referred to the tradition of the courts bringing justice to the regions that dated to Saxon and Norman times in England.

The observations made by those who spoke on behalf of the communities are equally notable. In 2004 the mayor of Lismore not only said how honoured his community was but that he regarded it as 'a very positive development that will help our community appreciate, to a greater extent, the workings of the court system'. At the opening of the Dubbo sittings in 2002 councillor Gerry Peacock, formerly the mayor and local member of NSW Parliament, referred to the occasion as 'historic', it being the first time that the court had sat there in its appellate jurisdiction. While noting the development of the city he said '[t]his sitting, in a sense, is another aspect of this growth in education, because it gives our people an opportunity to see how another facet of law is administered at first hand.'

The presence of the superior courts in regional areas has importance beyond providing ease of access. In demonstrating the continuing administration of justice at all levels, it has symbolic as well as educational significance. Given this, it is unfortunate that the initiative appears to have had a hiatus, at least since 2006.

The courthouses

A particular joy of regional practice is the almost constant opportunity one has to work in beautiful, historic and often surprisingly functional courthouses. It is all the more surprising when one understands a little of their history.

In his introduction to Terry Naughton's pictorial record of New South Wales courthouses, *Places of Judgment*, J.M Bennett quotes Dowling J, a foundation judge of the District Courts, who recounted:

> When my first Circuit was undertaken, there was not in the whole of it a building worthy of being called a Court house…. In some places there were only slab huts. At other places, I had to go to an hotel, or perhaps make use of an outhouse, such as a dancing room…. But almost all I had to fit up with my own hands by using calico, hammers, nails and packing cases - to give them the semblance of a court.[1]

The chapter includes a description of the 'gunyah style' courthouse built in Wee Waa in the 1850s. There were no windows and instead the timber slabs for the walls were 'set three inches apart to admit light and air.' Limited research suggests that 'gunyah' is an Aboriginal word meaning a crude bush hut.[2]

Although a few regional courthouses of substance appeared during the first half of the 1800s in places such as Windsor, Berrima and Hartley, it wasn't until the 100th anniversary of settlement was approaching and the gold rush had arrived that a concerted building effort took place. The activity followed legislative authority being given for circuit courts, exercising criminal jurisdiction, to sit in country districts. A town's nomination as a venue for a circuit court became a status symbol and Bennett describes the construction of imposing courthouses as a manifestation of that rivalry.[3]

Whatever the precise reasons, regional New South Wales remains dotted with lovely examples of colonial courthouses. Many, if not most, are still in use. Across the state towns such as Grafton, Dubbo, Orange, Goulburn, Parkes, Cowra, Deniliquin and Broken Hill enjoy the continued use of courthouses built in the second half of the 1800s by colonial architects such a James Barnet and Walter Vernon.

Bathurst courthouse is a particularly notable example. Some would argue that it is the finest courthouse in regional New South Wales if not the state. The grandeur of the building is probably responsible for the well-known myth that its plans were drawn in England, intended for India but mistakenly ended up west of

Panoramic view of Bathurst Courthouse. Photo: by John O'Neill

the Blue Mountains. Two brief observations about the building. The first is the miniscule size of the original witness box in the jury court. Well into the 1990s a witness was required to remain standing after taking the oath while the court officer placed a small stool, like that of a milkmaid's in a children's book, behind them so they could sit. The box's dimensions might have been drawn to force a witness to give their testimony on their feet as was formerly the custom. A new, more generous, facility has since been added. The second is the utility of the place so far as the work of a practitioner is concerned. The legal rooms are many and appear to have been purpose built. They remain furnished with large, apparently original, wooden tables that suit well the needs of a barrister in a trial away from chambers.

With water seen running down the interior walls of at least two court houses in the area during the welcome but persistent rain of 2010, it is hoped that money will continue to be spent on maintaining these wonderful and important public places.

Other developments

In recent years, the regional Supreme and District Courts have witnessed the 'disappearance' of the deputy sheriff – an honorary position occupied by a leading local citizen - at sittings of those courts in country towns. The deputy sheriff participated in ceremonial sittings of the courts and on other occasions. A deputy sheriff was recognition of involvement of the local community in the administration of justice.

The advent of AVL conferencing has had a major impact for regional barristers. No longer is it necessary to travel long distances to various gaols scattered throughout the state for a conference with a person in custody. Such a conference can now be done effectively with the regional barrister in the town in which he/she is located and the person in custody perhaps hundreds and hundreds of kilometers away – the saving in time and cost has been enormous.

The lifestyle

Life for a regional barrister is very good personally and professionally. It enables members of the bar to practise law and, at the same time, to enjoy the benefits of living and working in a wonderfully peaceful and enjoyable environment without the hassles of traffic congestion and the hustle and bustle of city life and city practice. Living 'out of a suit case' and driving long distances are the hallmarks of the regional barrister. But traffic jams are unknown as he or she crisscrosses the state clocking up thousands of kilometers each year.

Endnotes

1. T Naughton, *Places of Judgment, New South Wales* (Law Book Company, Sydney, 1987) with a historical introduction by J.M Bennett, p.6.
2. www.aboriginalculture.com.au/housingconstruction.shtml
3. ibid., p.9.

Practising as a crown prosecutor

By Margaret Cunneen SC

If you are around my vintage, you may recall an early television ad offering training for 'the best, most interesting job in the world'. It featured a comely young woman with a beehive hairdo named Judy Suter. (I wish my memory was as good for things that happened a month ago.) She was spruiking an establishment which is probably a university now – The Receptionist Centre. I didn't graduate from The Receptionist Centre but I have clocked up 20 years in the best, most interesting job in the world. I am a crown prosecutor.

Criminal trials are fascinating, absorbing, stimulating and poignant. Few are devoid of humorous moments. Although the judge maintains order, makes decisions on the law and generally ensures that the parties, the Crown and the accused, each have a fair trial, it is the crown prosecutor who has control of the trial's course. The charge or charges which appear on the indictment are determined by the crown prosecutor, as are the witnesses to be called and the nature and extent of the evidence to be adduced from them.

The role of crown prosecutor in New South Wales derives from the *New South Wales Act 1823* and the *Australian Courts Act 1828* and the first crown prosecutor in this state was Frederick Garling, appointed on 7 January 1830. Now there are 84 throughout the state, who, as statutory office holders under the *Crown Prosecutors Act 1986,* prosecute in the majority of criminal trials conducted in the Supreme and District Courts and in appeals from them to the Court of Criminal Appeal and the High Court. About 29 per cent of crown prosecutors are women.

Practice as a crown prosecutor is regulated more stringently than that of other barristers. We are bound by the Director of Public Prosecutions Prosecution Guidelines which describe the prosecutor's role as follows:

> to assist the court to arrive at the truth and to do justice between the community and the accused according to law and the dictates of fairness.

Although it is frequently misunderstood by victims of crime, the Guidelines prescribe that:

> a prosecutor represents the community and not any individual or sectional interest. A prosecutor acts independently, yet in the general public interest.

As practising barristers, crown prosecutors are also bound by the New South Wales Barristers' Rules and

there are additional rules for prosecutors which do not apply to those not so acting, including:

> A barrister shall not press the prosecution's case for conviction beyond a full and firm presentation of that case.

The Barristers' Rules provide that a prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court…and must not argue any proposition of fact or law which he or she does not believe on reasonable grounds to carry weight.

Practice as a crown prosecutor is regulated more stringently than that of other barristers.

The DPP Guidelines say that crown prosecutors must act at all times with fairness and detachment, being neither suspicious nor gullible. 'Nevertheless', they continue, 'there will be occasions when prosecuting counsel will be entitled firmly and vigorously to urge the prosecution's view about a particular issue and

to test, and if necessary to attack, that advanced on behalf of the accused. Adversarial tactics may need to be employed in one trial that may be out of place in another. A criminal trial is an adversary process and prosecuting counsel will seek by all proper means provided by that process to secure the conviction of the accused of the crime charged'.

Although crown prosecutors do not represent a victim or complainant, the DPP Guidelines also oblige observation by them of the New South Wales Charter of Victims Rights, the first and foremost of which is: 'A victim should be treated with courtesy, compassion and respect for the victim's rights and dignity'.

Under the Charter, crown prosecutors are expected to consult a victim before any decision is made to modify or not proceed with charges, including any decision to accept a plea to a less serious charge. The views of a victim are not of course determinative but they must be taken into account.

'Lawyers' and 'senior lawyers' without the mettle to append their names to their opinions are said to have described prosecutors in the Office of the DPP as 'zealots', 'without much experience in life' working in a 'sheltered workshop'.

All of these rules, some having the appearance, at least, of pointing in opposing directions, impose a heavy burden upon us. Because our principal and guiding function is to be independent of the police and complainant/victim on the one hand and the accused on the other, the courts look to crown prosecutors to provide all the applicable law and jury directions. Should the law be incorrectly applied, or the jury directions prove inadequate, the Court of Criminal Appeal will reserve its heaviest rebuke for the crown prosecutor. It is sometimes difficult to explain to investigating police and to people who allege that they are victims of crimes (or to bereaved relatives of people who were undoubtedly the victims of homicide), why one is obliged to remind the presiding judge of additional directions to the jury which appear to undermine one's own case.

Every barrister well understands the stresses involved in making the numerous decisions, great and small, which advocates make during the course of any legal hearing. Every barrister has a duty to the client and a duty to the court. For a crown prosecutor, the multiplicity of duties and the public forum in which we conduct our work, always under the glare of media scrutiny, combine to produce what is often a stressful and lonely environment characterised by high levels of conflict on several fronts.

Every barrister is familiar with hostility from the bench and from opposing parties. Practice at the bar is a poor choice for lawyers who are not resilient in its face. However there is an extreme and quite malicious form of hostility which some reserve for lawyers who practise as prosecutors. If it is accurate (and it would be no particular surprise to me if it is not), a recent piece in a Sydney newspaper on the topic of the selection of a new director of public prosecutions contains some typical manifestations. 'Lawyers' and 'senior lawyers' without the mettle to append their names to their opinions are said to have described prosecutors in the Office of the DPP as 'zealots', 'without much experience in life' working in a 'sheltered workshop'.

Considering that the ranks of crown prosecutors have been enhanced, in recent years, by some of the finest and most able former defence barristers I have had the privilege to oppose in trials, and observing that the Office of the Director of Public Prosecutions has attracted many brilliant young solicitors with outstanding academic credentials, it is staggering that these comments could be made. Irrational and disrespectful comments such as these, although unsourced and unsupported, risk damaging public confidence in our role. Perhaps that is precisely the point of them.

Although all of these factors combine to produce an extraordinarily adversarial 'workplace', we have always enjoyed the unfailing support and confidence of Senior Crown Prosecutor Mark Tedeschi QC and that of our recently retired director of public prosecutions, Nick Cowdery QC. Our leaders expect us to be able to justify a particular approach or tactical decision by reference to the evidence and the DPP Guidelines. If we can do that, we may be confident of their backing through even the most trenchant and sustained criticism.

Criminal law is a fascinating area in which to practise. It is always exciting to take delivery of a new brief and the more so, in a slightly different way, when, due to

increasing budgetary constraints, the brief is delivered a very short interval before the start of the trial. Criminal trials provide a fascinating insight into human behaviour and into the real lives of members of our society. For so many of the players in a criminal trial, the events which are put under the forensic microscope are among the worst things, or have brought about the worst consequences, in their lives. Each of the players is a member of the community the crown prosecutor represents. Yet the crown prosecutor's role is to remain independent of any sectional or individual interest that is not consistent with the general public interest.

...it is not 'zealotry' to present a strong case if the evidence is itself strong.

Crown prosecutors take very seriously their role as independent ministers of justice striving to achieve what best serves the general public interest. Crown prosecutors are always aware that, whatever the result, there will be dissatisfaction, to some degree, in some quarters. Victims of crime and/or their traumatised relatives would often not be happy with any result short of putting the offender up against a wall for the immediate attention of a firing squad. Investigating police, who have often invested months or years of effort and emotion in a brief, also have an obvious interest in conviction and salutary penalty. This is why crown prosecutors, independent of any political interest and free from the direction of any police or investigatory office, are an essential and intrinsic part of an advanced criminal justice system.

Crown prosecutors have, as their direct defence counterparts, the public defenders. We enjoy extremely cordial and supportive relationships with the public defenders who, although fewer in number than the crowns, are all of course highly experienced criminal lawyers operating under similar pressures. They, like the crowns, are motivated by, and derive great personal satisfaction from, a sense of direct service to the community.

I have sought the views of many of my colleagues and, whether they are older or younger, with many years at the bar or just a few, they agree that service as a crown prosecutor is stimulating, absorbing and replete with human interest. Keeping abreast of developments in the criminal law and evidence is challenging and exacting. The years tend to fly by because it is not the kind of job in which one has it all mastered in a year or two. Our independence leaves room for humanity, compassion and kindness. On the other hand, it is not 'zealotry' to present a strong case if the evidence is itself strong.

Jury trials involve a very special type of advocacy and the presence of a jury commandeers a court efficiently toward a just result determined by a cross-section of the community which the crown prosecutor represents. For the lawyers and for the judge, a criminal trial is an unforgettable journey during which excellent professional relationships are often forged. Every trial teaches new lessons and hones new skills. Decisions made by ordinary citizens, the consequences of them upon themselves and the ripple effects upon many others serve as broadening and unforgettable life experiences.

Practice as a crown prosecutor is not an ordinary job. It is made extraordinary by a commitment to justice through independence, transparency and service in the best interests of the community. It has been a most fulfilling and fascinating 20 years.

The New South Wales Public Defenders

By Dina Yehia SC

On 18 May 1967 an article featured in the *Sydney Morning Herald* about the New South Wales Public Defenders Office. In reporting on the increase in demand for legal aid the journalist wrote:

> The sharp increase in the demand for legal aid in criminal cases during the last 18 months arises primarily from a spectacular run of acquittals and good behaviour bonds for those represented by the persuasive Public Defenders, but it is also partly due to the increase in crime and the cost of engaging private counsel.

A solicitor with a large criminal practice recently told a client with limited finance: 'apply for the public defender. He gets them off – and it's free!' Similar advice is being echoed along the corridors of Long Bay gaol.

The Public Defenders Office started in 1941. The first public defender to be appointed was Gordon Champion who sadly passed away as a result of a heart attack on his way to Darlinghurst Court. By 1967 there were three public defenders (all male). The legal aid first day fee was $36, $38 for murder, manslaughter and rape.

Some things have changed over the 42 years since 1967. We now have 25 public defenders, seven of whom are women. The remuneration has improved considerably.

But, in other respects, things have not changed at all. In 1967 public defender Mr Vizzard QC appeared for a notorious child kidnapper and murderer, Stephen Leslie Bradley. It was reported in the *Sydney Morning Herald* that Vizzard QC, next to Bradley, seemed to be the most hated man in Sydney.

Public defenders continue to be briefed in serious criminal trials both in the District and Supreme courts. They continue to appear for some of the most unpopular clients facing criminal prosecution.

Together with counsel at the private bar conducting serious criminal trials, the work of public defenders is intense and the responsibility great.

Of the 25 public defenders a number are based in regional centres such as Newcastle, Lismore, Dubbo and Wollongong. We are briefed by the Legal Aid Commission, the Aboriginal Legal Service, community legal services and private solicitors with a grant of legal aid.

While most of our work involves the cut and thrust of trial practice, a significant proportion (28 per cent) involves appellate work in the Court of Criminal Appeal and High Court.

An important function of the public defenders is to provide a mentoring and educational role for young practitioners. We provide an important resource by way of telephone advice to practitioners (over 637 in 2009–2010) and brief written advice to the profession on legal, ethical and practice issues.

The public defenders website is also a resource for the profession, students and the general public. It provides sentencing tables, papers relating to a variety of legal topics and features the John Stratton 'Criminal Law Survival Kit'. The website received over 363,000 hits in 2009–2010.

Together with counsel at the private bar conducting serious criminal trials, the work of public defenders is intense and the responsibility great.

One of the functions of the public defenders under the Public Defender Act is the provision of advice to the attorney general and others on law reform. We make submissions on criminal law reform at the request of the NSW and Australian Law Reform Commissions, Criminal Law Review and parliamentary committees of inquiry.

Changes in the law

Those of us who practise in the field of criminal law (both public and private counsel) have seen a number of changes in the criminal justice system over the last couple of decades. Some of these changes are a cause of concern. There has been a significant increase in the New South Wales prison population in the last decade and an apparent lack of vision and commitment with respect to how we deal more effectively with those processed through the system.

A number of factors may contribute to increased imprisonment rates. A higher crime rate and more effective law enforcement may mean more people are committing crime and more arrests and convictions than ever before. However, these are not the only factors. Indeed, a review of the crime statistics in the

24 months leading up to December 2010 reveals that among 17 major offence categories, the picture is one of stable or falling crime. Ten of the 17 major offence categories are stable and seven are trending downwards.[1]

While there is evidence of an upward trend in offences relating to the possession and trafficking of drugs, overall the director of the Bureau of Crime Statistics and Research (BOSCAR), Dr Weatherburn, is of the opinion that there is a general pattern of stable or falling crime rates.

Two factors that undeniably contribute to the increase in the rate of imprisonment in New South Wales are changes to the law in the areas of bail and sentencing.

In a 2010 Report, BOSCAR found that the NSW imprisonment rate is about twice that of Victoria.[2] Adjusted for population size, the per capita rate at which NSW sends convicted offenders to prison (204 per 100,000 population) is twice that of Victoria (104 per 100,000 population) This fact, and the higher remand rate in NSW are the main reasons for the higher prison population.

In 2009 Victoria had 813 adult defendants in prison on remand, giving it a remand rate of 19.3 per 100,000 population. By contrast, in the same year NSW had 2,592 defendants on remand, giving it a remand rate of 47.3 per 100,000 population. The higher NSW remand rate is due to higher bail refusal rate and higher bail revocation rate.

Bail

The fundamental purpose of the Bail Act is to permit release from custody of persons arrested and charged with an offence, but to provide for holding persons on remand on limited grounds. The right to liberty prior to conviction is not a lofty idea but a fundamental right. It is a function of the presumption of innocence.

However, the percentage of prisoners on remand has been trending upwards for some time with 25 per cent of New South Wales prisoners held on remand. Alarmingly, the proportion of juveniles held on remand is even higher. An increasing number of children and young people in NSW are being held on remand in the state's juvenile detention centres. In 2006, 3,623

Photo: iStockphoto.com

children and young people were admitted into custody on remand and by 2008 this figure had increased to 5,081 (NSW Auditor General 2008)[3].

Only one in seven, or 16 per cent of children and young people on remand will go on to receive a custodial sentence. In NSW 38.8 per cent of all children and young people on remand are Aboriginal or Torres Strait

The right to liberty prior to conviction is not a lofty idea but a fundamental right. It is a function of the presumption of innocence.

Islander. These statistics raise serious concerns about the operation and application of the Bail Act.

Considering that only 16 per cent of children on remand go on to receive a custodial sentence, a large number of children and young people are being unnecessarily exposed to an environment that can have a detrimental effect on their future and, arguably compounds, rather than alleviates recidivism rates.

A brief review of the various amendments to the Bail Act quickly highlights the more restrictive approach taken to bail since the Bail Act was enacted in NSW in 1978. When the Bail Act was enacted it created a presumption in favour of bail for all offences except violent or armed robbery. Although the 1976 *Report of the Bail Review Committee* had recommended a presumption in favour of bail for all offences punishable by imprisonment, the NSW government introduced the exceptions in response to public response to the shooting of a bank manager during an armed robbery by a person already on bail.

In 1986 an amendment to the Bail Act removed the presumption in favour of bail in relation to some serious drug offences. In the 25 years since then, 18 other amending Acts have removed the presumption in favour of bail for a number of offences.

In 2002 and 2003, the New South Wales Government introduced amendments to remove the presumption in favour of bail in relation to different types of 'repeat offenders', including 'repeat property offenders'. Further amendments in 2003, introduced the requirement that bail only be granted in exceptional circumstances if an accused is charged with murder, or charged with a 'serious personal violence offence'.

In practical terms the introduction of the 'exceptional circumstances' category means that numerous accused charged with murder are remanded for lengthy periods before they face trial. Where there is an acquittal at trial, there is little recourse by an individual to be compensated for the months or years spent on remand.

Between 1993 and 2007, higher courts and local courts appear to have become more severe in the sentencing of convicted offenders.

In 2007 the Bail Act was again amended with the introduction of section 22A. Under this amendment, accused persons can only make one application for bail except under certain limited circumstances. A recent report by BOSCAR demonstrates that this amendment has increased the numbers of remandees, as children and young people are remaining in custody for longer periods unable to reapply for bail.[4]

The current bail laws fail to strike the right balance between, on the one hand, not infringing upon the liberty of an accused person who is entitled to the presumption of innocence and, on the other hand, ensuring that an accused attends court and does not interfere with witnesses or commit other offences. This failure can only be addressed by a comprehensive review of the Bail Act with particular focus on the abolition of the presumptions against bail and the repeal of s 22A.

Sentencing

Another factor that has contributed to the increase in the rate of imprisonment in New South Wales is the increased use of imprisonment as a sanction and the increase length of prison sentences. Between 1993 and 2007, higher courts and local courts appear to have become more severe in the sentencing of convicted offenders. The increase in both the imposition of gaol sentences and the length of those sentences has contributed to the 50.3 per cent increase in the NSW prison population over the same period.

Sentencing in New South Wales courts is an issue of major public interest. Unfortunately, the media often portrays NSW courts as being increasingly lenient. The evidence, of course, suggests otherwise.

Of particular concern are the appalling figures of Indigenous people in custody. Indigenous people make up 21.3 per cent of the NSW prison population (of a total 2.1 per cent of the general population). The imprisonment rate of Indigenous Australians is more than 13 times higher than the imprisonment rate of non-indigenous Australians. Indigenous males account for 20.8 per cent of full time male prisoners and indigenous females 27.6 per cent of the full time female prison population.[5]

Sentencing in New South Wales courts is an issue of major public interest. Unfortunately, the media often portrays NSW courts as being increasingly lenient. The evidence, of course, suggests otherwise. The following tables display the increase in the imposition and length of prison sentences in NSW local courts between 1993 and 2007:[6]

Table 5. Percentage of convicted offenders imprisoned, by principal offence,

NSW local courts, 1993 to 2007

	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	Trend
Assault	7.5	8.1	9.1	8.0	7.9	8.9	8.8	7.8	8.4	9.1	10.0	10.1	10.4	11.5	10.8	Upward**
Sexual assault & related offences	15.7	13.6	15.1	17.1	14.6	12.7	15.2	16.1	24.6	21.8	21.7	30.7	27.1	24.0	24.3	Upward*
Robbery	75.0	58.3	27.0	40.5	40.9	47.9	49.1	25.8	45.7	40.7	45.7	50.0	51.4	44.3	45.3	Stable
Break & enter	33.7	33.9	36.9	39.3	40.2	42.8	44.4	41.1	44.6	44.7	46.1	48.5	49.7	48.8	48.5	Upward**
Theft (except motor vehicles)	8.0	8.1	8.0	8.5	9.0	10.9	11.7	11.8	11.4	11.5	10.7	12.9	12.6	12.5	12.4	Upward**
Motor vehicle theft & related offences	31.9	31.8	33.6	33.3	39.6	33.6	34.8	33.7	39.9	38.5	38.5	40.3	42.2	42.0	39.5	Upward**
Fraud & related offences	8.8	9.2	9.7	7.9	7.9	11.2	10.2	9.8	8.7	9.0	9.0	9.3	10.2	8.1	9.4	Stable
Deal, traffic or cultivate illicit drugs	8.5	7.9	9.8	9.8	10.7	9.2	11.4	10.2	14.8	13.4	13.5	12.2	14.7	14.3	13.3	Upward*
Property damage	2.9	2.7	3.0	3.5	3.6	3.5	4.1	3.7	4.4	4.4	4.4	4.7	4.9	4.5	5.1	Upward**
High range PCA	2.5	2.8	3.3	2.2	2.6	2.9	2.6	2.3	2.2	2.8	2.9	3.9	4.3	5.0	5.1	Upward*
Breach of domestic violence order	13.2	13.9	14.0	10.6	11.1	11.5	12.1	11.0	9.9	10.9	10.0	12.3	12.4	13.0	16.0	Stable

* Statistically significant at < .05

** Statistically significant at < .001

Table 6. Average length of prison sentence (months) imposed against convicted persons, by principal offence,

NSW local courts, 1993 to 2007

	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	Trend
Assault	4.5	4.2	4.3	4.3	4.3	4.6	4.4	4.8	5.0	5.0	5.6	6.0	6.2	6.2	6.2	Upward**
Sexual assault & related offences	6.6	5.1	6.8	5.3	7.2	6.7	5.9	8.6	6.9	6.3	7.3	7.6	7.1	7.6	7.1	Upward*
Robbery	8.4	8.4	7.1	6.3	6.6	8.0	8.1	5.4	6.3	7.7	7.2	6.9	8.4	7.1	7.6	Stable
Break & enter	8.0	7.9	7.7	7.4	7.7	7.6	7.5	7.4	7.5	8.2	8.4	8.6	8.7	8.9	8.5	Upward*
Theft (except motor vehicles)	4.2	4.4	3.8	4.1	4.2	4.2	4.0	4.0	4.2	4.5	4.8	5.0	4.9	5.0	4.8	Upward*
Motor vehicle theft & related offences	7.2	7.1	7.3	6.6	6.7	6.7	6.1	6.3	6.2	6.9	7.0	7.0	7.6	7.8	6.8	Stable
Fraud & related offences	5.0	5.1	5.2	5.3	5.2	5.1	5.2	5.4	5.2	5.9	5.7	6.3	6.1	6.1	6.2	Upward**
Deal, traffic or cultivate illicit drugs	4.9	5.3	5.4	5.1	5.9	6.1	6.6	6.1	6.7	7.2	7.6	7.6	6.9	7.2	6.7	Upward**
Property damage	2.9	2.8	3.1	3.2	3.2	3.1	3.7	3.5	3.7	3.9	4.0	3.5	3.6	4.2	3.9	Upward**
High range PCA	4.5	4.1	4.7	4.5	4.6	5.1	5.5	5.4	5.4	5.9	6.5	6.3	6.9	7.1	7.0	Upward**
Breach of domestic violence order	2.1	2.7	2.7	2.6	2.8	2.8	3.2	3.4	3.4	4.1	4.5	4.6	4.4	4.7	4.5	Upward**

** Statistically significant at < .05*

*** Statistically significant at < .001*

There have been several major sentencing reforms that may have impacted upon the sentencing trends, most notably the introduction of the *Crimes (Standard Minimum Sentencing) Act 2002* (NSW). No doubt some of these reforms have been motivated by demands from some segments of the community for heavier sentences.

A study conducted by the Judicial Commission of NSW considered the effects of Division 1A of the *Crimes (Sentencing Procedure) Act 1999* (standard non-parole periods) on the duration of full-time imprisonment. Only three of the offences in the table to Division 1A had sufficient numbers to warrant a comparison between the sentences in the pre and post-periods that was statistically significant. The study found that both the length of the non-parole period and the full terms of sentences increased for these offences.[7]

The largest increase occurred for the offence of wounding with intent to do grievous bodily harm. The term of sentence increased by 60 per cent with the median non-parole period more than doubling.

For sexual assault (s61 of the Crimes Act) the median full term increased by 28.6 per cent with the median non-parole period increasing by 60 per cent.

For murder, the median full term increased by 27.8 per cent with the median non-parole period increasing by 17.9 per cent.

There is little, if any, evidence that increase in prison sentences reduces the rate of crime in the community. If the primary purpose of increases in imprisonment is to fulfil principles of retribution and denunciation, we have to ask ourselves at what cost?

The financial cost to the community of locking people up has become obscene. It costs more than $200 a day to keep an offender in custody. In 2008, net recurrent and capital expenditure on prisons in Australia exceeded $2.6 billion per annum.[8] One ponders the real achievements that could be made if even a modest percentage of this outlay was re-directed to rehabilitative initiatives such as post release programs.

The social cost of an increasingly punitive society is much harder to quantify. Minds will differ as to whether harsher custodial penalties really address the fears and concerns of the community. Interestingly, a jury survey conducted in Tasmania between September 2007 and October 2009 revealed that 52 per cent of jurors surveyed chose more lenient sentences than the sentencing judge had imposed and only 44 per cent were more severe than the judge. The study surveyed 698 jurors from 138 trials.[9]

The study provides some evidence that a better-informed public could have an impact upon community perception that sentences are too lenient. The results suggested that modest improvements in knowledge levels could be gained by providing better information and potentially change attitudes.

Politicians should not be afraid to conduct a comprehensive review of bail and sentencing laws in this state. The concern that politicians are judged poorly if perceived to be 'soft on crime' can only be properly redressed by putting in place mechanisms that ensure a well-informed community. Some initiatives have already been taken in that direction. Publishing sentencing judgments is one such initiative but more needs to be done by way of community education and by correcting the inaccurate and emotive scaremongering that emanates from some talkback radio.

True reform in the area of bail and sentencing will require resolve, courage and rational debate. In the meantime offenders are being imprisoned at a higher rate and to longer sentences. These increases place a heavy burden on the state's resources including on the Public Defenders Office.

Endnotes

1. 'NSW Recorded Crime Statistics 2010' NSW Bureau of Crime and Statistics and Research, 19 April 2011.
2. 'Why Does NSW have a Higher Imprisonment Rate Than Victoria?' BOSCAR 2010.
3. 'Releasing the Pressure on Remand', Youth and Justice Coalition's Bail Me Out Young Offenders and Bail Report, September 2009.
4. BOSCAR: Vignaendra et al (2009).
5. Corben S (2010) NSW Inmate Census, Sydney: Corrective Service NSW.
6. 'Trend in Bail and Sentencing Outcomes in NSW Criminal Courts: 1993–2007' , Lulham et al BOSCAR November 2008.
7. 'The impact of standard non-parole period sentencing scheme on sentencing patterns in NSW', Judicial Commission of NSW May 2010, p.57.
8. 'Prison populations and correctional outlays: The effect of reducing re-imprisonment', Weatherburn et al BOSCAR, December 2009.
9. 'Public judgment on sentencing: Final results from the Tasmanian Jury Sentencing Study', Warner et al, *Australian Institute of Criminology*, No 407 February 2011.

From tax to terrorism, common law to code

Chris Craigie SC writes about prosecuting for the Commonwealth

When I commenced my term as Commonwealth DPP I expected that at least some aspects of the role would have intellectual elements not too far distant from the work in which I had been engaged at the bar here in Sydney, albeit in what some people misguidedly insist on calling 'the other side'. In the event, my experience over the past 3½ years as director has both confirmed some expectations and also thrown up a whole range of experiences that have been entirely different to anything that I might have imagined. Instead of my former and primarily advocacy-focussed role, I find myself in an environment that often calls upon traditional barristers' skills in swift distilling and appreciating complex issues but also requires those skills to be adapted and supplemented to meet the daily demands of leading a national legal practice. The practice itself is unique, carrying with it all the challenges inherent in prosecuting across an extraordinary range of offence categories in jurisdictions across Australia.

The laws of the Commonwealth, and accordingly the prosecution practice of the Office, have expanded and changed significantly over the quarter century since it was created. With those changes the Commonwealth DPP's remit has expanded from a practice perhaps most strongly identified with prosecuting fraud and the importation of drugs to a practice much more diversified in its subject matter. This currently includes the areas of corporate crime, market manipulation and insider trading, counter terrorism, cyber-crime via internet child abuse, serious and organised crime and border protection, to name but a few. The key concepts used in prosecuting Commonwealth offences have also changed significantly, with the move from a case-based common law model to one requiring the overall application of criminal responsibility principles as legislated in the *Criminal Code Act 1995*.

If one were to identify one constant theme in the CDPP's life and development, particularly in recent years, it would be in the remarkable capacity of the Office to take on new changes and challenges and to adapt in a timely fashion with new skills, expertise and effective responses.

The Prosecution Policy of the Commonwealth

In February 1986 the then attorney-general presented a statement to parliament that had been prepared by the Office of the Director of Public Prosecutions. The statement set out the guidelines to be followed in the making of decisions relating to the prosecution of Commonwealth offences. That document, the *Prosecution Policy of the Commonwealth* (*Prosecution Policy*), reflected the significant changes to the Commonwealth prosecution process affected by the *Director of Public Prosecutions Act 1983* and is very much the enduring and invaluable legacy of the founding director, Ian Temby QC. The *Prosecution Policy* was revised in 1990 and again more recently in 2009 to include guidance on victims, mental health of offenders and prosecution disclosure.

The laws of the Commonwealth, and accordingly the prosecution practice of the office, have expanded and changed significantly over the quarter century since it was created.

The *Prosecution Policy* provides the fundamental underpinning of sound prosecution principles to be applied in undertaking our work across the different jurisdictions in Australia. Its primary importance in the most essential aspects of maintaining a fair and effective prosecution service cannot be overstated. The policy serves two main purposes; namely to promote consistency in decision making, and to inform the public by clearly articulating those principles upon which the CDPP performs statutory functions.

The test in relation to the decision to commence or continue a prosecution is one of the most important provisions contained in the *Prosecution Policy.* This test mirrors that which is contained in all of the Australian state and territory prosecution policies. Indeed, it is in very similar terms to the tests applied by the DPP for England and Wales and several other countries sharing a common law heritage. The essence of the test is that a prosecution should not proceed if there is no reasonable prospect of a conviction being secured. If that test is met, the prosecutor must then consider whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to proceed.

Photo: Australian Customs Service

Comparisons with state and territory DPP counterparts

Whilst the CDPP shares much, most importantly an ethos of independence, with our state and territory DPP counterparts, we also face some challenges that are unique to the federal prosecutor. The work of the CDPP extends through all levels of the courts from magistrates' courts to the High Court of Australia. We have tended to be structured in a way that permits us to operate in a way that allows the same CDPP lawyers to be involved through most stages of the prosecution process. CDPP lawyers appear on mentions, bail, summary matters, committals, trials and in some species of appeals. Where our own in-house solicitor-advocates or in-house counsel do not appear, we brief counsel from the various Australian bars. In many cases those counsel will be from a group that we have identified though experience as having the specialist skills required to operate effectively in particular areas of Commonwealth criminal law. Of course that group is an open category that changes from time to time as people develop a profile that brings them to notice. For sensible reasons, our practice and structure does differ somewhat from what is possible for the majority of state and territory DPPs. In the case of those Offices, the emphasis is mainly on committals and trials of what one might call 'traditional' offences, commonly with police prosecutors handling many matters at earlier stages and trial work being undertaken by a large component of salaried counsel commissioned as crown prosecutors.

The CDPP also receives referrals from many agencies in addition to the Australian Federal Police. There really is no 'typical' CDPP brief to prosecute. By way of example, last year we received briefs of evidence from over 30 Commonwealth agencies, as well as from state and territory agencies that have undertaken investigations that resolve in Commonwealth charges being laid. The diversity of our work reflects the range of regulatory and other agencies with whom we work. Our prosecutors may find themselves faced with anything from the illegal importation of Mexican red-knee tarantulas, to using a 'carriage service' (i.e. a telephone line) to harass members of the Federal Court, failing to vote, engaging in large scale tax fraud, sexual slavery, terrorism, insider trading and conspiracy to import commercial quantities of cocaine.

Prosecuting the range of Commonwealth offences in eight different jurisdictions certainly makes for a varied and diverse practice. A given day may well find CDPP counsel appearing in the High Court, whilst others are in engaged in Supreme Court, County and District Court trials. That same day will find our lawyers in magistrates' courts, some of them quite remote, including perhaps one of our lawyers flying in to prosecute in a tiny court on a Torres Strait island. As we prosecute through the regional offices in the capitals (plus Cairns and Townsville), it is important that the consistent and national character of the practice is maintained. This is facilitated by frequent communication with the regional Deputy Directors and guidance from head office in Canberra, to assure adherence to uniform standards across the office and also through the *Prosecution Policy*. I add that, another element of cohesion should rest with the director himself or herself, through a reasonably frequent presence in the various offices and keeping in touch as much as human energy and the scale and distribution of the offices allows.

Prosecuting the range of Commonwealth offences in eight different jurisdictions certainly makes for a varied and diverse practice.

Introduction of the Criminal Code

On 15 December 2001 the general principles of criminal responsibility contained in the *Criminal Code* were applied to all Commonwealth offences. This move from common law to Code-based law posed a

significant challenge for the CDPP, our investigating agencies and the courts.

Whilst the Criminal Code was developed as a model, with the view of general application across all criminal jurisdictions in Australia, since 2001 only three jurisdictions have adopted Code provisions; being the Commonwealth, the ACT and Northern Territory. I am not the first to observe and experience that coming to the Code with the ingrained analytical habits of a common law background requires considerable patience and skill in translation. The task may often fall to the Commonwealth prosecutor to assist a court as to the principles that govern criminal responsibility and the way in which they are to be applied in Commonwealth cases through Chapter 2 of the Code.

The Criminal Code is premised upon a concept that requires each offence to be broken down into physical and fault elements. Physical elements are limited to conduct, result of conduct, or a circumstance in which conduct, or a result of conduct, occurs. Once the physical elements of an offence are determined, fault elements can either be specified in an offence or the default fault elements in Chapter 2 are applied. Fault elements are restricted to intention, knowledge, recklessness or negligence, although other fault elements may apply if an offence so specifies.

There is a developing High Court and superior court jurisprudence on the interpretation of the Code. The High Court has provided guidance in several areas. In particular, in 2008 in the matter of *The Queen v Tang [2008] HCA 39* the High Court considered the elements of the slavery offences and the process of determining the elements of an offence in accordance with the general principles of criminal responsibility in Chapter 2 of the Criminal Code. In 2009–10 the High Court considered conspiracy and the interpretation of section 11.5 of the Criminal Code in the case of *R v LK and RK* [2010] HCA 17. The implications of section 109 of the Constitution when applied to the interaction with or conflict between the Commonwealth's criminal laws and those of states has been the subject of consideration and much discussion since the related High Court decision in *R v Dickson* [2010] HCA 30. As might be expected, there are several new matters involving interpretation of the Code currently before the High Court.

Wei Tang outside the Magistrates Court in Melbourne. Photo: Trevor Pinder / Newspix.

Sentencing

The basic mechanisms and principles relating to the sentencing of persons who have committed offences against laws of the Commonwealth are to be found in Part 1B of the *Crimes Act 1914*. This largely provides a uniform sentencing law for Commonwealth offences; however it is not the only or exclusive resource of the court when sentencing federal offenders. The *Judiciary Act 1903* also allows courts to utilise those additional alternative sentencing options that may be available in the sentencing jurisdiction, such as community service orders or the intensive correction orders that have recently replaced periodic detention in New South Wales. The reality is that one must recognise that Commonwealth matters represent a minority of a state jurisdiction's trial caseload, under 20 per cent in NSW and sometimes less than that in terms of a particular judicial officer's day to day experience. In sentencing, as in issues involving interpretation of the Criminal Code, the role of a Commonwealth prosecutor before a court of first instance necessarily requires responsibility and tact in being willing and able to assist the court, when requested and if necessary. Although identifying

that happy place between too much and too little in the volume of case law and statistics presented is not always easy, invariably this is achieved in a manner that is concise, restrained and respectful.

Maintaining a degree of consistency in federal sentencing across all Australian jurisdictions carries an inherent level of challenge. The perennial issue was recently considered by the High Court in *Hili v the Queen; Jones v The Queen* [2010] HCA 45. In that case the High Court held that the consistency that is sought in federal sentencing is a consistency in the application of the relevant legal principles, not a numerical or mathematical equivalence. In summary, this requires that the first and paramount means of achieving consistency in federal sentencing is to apply the relevant statutory provisions, without being distracted or influenced by provisions that would apply if the offender were not a federal offender. In seeking consistency, sentencing judges must have regard to what has been done in other cases. However, the range of sentences imposed in the past does not fix the boundaries within which future judges must sentence.

It will be seen from the example of the above necessarily selective summary of appellate jurisprudence, that although there has been an historical centralising tendency in some aspects of our national life, the distillation of consistent Commonwealth sentencing practices through the various parts of our federal 'laboratory' is likely to remain a continuous process.

The Office

From around one hundred people a quarter century ago the CDPP now employs in excess of 500, with an office in each state and territory capital, plus the offices in Cairns and Townsville to cover two dispersed population hubs of Queensland. The office has retained a remarkable degree of continuity, in many cases refreshing its senior leadership from people who have grown to professional maturity in long service with the office. In the case of the CDPP this has operated as a healthy thing in the way that it has fostered the strong sense of organisational identity. In the mix with much talent that has come from outside, stability sits quite comfortably alongside change in an office accustomed to working in a dynamic law enforcement environment.

As director I have always been very conscious of the strong and positive institutional culture of the CDPP's staff. They are committed to ideals and practices reflective of high ethical standards, dedication and professional excellence. The latter is particularly so in regard to the swift mastery of new legislation and offence provisions in novel areas of practice. The need for such a response frequently arises for the Commonwealth's prosecutors. Assimilating and adapting to new areas of practice as they developed is a particular intellectual strength of CDPP lawyers in contributing to the law enforcement objectives of the Commonwealth, its regulators and criminal justice agencies.

Maintaining a degree of consistency in federal sentencing across all Australian jurisdictions carries an inherent level of challenge.

I came to the appointment as director after more than thirty years in practice and with more than a little knowledge of the Office of the CDPP, albeit limited to that of an observer. In that sense I was no stranger to the fact that this is an Office that attracts and retains staff with talents in the first rank of legal, administrative and managerial skill. I understand now how this has been done and maintained throughout the history of the office which I am privileged to lead.

Truth and the law

The Sir Maurice Byers Address was delivered by the Hon JJ Spigelman AC on 26 May 2011.

One of the great delights of my practice at the bar was the virtually daily interaction I had with Sir Maurice Byers over a period of some 14 years, when we were members of the same floor with chambers only a few metres apart. He was, as everyone who remembers him will attest, the consummate barrister's barrister.

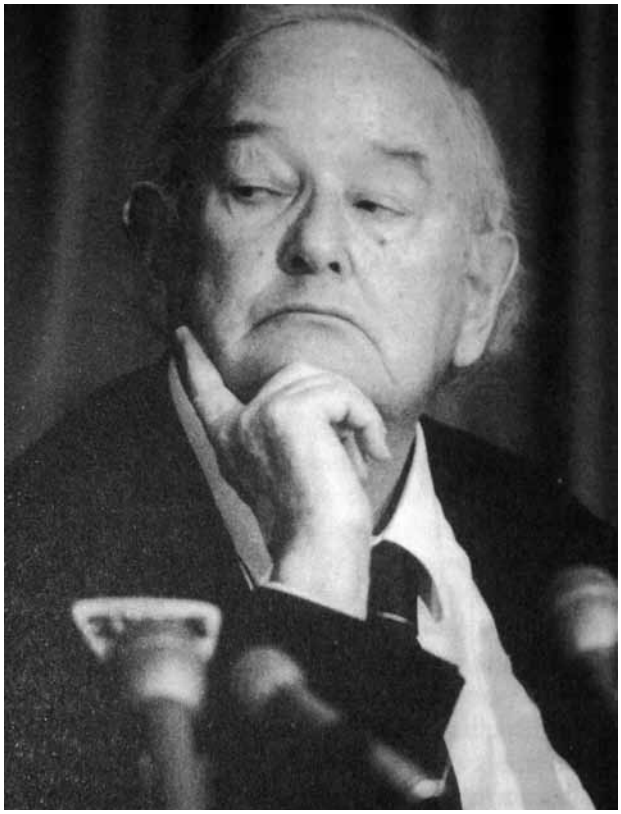
This personal contact occurred in the years after he retired as solicitor-general but still concentrated on appellate work. However, he could and did do it all. He had the full range of skills. Nevertheless, his capacity for careful analysis and the fashioning of a compelling argument, without wasted words but with unerring accuracy for the issues at hand, was unsurpassed.

Amongst his many attributes he was, without question, the foremost constitutional counsel of his era. His success in the High Court in constitutional cases when appearing as solicitor-general for the Commonwealth was extraordinary. That success was not only measured in the outcome of particular cases. Those were tactical victories, representing stages in a broader Commonwealth strategy, which he pursued with unerring consistency.

In terms of his personal relationships, perhaps the most extraordinary aspect of meeting Sir Maurice was that a man of such consummate ability would, without affected humility, invariably treat others with courtesy, even kindness. He exuded an entirely disarming charm. He was one of the few people I have ever met who apologised to me whenever I interrupted him.

His wit was sharp, but never descended to personal derogation. I remember a night in Canberra, at a then new restaurant called, I think, The Republic, which prided itself on its avant garde cuisine. Someone suggested that he may wish to select emu or kangaroo meat from the modish menu. Sir Maurice growled in reply: 'I refuse to eat the Coat of Arms'. I well recall the short, one sentence, handwritten note I received from Sir Maurice upon my appointment as chief justice. It read: 'Congratulations on starting at the top'.

I have taken as my theme for this address the relationship of truth and the law. I do this in recognition of the fact that the overwhelming majority, well over 90 percent, of all litigation is determined by findings of fact. I have done this consciously at the end of a judicial life when I sat only as an appellate judge, for whom it is all too easy to succumb to that intellectual snobbery of legal



practice which accords highest status to the capacity for technical analysis of legal points. In the practical operation of the law in our society, such points are of comparatively minor significance. What matters most are the facts.

Dixon and Jesting Pilate

As an appellate judge, I am reminded of the riposte that Sir Owen Dixon once made to a woman at a dinner party, in response to her observation about how wonderful it was to dispense justice. Either cynically or in exasperation, Dixon said:

> I do not have anything to do with justice, madam. I sit on a court of appeal, where none of the facts are known. One third of the facts are excluded by normal frailty and memory; one third by the negligence of the profession; and the remaining third by the archaic laws of evidence.[1]

In this address I will be particularly concerned with the first and third of Sir Owen's examples, i.e., 'normal frailty and memory' and 'the archaic laws of evidence'. It would be churlish, indeed ungrateful, in this, my final address to the New South Wales Bar Association, with

whose officers I have had a close and fruitful relationship throughout my period as chief justice, to canvass a subject such as 'negligence of the profession'.

When not subject to the intolerable burden of having to be polite at dinner, Sir Owen Dixon expressed the view that truth seeking was the objective pursued by the courts. In one address he said:

> For some eighteen years I played my part as counsel at the bar, that is to say I was a humble auxiliary in the courts that seek day by day in case after case to come at the truth both of the law and the facts in the faith which we are all taught that that is justice.[2]

This passage occurred in the midst of a long, rather rambling set of reminiscences which Dixon delivered to the Royal Australian College of Surgeons and which he entitled 'Jesting Pilate'. He adopted that characterisation of Pontius Pilate's conduct from the opening sentence of Francis Bacon's essay 'Of Truth', being the first in Bacon's collection of Essays, one of those rare works of the human hand that is of enduring significance, even after four centuries.

Dixon concluded this address by quoting Bacon's first sentence: ''What is truth?' said jesting Pilate, and would not stay for an answer.'

To which Dixon added an observation: 'I have not forgotten that when Pilate said this he was about to leave the judgment hall.'

This is a rather enigmatic remark and, I say with considerable regret in view of my admiration of Sir Owen Dixon's intellect which I have expressed on earlier occasions,[3] he was quite wrong. So, probably, was Bacon.

As reported in the Gospel of John, Pilate's question 'What is truth?' was in response to an assertion by Jesus that he had come into the world 'to testify to the truth'. It is by no means clear to me that Bacon was correct to say that Pilate was 'jesting'. I prefer the interpretation by the author of an innovative and inventive biography of Pilate, innovative and inventive because virtually nothing is known about the man, that:

> Most probably Pilate thought Jesus was out of his depth and was simply tossing the subject back to him, as confident men do.[4]

With respect to Owen Dixon's additional remark, it

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was incorrect for him to state that this observation was made as Pilate 'was about to leave the judgment hall'. He did leave, but only to consult the people gathered outside, who in our legal terms constituted, in effect, the jury for the occasion. According to John, this occurred during the period that Pilate was asserting that he could 'find no case against' Jesus and was asking whether he should be released. After the consultation Pilate returned to the 'judgment hall' and, to use our terminology again, continued the trial.

For purposes of the topic of this address, the intriguing issue is what Dixon meant by his reference to time. Did he mean that the trial which, according to his version, had just concluded was not concerned with the identification of truth? Or, did he mean that the search for truth in the trial had concluded, but that there was always the possibility of doubt about the adequacy of the process by which the truth had been found? Both these quite distinct questions must be addressed by those of us engaged in the common law process of determining facts. They are the focus of this address.

Truth and the adversarial system

The common law adversarial system of legal procedure is not, in terms, directed to the establishment of truth. There are three views about the relationship between truth and the adversarial system. They are:

- The adversarial system is not concerned with truth, but with 'procedural truth' or 'legal truth', as distinct from substantive fact.[5]
- The adversarial system is the most effective mechanism for the discovery of truth by the application of the Socratic dialogue.
- The adversarial system seeks truth, but that search is qualified when the pursuit of truth conflicts with other values.

The first position was cogently stated by Sir Frederick Pollock who said:

> Perhaps the greatest of all the fallacies entertained by lay people about the law … is that the business of a court of justice is to discover the truth. Its real business is to pronounce upon the justice of particular claims, and incidentally to test the truth of the assertions of fact made in support of the claim in law, provided that those assertions are relevant in law to the establishment of the desired conclusion; and this is by no means the same thing.[6]

To similar effect is the comment by Viscount Simon LC that: 'A court of law … is not engaged in ascertaining ultimate verities: it is engaged in determining what is the proper result to be arrived at, having regard to the evidence before it.'[7]

The relationship between this first position and the adversary system arose directly for decision by the House of Lords in a case involving a claim for public interest immunity. The trial judge, the late Lord Bingham sitting at first instance, determined that he would inspect documents involving deliberations by ministers and civil servants at the highest level with respect to a Cabinet decision that was under challenge on the grounds of improper purpose. He did so on the basis that such inspection was necessary in the interests of the administration of justice, because those documents could give 'substantial assistance to the court in determining the facts upon which the decision in the cause will depend'.[8]

The proposition upon which Lord Bingham based this conclusion was:

> The concern of the court must surely be to ensure that the truth is elicited, not caring whether the truth favours one party or the other but anxious that its final decision should be grounded on a sure foundation of fact. Justice is as greatly affronted where a plaintiff is wrongly awarded relief as where he is wrongly denied it.[9]

On appeal, the Court of Appeal said that this was the wrong test. The question was not whether the documents would assist the court in determining the facts but whether there was a likelihood that the documents would support the case of the party seeking discovery. The House of Lords agreed with the Court of Appeal.

Lord Wilberforce identified the relevant distinction in the following way:

> In a contest purely between one litigant and another, such as the present, the task of the court is to do, and be seen to be doing, justice between the parties – a duty reflected by the word 'fairly' in the rule. There is no higher or additional duty to ascertain some independent truth. It often happens, from the imperfection of evidence, or the withholding of it, sometimes by the party in whose favour it would tell if presented, that an adjudication has to be made which is not, and is known not to be, the whole truth of the matter: yet if the decision has been in accordance with the available evidence and with the law, justice will have been fairly done. It is in aid of justice in this sense that discovery may be ordered, and it is so ordered upon the application of one of the parties who must make out his case for it. If he is not able to do so, that is an end of the matter. There is no independent power in the court to say that, nevertheless, it would like to inspect the documents, with a view to possible production, for its own assistance.[10]

The second position is often expressed in the succinct statement of Lord Eldon in 1822 that: 'Truth is best discovered by powerful statements on both sides of the question'.[11] This frequently cited[12] quotation, however, is taken out of context. Lord Eldon's full judgment is revealing. He said, in relation to a barrister appearing for a client:

> The result of the cause is to him a matter of indifference. It is for the court to decide. It is for him to argue. He is … merely an officer assisting in the administration of justice and acting under the impression, that truth is best discovered by powerful statements of both sides of the question.'[13]

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The adversarial system was comparatively new in 1822. It is by no means clear that, as that system has developed in the course of the century, barristers remained 'indifferent' to the result of the cause. However, as Sir Gerard Brennan pointed out with reference to the full quotation from Lord Eldon: 'Counsel's duty is to assist the court in the doing of justice according to law'.[14]

In the address I gave on the occasion of my swearing-in as chief justice on 25 May 1998, I propounded this second position. I noted that the adversary system, as a manifestation of the power of Socratic dialogue, was one of the greatest mechanisms for identification of truth that had ever been devised.[15] This perspective reflected my then experience as a member of the bar. Judicial experience has provided a different perspective.[16]

I have come to realise that the Socratic dialogue works when both disputants are, as Lord Eldon understood, indifferent to the result. Seeking victory does not necessarily have the same salutary consequence of attaining the truth.[17]

The third and intermediate position reflects the recognition that the untrammelled search for truth may impinge upon other public values. It is sometimes referred to in terms of a tension between 'truth' and 'justice'.[18]

As long ago as 1846, in a judgment which Lord Chancellor Selborne would later describe as 'one of the ablest judgments of one of the ablest judges who ever sat in this court',[19] Vice Chancellor Knight Bruce said:

> The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still for obtaining of those objects, which however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination … Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much.[20]

The vice chancellor went on to refer to paying 'too great a price … for truth'. This is the formulation which has subsequently been frequently invoked.[21]

I have become a supporter of the third position. It should now be accepted that the task of fact finding for the courts is to identify the truth, subject to the principles of a fair trial and to specific rules of law and discretions designed to protect other public values which, on occasions, are entitled to recognition in a way which constrains the fact finding process.

The significance of truth seeking

The recognition that the principal purpose of legal proceedings is to identify the true factual circumstances of any matter in dispute is of fundamental significance for the administration of justice and the maintenance of public confidence in that system. If this recognition constitutes a modification of the adversary system, it is a modification that should be made. The search for

truth is a fundamental cultural value which, at least in Western civilisation, is a necessary component of social cohesion and of progress. The law must reflect that fundamental value and do so at the core of its processes.

The public will never accept that 'justice' can be attained by a forensic game. The public require a system dedicated to the search for truth, subject only to the fairness of the process and consistency with other public values.

We seem now to have passed through the convulsion in the humanities and social sciences academy of that conglomeration of doctrines often referred to as 'post modernism'. The only thing that was ever interesting about 'post modernism' was what it was 'pre'. The 'post modernist' form of relativism that drew on the difficulties of proving truth and the distortions that can arise in the truth finding process to conclude that the search for truth should be abandoned would, in the end, have destroyed the cloistered academy which generated this perversion.

It was, of course, comforting for such members of the academy to know that 'post modernism' implied that an external observer, such as an academic, was always in a better position to understand what was going on than any practitioner in the field under consideration. Such doctrines, for example, necessarily led to the conclusion, first identified by Gore Vidal, that works of literature were not written for the purpose of being read, but for the purpose of being taught. Insofar as the strand in our legal tradition which denied that fact finding in litigation was directed to the identification of true facts gave comfort to this transient ideology in other contexts, any such contribution, is no longer operative.

Once the central significance of truth in fact finding is acknowledged, certain corollary principles follow. First, any exception or qualification to achieving that goal must be clearly defined and narrowly confined. Secondly, those principles, rules and practices which have such an effect must be subject to regular review, in order to determine whether their original justification is still valid and valid to the full extent of the qualification. Only if that is done, and done on a regular basis, can we confidently assert that the commitment to the pursuit of truth remains a core value.

The approach that should guide reform in this context to matters of this character is that expressed by the Supreme Court of the United States, in the case which overturned the longstanding principle that a wife was not a competent witness on behalf of her husband who was an accused in a criminal trial.

In *Funk v United States*, the court said: 'The fundamental basis upon which all rules of evidence must rest – if they are to rest upon reason – is their adaptation to the successful development of the truth. And since experience is of all teachers the most dependable, and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule.'[22]

The public will never accept that 'justice' can be attained by a forensic game. The public require a system dedicated to the search for truth, subject only to the fairness of the process and consistency with other public values.

Restrictions on truth finding

I turn to what Sir Owen Dixon called 'the archaic law of evidence.' The rules of practice and procedure and exclusionary rules of evidence which result in potentially relevant evidence not being taken into account as a matter of law are multifarious. In a lecture of this character I can only list them without pretending to be comprehensive.[23] They include:

- Legal professional privilege
- Public interest immunity
- Confessional privilege, where recognised
- Journalists' privilege, where recognised
- Exclusion of illegally obtained evidence
- The privilege against self-incrimination
- Limited (or, in criminal cases, the absence of) inferences from failure to testify or call evidence
- The principle of finality, preventing the reopening of a trial[24]

- The related double jeopardy principle in a criminal context
- Restrictions on the admissibility of fresh evidence on appeal
- The exclusion of involuntary or unknowing confessions
- Restrictions on the use of tendency or coincidence evidence
- The exclusion of hearsay evidence
- The exclusion of lay opinion evidence
- The exclusion of evidence after balancing prejudice and probative value
- The parol evidence rule
- The rule against splitting a case
- Exclusion of evidence of settlement offers

In addition to these evidentiary rules, there is a range of principles and practices that are designed to ensure a fair trial, particularly in criminal proceedings. The principle of a fair trial is manifest in numerous rules of evidence and aspects of practice and procedure. I have addressed this matter elsewhere.[25]

...experience suggests that a systematic review of many practices and rules by reason of the demise of the civil jury would be justified.

Many of these evidentiary rules and principles of a fair trial were developed at a time when a jury was the tribunal of fact in both civil and criminal cases. Some were adopted because of the susceptibility of juries to improper influence. Others because juries gave no reasons and it was not possible to detect or correct errors of fact.

Many of these rules remain applicable, long after the civil jury has disappeared and judge alone trials occur even with respect to indictable offences. There have been significant statutory modifications. The law of evidence has often been reviewed. Many of the changes contained in the Evidence Acts can be seen as adapting to this change in the constitution of the tribunal of fact.[26]

There remains a reluctance to systematically review longstanding rules that are in fact anachronisms. Issues of unreliability of evidence are the basis for a number of these rules and principles, e.g., the exclusion of involuntary confessions, of hearsay evidence, of evidence of general bad character, of coincidence or tendency evidence, once called similar fact and propensity evidence. Each of these exclusionary rules has accumulated exceptions and subrules, at common law and under statute. Insofar as they turn on questions of unreliability, as distinct from conflict with other public values, it may be that they are no longer appropriate outside the context of a jury trial.[27]

As a matter of practice in civil litigation, such exclusionary rules are often not invoked when they could be. Longstanding business records provisions removed the hearsay rule in most civil cases. It is now rare for documents not to be admitted subject to relevance. As a matter of practical reality, the system may have adapted informally to the change in the identity of the fact finder.

As the United States Supreme Court said in *Funk*, as quoted above, experience suggests that a systematic review of many practices and rules by reason of the demise of the civil jury would be justified. In this regard I would add it was the jury that determined a fundamental aspect of our civil procedure. A single continuous trial, at which all matters were to be determined at the same time is a product of the jury system. It may still be appropriate on cost and efficiency grounds, but not necessarily always.

Civil law jurisdictions have not had juries and, accordingly, have generally adopted an episodic procedure. Other principles and practices have developed differently. Many of the basic differences between the two systems have, convincingly, been attributed to the common law tradition of fact finding by juries.[28]

Common law and civil law

It is customary to distinguish between the adversarial or accusatory system of common law jurisdictions and the inquisitorial system of civil law jurisdictions. Although always an oversimplification, the distinction retains some utility in criminal proceedings. It has long since lost such utility as it may ever have had in civil proceedings.[29]

Relevantly, for present purposes, it is often asserted

that the critical difference is that an adversary system does not expressly dedicate itself to the search for truth, whereas an inquisitorial system does. This, in my opinion, is false.

The proposition is based in large measure on the differing roles in the two systems of the parties to a dispute and the judicial decision-maker. In common law jurisdictions the parties have carriage of the proceedings and determine what evidence will be called. Accordingly, the process will be determined by the interests of the parties, who do not, at least in civil proceedings, necessarily seek a finding of truth. In civil law jurisdictions the judicial officer has greater control of the proceedings and, at least in crime, determines what evidence will be called. He or she has no interests which may conflict with truth finding.

It is the case that criminal and civil codes in civil law jurisdictions often impose obligations to find the truth.[30] There are no similar express requirements in common law jurisdictions. However, absent a 'code' there is no need to set out such an objective. The adoption by statute in various jurisdictions of an 'overriding purpose' of civil litigation in recent years has been driven by cost and delay issues, not truth seeking.

The origins of the different approaches between the two kinds of systems are to be found in the different traditions about the relationship between the state and its citizens.[31] Common law jurisdictions reflect a narrower conception of permissible state activity. The adversary system and, perhaps even more clearly the use of the jury as the tribunal of fact, manifest the significance long attached in such jurisdictions to the autonomy of the individual and to the maintenance of personal freedoms, so that no arm of the state, not even the judiciary, controls and directs how they conduct their affairs, including legal affairs. In civil law jurisdictions, the authority of the state was more dominant and not traditionally restricted in such ways. However, in most such nations the balance changed in this respect, particularly after the Second World War.

The falsity of the proposition that is sometimes advanced, that investigatory or inquisitorial systems seek truth and adversary or accusatory systems do not, is well illustrated by the existence of rules and practices that exclude potentially relevant evidence. I have set out above a list of principles and practices of the common law tradition which have this consequence. Although not stated in the same jurisprudential language, e.g., as an exclusionary rule of evidence, specific practices and rules in most civil law jurisdictions also lead to the consequence that certain information is not made available to the judicial decision-maker.

Some of these practices are of long standing. Others have been adopted and elaborated in the second half of the last century in almost all civil law jurisdictions as constitutional, statutory and treaty provisions for human rights protections, including the right to a fair trial.

The falsity of the proposition that is sometimes advanced, that investigatory or inquisitorial systems seek truth and adversary or accusatory systems do not, is well illustrated by the existence of rules and practices that exclude potentially relevant evidence.

As far as I have been able to determine, all such nations now restrict the use of potentially relevant evidence on the basis of a similar range of public policy considerations as has long been the case in common law jurisdictions, e.g., illegally obtained evidence, encompassing illegal searches and seizures; wire taps; involuntary confessions; the failure to warn of the right to silence; and a range of due process violations, reflecting the principle of a fair trial.[32] Various provisions prevent use of evidence acquired in breach of these principles. Indeed, in Germany rules restricting illegally obtained evidence date back to the late 19th century, long before any such principle was adopted in common law jurisdictions.[33]

The consistency and extent of the application of these rules varies considerably from one jurisdiction to another. Some commentators suggest that they are not applied with the same rigour as in common law systems.[34] Indeed, one observer concludes that these exclusionary rules have been systematically ignored or undermined in certain jurisdictions, namely Italy and Spain.[35] However, the rules are also capable of enforcement at a supranational level, e.g., by the European Court of Human Rights.

Civil law jurisdictions also recognise, in a somewhat different jurisprudential manner, what common law

nations would call legal professional privilege. In France, avocats enjoy such protection by the doctrine of secret professionnel, which cannot be waived, even by the client, and which privilege is not lost even if the material becomes known to third parties.[36] Similarly, German and Italian lawyers have an obligation of professional secrecy, breach of which is a criminal offence, although clients can waive the privilege.[37] In Switzerland violation of professional secrecy is also a criminal offence and lawyers cannot be compelled to give evidence or produce documents, even if the client waives the privilege. However, a lawyer can seek a judicial order for release from the obligation.[38]

One practice which inhibits truth seeking in the criminal justice system is plea or charge bargaining. Long regarded as an anathema in civil law jurisdictions, the practical needs of the system, of the same kind as operate in common law jurisdictions, have led to the adoption of such practices at least sub silentio.[39]

are not known to the common law. For example, in some jurisdictions a witness may refuse to testify if the testimony could dishonour him or a relative, or even if it is likely to cause direct pecuniary damage. Of particular significance for commercial litigation is that confidential business information is protected from production, not merely subject to non-disclosure orders.[42]

Lawyers in common law jurisdictions would be particularly sceptical about the claim of truth seeking in civil cases because of the absence of a right to discovery in civil law jurisdictions.

Although general discovery is now often confined, for reasons of cost and efficiency, even discovery limited to issues or categories has no direct equivalent in civil law jurisdictions. Practitioners and clients in such nations, however, clearly regard common law discovery, particularly on the American model, as a case of the truth costing too much, in this respect, literally.

Lawyers in common law jurisdictions would be particularly sceptical about the claim of truth seeking in civil cases because of the absence of a right to discovery in civil law jurisdictions.

One of the most debated rules for exclusion of evidence in common law jurisdictions is the application of the hearsay rule. There is no equivalent rule in civil law jurisdictions. Nevertheless, there are other legal principles in those jurisdictions which have similar, albeit not identical, consequences.

What is referred to as 'derivative evidence' has traditionally been regarded in civil law jurisdictions as inferior to primary evidence. Of particular relevance for the circumstances in which the hearsay principle would apply in a common law jurisdiction is the doctrine of 'immediacy', which requires direct contact between the judicial decision-maker and the source of the proof. The practice of requiring the presentation of primary evidence where that is possible varies considerably from one civil law jurisdiction to another.[40] Perhaps more significantly, appellate review of fact finding, which shows little deference to factual findings at first instance, often recognises the use of derivative evidence as a source of relevant error.[41]

In some significant respects, civil law jurisdictions have rules and practices which impede truth seeking where a common law jurisdiction has no restriction. Many civil law jurisdictions contain forms of privilege which

Civil law jurisdictions, of course, give the court powers to obtain documents. However, the system does not involve the right to detailed inquiry by a party in order to ensure that documents, no matter how damaging to that party's case, are in fact revealed. A lawyer of the common law tradition would regard a right of access to the internal documents of the other party, enforced by the professional obligations of lawyers for that other party, as essential to determining the true facts. However, that is not, generally, available in the practical operation of most civil law systems.

As one civil lawyer put it:

> We feel that the principle onus probadi incum bat allegandi excludes the possibility of obtaining the help of the court to extract evidence from the other side. We react to the notion of discovery, be it English or, worse, American style, as an invasion of privacy by the court, which is only acceptable in criminal cases, where the public interest is involved.[43]

As an English academic correctly observed: 'The 'inquisitorial' civil law does more to protect a party's privacy and to insist that the parties must prepare their own cases for themselves, than does the 'adversarial'

common law. The latter, in effect, requires the parties to open their files by revealing what documents they possess and, in the absence of compelling reasons to the contrary, to lay them open for inspections.'[44]

In Germany, where civil proceedings, other than in family law, proceed on an adversary basis, the judge may order the production of additional evidentiary material. Parties can request that documents from the other side be produced. However, the judge must be convinced that the efficacy of the trial and interference with the privacy of others is justified. He or she will apply a test of materiality in both the sense of relevance and a requirement of substantiation, a party must be able to generally describe the facts that the evidence is intended to prove and establish their relevance. This is a much higher standard of relevance than that which applies in many common law jurisdictions.[45]

... where the decision-maker of fact operates as an umpire without responsibility for the discovery of facts, there is limited, if any, risk that the decision-maker will not have an open mind.

In France the ability of a party to obtain evidence from the other side is also significantly limited.[46] The documents available to the ultimate decision-maker tend to be those which have been exchanged between the parties, not extending to internal communications which may reveal attitudes or record oral statements.[47] The Code of Civil Procedure does make provision for disclosure of documents by third parties and parties.[48] However, as in Germany, the conditions are restrictive. The applicant must identify the document and establish why she has been unable to obtain it himself.[49]

In most civil law systems, although parties have the right to suggest lines of inquiry, including an order for the production of documents, it appears that this right is not exercised as robustly as a common lawyer would do.[50] There must be tactical doubt about asking for evidence without knowing whether it will harm or help one's case. Most of the internal documents of the other side are likely to support its case. Only a brave lawyer would insist on the judge seeing such documents in the hope that there may be a smoking gun. Unlike a common lawyer, the option of not tendering all the documents is not open.[51]

Civil law jurisdictions do not accept that the 'maximum access to facts' approach will necessarily lead to better outcomes. As one observer put it, with respect to the German system:

> There is no assumption that justice is likely to be directly proportional to the access of a party to fact. Indeed, it is the ability of the system to focus on determining those facts which are relevant to the legal issues that is considered critically important. ...
>
> The central notion is that procedural justice is primarily secured by the informed professionalism of the judiciary. It is the judge's skill and experience in evaluating evidentiary material which is considered likely to lead to the 'truth', not the gathering of immense quantities of factual information by attorneys who are then free to present or not present such information and to manipulate its presentation to serve their own ends.[52]

This passage does highlight the different approaches between the two systems in a manner which is not based on the simple proposition that one is concerned with discovering truth and the other is not.[53]

Proponents of the adversary system contend that the professionalism, skill and, most significantly, the incentive to be complete and rigorous on the part of the lawyers for a party to proceedings, will ensure that the true facts are more likely to be uncovered. That, it is said, is preferable to taking a risk about the competence and enthusiasm of a judge, from a judicial tradition that is more bureaucratic than that which exists in common law jurisdictions.

Furthermore, where the decision-maker of fact operates as an umpire without responsibility for the discovery of facts, there is limited, if any, risk that the decision-maker will not have an open mind, but proceed on the basis of assumptions which were formed early in the process with the consequence that the fact finding is pursued with a view to proving a working hypothesis. That is particularly true when the judge has access to a police report or an earlier investigating magistrate's report prior to commencing the proceedings. As Justice Emmett has put it, in an adversarial system ' ... the art of suspended judgment can be practised for a much longer period by the judge'.[54]

Lawyers in the civil law tradition would emphasise the possibility that a lawyer for a party will not put evidence before the judicial decision-maker because the true facts, or other facts to which a particular witness could

attest, are not in the interests of his or her client. Judges in common law jurisdictions must still decide the facts on the basis of the evidence which the parties allow them to see or hear. Even in cases in which it appears that a witness can give direct evidence, the judge is not, as a general rule, entitled to call the witness. Statutory modifications to this principle have been few and common law exceptions remain narrowly defined.[55]

The judge may ask questions during the course of a witness's testimony but traditionally there have been strict restrictions on the scope, nature and intensity of such questioning. Theoretically, judges are not able to pursue the truth where, for tactical reasons or incompetence, lawyers do not do so. That is no longer how it works in civil litigation.

Commencing in commercial cases, but now applying more generally, judges seek to discover the true facts by asking questions of witnesses. This does not happen in criminal cases or in civil cases with significant consequences, e.g., civil penalty proceedings. Nor does it tend to happen where both parties are competently represented. However, to a degree which would not have occurred in the past, trial judges now intervene to ensure that a witness gives the evidence that he or she appears capable of giving.

This is a significant change in civil litigation practice and has happened gradually. It commenced two or so decades ago and was clearly motivated by truth seeking.[56] Within the bounds of procedural fairness, it is almost inconceivable today that an appellate court would intervene with a trial judge's pursuit of the truth.

In civil procedure there has been a significant degree of convergence between the two systems. Differences still remain. It is not useful to seek to resolve the arguments in support of each approach. One thing that is certain is that attempting to transpose principles and practices from one system to the other system is fraught with the possibility of the creation of perverse effects, in the same way as a body may reject foreign tissue. The education, skill set and work culture is quite different in the two kinds of jurisdictions. The process of convergence has been, and will continue to be, pragmatically slow.

Perception and memory

I return to Sir Owen Dixon's statement that many facts are lost by reason of 'normal frailty and memory'. As I indicated, perhaps that is what he thought Pontius Pilate meant by his question. The process of fact finding raises a wide range of issues. In this address I can touch on only a few. I commend for your careful consideration a longer discussion by the late Lord Bingham which, like everything his Lordship wrote, is incisive and insightful.[57]

Legal practitioners and judges must approach the task of establishing the truth with humility. We must always be prepared to reassess our assumptions and practices in the light of experience, as we traditionally have done, but also in the light of scientific research, which we have not traditionally done.

Sometimes our experience leads us astray. Notoriously, directions to juries in sexual assault cases and legal principles requiring corroboration were based on assumptions about human behaviour, thought to be well founded. For example, that a woman who had been sexually assaulted would necessarily complain at the first opportunity. We now know that that assumption was derived from the fact that, until comparatively recently, almost all judges were male and, frankly, had no idea as to how a person who had been sexually assaulted would behave.[58]

Five years ago two judges of the Supreme Court of New South Wales, Peter McClellan and David Ipp, coincidentally and without knowledge of each other's intention, considered such issues in addresses delivered within a few weeks of each other.[59] The two papers appear in Volume 80 of the *Australian Law Journal*. I commend them to anyone who wishes to understand the problems of determining the validity of oral evidence in the light of the considerable body of psychological research, to which both of the papers refer. They are more detailed than I can be on this occasion. I will deal generally with two matters at the heart of the fact finding process: perception and memory.

There are well known limitations on the capacity to perceive or hear events at the time that they occur. I refer to matters such as lighting, duration of the event, and the location, age, stress, fear, expectations and biases of, particularly, observers. Such difficulties of perception are reasonably well understood by lawyers.

The classic case, which is featured in numerous law school demonstrations of this problem was, I believe, first deployed by a professor of criminal law at the

University of Berlin in 1901. Persons enter a lecture room arguing, after a struggle one pulls a gun and a blank shot is fired and the protagonists quickly leave the room. All of the students in the lecture hall are then asked to write down various details of the persons and the events. On every occasion that this experiment has been staged there has been an extraordinary range of different responses about such matters as the colour of their hair, their height and about the sequence of events.

Many studies by psychologists conclude that a significant proportion of people get the sequence of events wrong. This, of course, has been known for some time.[60] Further research suggests that there may be some systematic distortions resulting in an inability to accurately judge distance, speed, duration or sequence of events. For example, there appears to be a propensity to systematically overestimate the time that an event takes. Psychological research suggests that the greater the amount of violence involved, the greater the degree of overestimation.[61]

It is well established that the victim of a crime will focus on the central aspects of the traumatic event, such as the weapon, to the exclusion of details at the periphery.[62] Much of cross-examination focusses on peripheral details, in order to lay the groundwork for the suggestion that the witness cannot be believed on the central facts. Psychological research suggests that this entire approach to cross-examination is wrong if truth, rather than victory, were the object of the exercise.

Nevertheless, issues of perception are reasonably well understood. I will spend a little more time on memory. The plasticity of memory is not so widely accepted.

Witnesses can, without any dissimulation or propensity to lie, confidently assert the truth of conversations, observations and events which did not happen. The plasticity of memory impedes the truth finding process. This is not an uncommon phenomenon.

One prominent author in the field has set out seven distinct problems with memory.[63] His list is as follows:

- 'Transience, refers to the weakening or loss of memory over time'.
- 'Absentmindedness, involves a breakdown of the interface between attention and memory' because a person may not have focussed upon a particular matter which is later sought to be recovered.
- 'Blocking', involves a search for information which, for some reason, cannot be retrieved, as in a failure to be able to put a name to a face.
- 'Misattribution, involves a complex process of assigning memory to a wrong source'. This trick of memory is, 'much more common than most people realise'.[64] I will discuss misattribution further with respect to eyewitness testimony.
- 'Suggestibility, refers to memories that are implanted as a result of leading questions, comments or suggestions'. This is a matter of considerable significance for the legal system and is described by the author as 'the most dangerous'.[65] I will discuss this further.
- 'Persistence', involves remembering a subject, not necessarily of a traumatic character, which the person would prefer to forget.
- 'Bias reflects the influences of current knowledge and beliefs upon how we remember the past'. It is more common than anyone would like to admit. It involves 'editing or rewriting previous experiences in the light of what a person now knows or believes'. I will discuss bias further with respect to eyewitness testimony.

There is a small library of research on eyewitness testimony. The phenomena of misattribution, suggestibility and bias are encountered more often than lawyers care to admit.

A clear example of misattribution is the case of a woman who watched an interview on television and shortly afterwards was subjected to a rape. She gave a complete description of the rapist. It was in fact a description of the person who appeared on television. Luckily it was a live interview and he had a good alibi.[66]

Eyewitness testimony is particularly susceptible to that form of bias referred to as 'confirmation bias'. A person will remember being more sure about certain facts than he or she was at the outset. That is to say what started off as a suspicion, becomes knowledge and is asserted to be such. This will result in the person giving evidence with a sense of confidence that may be convincing.

The difficulties involved with eyewitness testimony are

frequently encountered in the course of litigation. Many of the matters that are considered in the psychological research have been the subject of legal decisions on the admissibility of evidence and on directions to juries about the use to which evidence could be put and its reliability. The context in which this issue has been faced in considerable detail is that of identification evidence. There is a considerable body of case law on the range of difficulties associated with both perception and memory issues.

For example the defect of 'suggestibility' is well understood to arise with respect to the use of photo identification.[67] Trial experience has led over many years to well understood defects and appropriate changes of practice.

unlikely, as Bugs Bunny is a Warners Bros character.[69]

Numerous psychological studies show how leading questions which assume or assert a certain element of an event, which did not in fact happen, were in fact recalled on no other basis than the question assumed or asserted that they were present or that some statement or photograph or film had contained or referred to this element.

The common law rejection of leading questions is well supported by psychological research, which clearly establishes that answers to such questions are less likely to be believed. There is, however, no control of leading questions in the procedures for police investigations or by lawyers preparing the written statements of evidence that have become ubiquitous in legal proceedings.

A clear example of misattribution is the case of a woman who watched an interview on television and shortly afterwards was subjected to a rape. She gave a complete description of the rapist. It was in fact a description of the person who appeared on television. Luckily it was a live interview and he had a good alibi.

Perhaps persons are more than usually prone to refuse to accept that they could have made a mistake about a matter such as identification. However, the distortions that affect identification evidence similarly affect other forms of eyewitness evidence. It is important to realise that the psychological research is also applicable to a much broader range of matters than identification and about which direct evidence is usually given. I refer to such matters as the content of conversations, the sequence of events and the surrounding circumstances which are observed or heard.

It appears to me that suggestibility gives rise to the most frequent distortions of memory. This occurs because of the mechanisms of inquiry adopted for purposes of legal proceedings by the police and by lawyers, both before and during a trial. The author of the sevenfold categories of problems states, correctly in my view, that suggestibility 'can wreak havoc within the legal system'.[68]

My favourite example of the ability of questioning to implant false memories is an experiment in which people were shown a picture referring to Disneyland and Bugs Bunny shaking hands with children. They were later asked if they had shaken hands with Bugs Bunny when they had visited Disneyland as children. A significant proportion said they had. This was quite

The stilted legal drafting, in words which the witness would never use, too often using the same formulation for all relevant witnesses, is an impediment to truth finding. The process props up a false witness, but a truthful witness will more readily concede a discrepancy in cross-examination and look the worse for the honest concession.

An observation, variously attributed to Lord Buckmaster or Lord Justices Bowen and Chitty, is that 'truth may sometimes leak out from an affidavit, like water from the bottom of a well'. Even if ethical restraints on witness coaching are complied with, the conduct of a lawyer taking a statement or preparing a witness may give clues on what evidence may be useful.

The issue of implanted memory came into dramatic prominence in the legal system a decade or two ago. I refer to the convictions based on allegedly repressed memories of sexual abuse, including the most bizarre recollections of satanic rituals. There are numerous studies which establish the falseness of such repressed memories.[70] That is not to say it never happens. It is that on too many occasions the memories were implanted by well meaning or ideologically motivated therapists.

This body of psychological research, together with a substantial body of confirmatory case law, emphasises

the care with which lawyers and judges should approach oral testimony and the restraint that ought to be displayed before making allegations that a witness is intentionally misleading the court. I am not sufficiently familiar with the detail of advocacy training to know whether this research is taught in a systematic way. If it is not, it should be.

Judicial education has focussed on such issues in recent years. However, more could be done. As Justices Ipp and McClellan emphasised in the two papers I have mentioned, an appreciation of the psychological research, which is constantly being updated, is a necessary part of truth seeking for all of us involved in litigation.

Perhaps one of the reasons why we have all avoided doing this in the past is that it may lead us into a morass from which there is no principled escape. One of the pioneer researchers in the field, Elizabeth Loftus, concluded:

> Judges and jurors need to appreciate a point that can't be stressed enough: True memories cannot be distinguished from false without corroboration.[71]

In the courts we have to make decisions which scientists may avoid. The fact finding process will, however, be improved if we have a better understanding of the difficulties with which we must struggle. Fact finding is at the heart of legal craft. Public confidence in the administration of justice requires that the system must be directed to discovering the truth of the facts.

Conclusion

In conclusion let me return to the Gospel of St John and his version of the trial of Jesus. I trust the religious amongst you will forgive me for considering the text in a secular spirit.

I approach these passages with some diffidence as they, together with the parallel version in the Gospel of Matthew, have been the source of Christian anti-Semitism for many centuries. It was, to say the least, convenient for the relationship between the early church and Roman authority to paint Pilate in a favourable light. Setting aside the possibility of divine authorship, these texts were either based on eyewitness testimony or reflect a collective folk tradition that was progressively edited for communal purposes.[72]

These eyewitnesses would have been subject to the full range of inadequacies of such testimony.[73] The process of editing folk tradition would have potentially involved systematic distortion. All this does is to confirm that fact finding is hard work.

Whether the words 'What is Truth?' and the sequence of events were accurately recorded by John cannot be determined with finality. However, like other facts, they can be determined with sufficient certainty for the task at hand, the degree of certainty varying with the seriousness of the purpose. Pilate's question, as Francis Bacon clearly acknowledged, is too good to check, even if we could.

All we toilers in the courts are required to do the best we can. I make no apology for so trite a conclusion. I advance it in the belief that we must do our best, with the determination that we always strive to do it better.

Traditionally, justice has been represented by a blindfolded woman holding equally balanced set of scales. That is no longer an appropriate symbol. The appropriate symbol for justice today is that which Gulliver discovered in Lilliput. There, justice was represented by a statue which had no blindfold and which, significantly, had eyes in the back of her head.

Blind justice is not an appropriate symbol of impartiality in a justice system dedicated to truth in fact finding. The balanced set of scales is sufficient for that purpose. The pursuit of justice cannot allow itself to be deceived. It may be constrained by other public values or by natural human failings, but it cannot allow itself to be deceived.

Endnotes

1. Philip Ayres, 'Owen Dixon's Causation Lecture: Radical Scepticism' (2003) 77 *Australian Law Journal* 682 at 693.
2. Sir Owen Dixon, 'Jesting Pilate' in Judge Woinarski (ed) *Jesting Pilate and Other Papers and Addresses by the Right Honourable Sir Owen Dixon* The Law Book Company, Melbourne, 1965, at 4.
3. See J J Spigelman, 'Book Launch: Sydney' (2003) 77 *Australian Law Journal* 682 at 686-690; J J Spigelman, 'Foreword', in Philip Ayres (ed) *Owen Dixon* The Miegunyah Press, Melbourne, (2nd ed) 2007.
4. Ann Wroe, *Pilate: The Biography of an Invented Man* Vintage, London, 2000, at 41.
5. On 'procedural truth', see G L Certoma, 'The Accusatory System v the Inquisitorial System: Procedural Truth v Fact?' (1982) 56 *Australian Law Journal* 288; Thomas Weigend, 'Is the Criminal Process About Truth? A German Perspective' (2003) 26 *Harvard Journal of Law & Public Policy* 157 at 160, 170-173. On 'legal truth', see Robert S Summers, 'Formal Legal Truth and Substantive Truth in Judicial Fact-Finding' (1999) 18 *Law and Philosophy* 497; Joseph M Fernandez, 'An Exploration of the Meaning of Truth in Philosophy

and Law' (2009) 11 *University of Notre Dame Australia Law Review* 53 at 79–80.

6. Sir Frederick Pollock, *Essays in the Law* Macmillan and Co, Oxford, 1922, at 275.
7. *Hickman v Peacey* [1945] AC 304 at 318.
8. *Air Canada v Secretary of State for Trade (No 2)* [1983] 1 All ER 161 at 167.
9. See *Air Canada v Secretary of State for Trade* [1983] 2 AC 394 at 442.
10. Ibid., at 438-439 per Lord Wilberforce.
11. *Ex parte Lloyd* (1822) Mont 70 at 72, reported as a note to *Ex parte Elsee* (1832) Mont 69. For a fuller statement of the position, see Franklin Strier, 'Making Jury Trials More Truthful' (1996) 30 *University of California Davis Law Review* 95 at 100-104.
12. See, e.g., *United States v Cronic* 466 US 648 (1984) at 655; *Jones v National Coal Board* [1957] 2 QB 55 at 63 per Denning LJ; *Sharp v Rangott* (2008) 167 FCR 225 at 239-240 [53].
13. *Ex parte* Lloyd supra at 72.
14. *Giannarelli v Wraith* (1988) 165 CLR 543 at 578-579.
15. 'Swearing-In Ceremony of the Hon J J Spigelman QC as chief justice of the Supreme Court of New South Wales' (1998) 44 NSWLR xxvii at xxxvi.
16. The effect of judicial experience is well expressed by an American judge, see Marvin E Frankel, 'The Search for Truth: An Umpireal View' (1975) 123 *University of Pennsylvania Law Review* 1031 esp at 1032–1034.
17. See, e.g., Strier (1996) supra at 116-123.
18. See, e.g., Viscount Kilmuir, 'The Migration of the Common Law' (1960) 76 *Law Quarterly Review* 41 at 43; *Air Canada v Secretary of State for Trade* [1983] 2 AC 394 at 411.
19. *Minet v Morgan* (1873) 8 LR Ch App 361 at 368.
20. *Pearse v Pearse* (1846) 1 De G Sm 12 at 28-29; 63 ER 950 at 957.
21. See, e.g., *The Queen v Ireland* (1970) 126 CLR 321 at 335 per Barwick CJ; *Ridgeway v The Queen* (1994) 184 CLR 19 at 52 per Brennan J; *Nicholas v The Queen* (1998) 193 CLR 173 at [34] per Brennan CJ. See also *The Queen v Swaffield* (1998) 192 CLR 159 at [91] per Toohey, Gaudron and Gummow JJ; *Whitehorn v The Queen* (1983) 152 CLR 657 at 682.
22. See *Funk v United States* 290 US 371 (1933) at 381.
23. For a detailed review of the position in United States criminal procedure, see Larry Laudan, *Truth, Error and Criminal Law: An Essay in Legal Epistemology* Cambridge University Press, Cambridge, 2008.
24. For an eloquent statement of the conflicting values, see The Ampthill Peerage [1997] AC 547 at 569 per Lord Wilberforce.
25. See J J Spigelman, 'The Truth Can Cost Too Much: The Principle of a Fair Trial' (2004) 78 *Australian Law Journal* 29.
26. For example, the differentiation between the tests applicable in civil and criminal proceedings, where the court is asked to balance unfair prejudice and probative value by s 135 and s 137 of the *Evidence Acts 1995*.
27. For example, the abolition of requirements for corroboration, save in a jury trial, by s 164 and s 165 of the *Evidence Acts 1995*.
28. See, e.g., J A Jolowicz, 'Civil Procedure in the Common and Civil Law' in Guenther Doeker-Mach and Klaus A Ziegert (eds) *Law, Legal Culture and Politics in the Twenty First Century* Franz Steiner Verlag, Stuttgart, 2004; Guenther Doeker-Mach and Klaus A Ziegert (eds) The Festschrift for Alice Erh-Soon Tay: Lawyer, Scholar, Civil Servant Franz Steiner Verlag, Stuttgart, 2004 at 59-60.
29. See, e.g., French Civil Code Article 16; L Cadet, 'The New French Code of Civil Procedure' in C H Van Rhee, *European Traditions in Civil Procedure Intersentia*, Antwerp, 2005 esp at [4.1.1]; Harold Koch and Frank Diedrich, Civil Procedure in Germany Kluwer, The Hague 1998 esp at [23]–[26].
30. See, e.g., German Criminal Procedure Code s 244(2); French Code of Civil Procedure, ss 10 and 11.
31. See, e.g., Matthew T King, 'Security, Scale, Form and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems' (2001) 12 International Legal Perspectives 185 esp at 193-207.
32. See Walter Paktar, 'The Exclusionary Rules in France, Germany and Italy' (1985) 9 *Hastings International & Comparative Law Review* 1; Y Ma, 'Comparative Analysis of Exclusionary Rules in the United States, England, France, Germany and Italy' (1999) 22 Policing: An International Journal of Police Strategies & Management 280; Stephen C Thaman, 'Miranda in Comparative Law' (2001) 45 St Louis University Law Journal 581; Kuk Cho, ''Procedural Weakness' of German Criminal Justice and its Unique Exclusionary Rules Based on the Right of Personality' (2001) 15 *Temple International and Comparative Law Journal* 1; See M King, 'Security, Scale, Form and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems' (2002) 12 *International Legal Perspectives* 185 at 218; Yue Ma, 'A Comparative View of the Law of Interrogation' (2007) 17 *International Criminal Justice Review* 5; Stephen C Thaman, ''Fruits of the Poisonous Tree' in Comparative Law' (2010) 16 *Southwestern Journal of International Law* 333.
33. See Richard S Frase, 'The Search for the Whole Truth about American and European Criminal Justice' (2000) 3 *Buffalo Criminal Law Review* 785 at 821.
34. See, e.g., King (2001) supra at 218.
35. See Thaman (2010) supra at 303.
36. See J McComish 'Foreign Legal Privilege: A New Problem for Australian International Law' (2006) 28 *Sydney Law Review* 297 at 303-304.
37. Ibid at 304–305.
38. Ibid at 306–308.
39. See Thomas Weigend, 'Is the Criminal Process About Truth? A German Perspective' (2003) 26 *Harvard Journal of Law & Public Policy* 157 at 171.
40. See Jeremy A Bloomenthal, 'Shedding Some Light on Calls for Hearsay Reform: Civil Law Hearsay Rules in Historical and Modern Perspective' (2001) 13 *Pace International Law Review* 93 at 100; Howard L Krongold, 'A Comparative Perspective on the Exclusion of Relevant Evidence: Common Law and Civil Law Jurisdictions' (2003) 12 *Dalhousie Legal Studies* 97 at 109–110.
41. See Krongold (2003) supra at 110.
42. See Mirjan Damaska, 'The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments' (1997) 45 *American Journal of Comparative Law* 839 at 842; David J Gerber, 'Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States' (1986) 34 *American Journal of Comparative Law* 745 at 764–766; B Kaplan, A von Mehren and R Schaefer, 'Phases of German Civil Procedure' (1958) 71 *Harvard Law Review* 1199 at 1237–1238.
43. Claude Reymond, 'Civil Law and Common Law Procedures: Which is the More Inquisitorial' (1989) 5 *Arbitration International* 357 at 360-361; quoted in Rolf Trittman and Boris Kasowlosky, 'Taking Evidence in Arbitration Proceedings between Common Law and Civil Law Traditions – the Development of a European Hybrid Standard for Arbitration Proceedings' (2008) 31 *University of New South Wales Law Journal* 330 at 336.
44. Jolowicz (2004) supra at 69.
45. See David J Gerber, 'Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States' (1986) 34 *American Journal of Comparative Law* 745.
46. See James Beardsley, 'Proof of Fact in French Civil Procedure' (1986) 34 *American Journal of Comparative Law* 459 esp at 461, 464 and 474.

47. Ibid, esp at 475.
48. Code of Civil Procedure, Articles 138-142.
49. See Jolowicz (2004) supra at 68-69.
50. See, e.g., Beardsley (1986) supra at 474, 485.
51. See Beardsley (1986) supra at pp 474, 475.
52. Gerber (1986) supra 768-769.
53. For a balanced comparison with respect to the conduct of criminal trials see Sandra Nehlep, 'A Glance at the Far Side: A Comparative Analysis of the Role and Powers of Judges in German and English Criminal Trials' (2005) 7 *The Judicial Review* 181.
54. Arthur R Emmett, 'Towards the Civil Law: The Loss of 'Orality' in Civil Litigation in Australia' (2003) 26 *University of New South Wales Law Journal* 447 at 457.
55. See Andrew Ligertwood and Gary Edmond, *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts* LexisNexis, Butterworths, Australia (5th ed, 2010) at paras [648]-[653].
56. See the analysis of the development by David Ipp, 'Judicial Intervention in the Trial Process' (1995) 69 *Australian Law Journal* 365 esp at 367-373; 'Reforms to the Adversarial Process in Civil Litigation' Parts I and II (1995) 69 *Australian Law Journal* 705, 790 esp at 712-715, 802-805.
57. T Bingham, 'The Judge as Juror: The Judicial Determination of Factual Issues' in *The Business of Judging: Selected Essays and Speeches* Oxford University Press, Oxford, 2000.
58. This became clear to me early in my judicial career. See *R v Johnston* (1998) 45 NSWLR 362 at 367.
59. See Peter McClellan, 'Who is Telling the Truth? Psychology, Common Sense and the Law' (2006) 80 *Australian Law Journal* 655; David Ipp, 'Problems with Fact Finding' (2006) 80 *Australian Law Journal* 667.
60. See, e.g., Glanville Williams, *The Proof of Guilt: A Study of the English Criminal Trial* Stephens & Sons, London, (3rd ed) 1963 at 87-88.
61. See, e.g., Elizabeth Loftus and James M Doyle, *Eyewitness Testimony: Civil and Criminal* Cluer Law Book, New York, 1987 esp at 38-39.
62. Ibid at 51.
63. Daniel L Schacter, *The Seven Sins of Memory: How the Mind Forgets and Remembers* Houghton Miflan, New York, 2001.
64. Ibid at 5.
65. Ibid at 9.
66. Ibid at 114.
67. For an outline of these issues see Ligertwood (2010) supra at [4.54]-[4.75]. See especially the significant range of empirical psychological research on identification evidence referred to at [4.59]. The classic text is Elizabeth Loftus, J M Doyle and J Dysert, *Eyewitness Testimony: Civil and Criminal* (4th ed) LexisNexis Charlottesville, 2008. This most recent edition is not to be found in any Australian library. For a brief overview see A Daniel Yarmey, 'Eyewitness Identification: Guidelines and Recommendations for Identification Procedures in the United States and in Canada' (2003) 44 *Canadian Psychology* 181 or Steven E Clark and Ryan D Godfrey, 'Eyewitness Identification and Innocence Risk' (2009) 16 *Psychonomic Bulletin and Review* 22.
68. Schacter (2001) supra at 5.
69. Kathryn Braun, Rhiannon Ellis and Elizabeth Loftus, 'Make My Memory: How Advertising Can Change our Memories of the Past' (2002) 19 *Psychology and Marketing* 1 esp at 13-14, 17-18.
70. For a detailed survey see Richard J McNally, *Remembering Trauma* Harvard University Press, Cambridge, 2003.
71. Elizabeth F Loftus, 'Memory Faults and Fixes: Research Has Revealed the Limits of Human Memory; Now the Courts Need to Incorporate These Findings into their Procedures' (2002) 18 *Issues in Science and Technology* 41.
72. The thesis that the New Testament is based on eyewitnesses is advanced in Richard Bauckham, *Jesus and the Eyewitnesses: The Gospels as Eyewitness Testimony* Eerdmans, Grand Rapids, 2006.
73. Judith C S Redman 'How Accurate are Eyewitnesses? Bauckham and the Eyewitnesses in the Light of Psychological Research' (2010) 129 *Journal of Biblical Literature* 177. This article is a good short overview of the psychological research and provides a checklist for advocacy training.

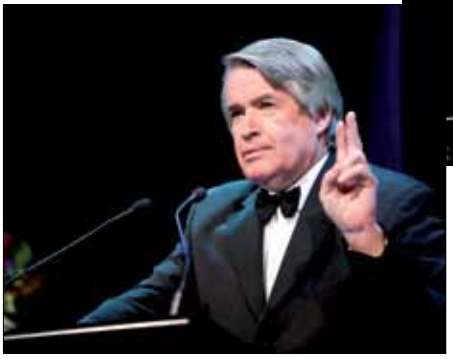
Bench and Bar Dinner

The 2011 Bench and Bar Dinner was held on Friday, 13 May 2011 at the Hilton Sydney.

Guest of Honour, Chief Justice Patrick Keane

Tom Bathurst QC (as he was then)

L to R: Damien Tudehope, Attorney General Greg Smith SC, John Hatzistergos and the Hon J L O'Meally AM RFD



Left: Mr Senior, John Griffiths SC
Above: Ms Junior, Angela Pearman

Peter Hastings QC, Des Fagan SC, Ian Temby QC

L to R: Duncan Brakell and Joseph Theseira

L to R: Ralphed Notley, Catherine Gleeson, Jane Maconachie, Victoria Brigden, James King

Rachel Francois, Peter Braham SC and Dale Bampton

L to R: Julie Soars and Deborah Robinson

John Maconachie QC, with daughter Jane and son Mark

L to R: Tatiana Stack, Sandrine Alexandre-Hughes, Jane Petrolo, Anne-Marie Mannile, Louise Jardim, Sarah Talbert

L to R: Conor Bannan, Theresa Dinh, Hugh McDermott and Sandrine Alexandre-Hughes

L to R: Laina Chan, David Williams SC and Tova Gordon

Farewell to Chief Justice Spigelman

The following speech was delivered by the Hon Justice Allsop on the retirement Chief Justice James Spigelman at a ceremony in the Banco Court, 31 May 2011.

Photo: Courtesy of the Supreme Court of New South Wales.

This sitting of the Supreme Court marks the end of 13 years and 13 days of James Jacob Spigelman in the Office of Chief Justice of the Supreme Court of New South Wales.

I have been asked to tender the apologies of Justices Heydon, Bell, Beazley, Campbell, Whealy, Handley, Hall, Brereton and Rein and the Hon Simon Sheller.

The privilege and honour fall to me to speak about you, chief justice, on this occasion. The fulfilment of that task is made difficult by the shortness of time permitted to me. There is so much that should be said. Most people here know of your extraordinary achievements and service in your life since coming to Australia with your parents from war-torn Europe in 1949 as a small child of three, before coming to the court as its chief justice in 1998. Reference should be made to the speech of the then Attorney, the late JW Shaw for an insight up to 1998. My principal task is to speak of your work on the court.

That undertaking, however, cannot be done adequately without appreciating the features and characteristics which, up to 1998, had marked your life as a brilliant student (double honours in one year in Arts, the Medal in Law, with only a passing acquaintance with the lecture rooms), nascent politician, author, brilliant lawyer and advocate and participant and administrator in so many aspects of this society's cultural and intellectual life and which continued to mark your work as a judge, a leader of this court and a colleague, these features being:

- courage and boldness of approach;
- a huge intelligence and an enormous capacity to express yourself with clarity and pungency;
- a deep sense of justice and a strong antipathy to any form of meanness or bigotry;
- a strong belief in the capacity of our legal system based on the rule of law, rigorous judicial technique and parliamentary democracy to provide a just framework for a healthy, fair and diverse society;
- an international and not provincial outlook, based on a deep appreciation of the widest range of cultural, artistic and social life in society, but an outlook that never lost sight of the essential task of those in public life of serving the people of Australia or of the fact that it is the lives of ordinary people that matter; and
- a consummate political skill (using that phrase in the broadest sense) based on all the above characteristics, made effective by a calm decency and fairness with which you treat everyone.

Your work on the court has been remarkable. I propose to finish, not start, with the judgments you have written in both criminal and civil law. Let me say, however, at the outset, that your work as a jurist in the primary task of crafting judgments has produced one of the finest bodies of judicial work in Australia's legal history. You stand as one of the best judges ever to have served this nation. I use no hyperbole here.

It is first necessary to say something of your work as an administrator of the court. You have managed the court during an important period of change. The *Civil Procedure Act 2005* has brought about important modernisation and reform of procedure in this state. Your energy and perception of the need for cost and time reduction in litigation was instrumental in bringing forward statutory, professional and cultural change. The process had begun in this court in the late 1970s. The Civil Procedure Act took those changes to the level of written law. There remains work to be done, but it was never a one-person task and you played more than one person's role.

Though you have a well-known suspicion of statistics, you have in fact marshalled them to be used wisely in the management of the two divisions and two appeal courts that comprise this court. Your skilled and careful management has been marked by calmness and an intimate grasp of detail. You also have a remarkable skill of perceiving conflict emerging amongst people, defusing it and solving the problem, never letting it lie to fester and arise on a later and more bitter occasion. You do not impose your will, but your choices, always wise, usually prevail.

Underlying this skilful management of the court has been your perception of the need to develop collegiality and congeniality within the court. The carrying on of judicial education and judges' conferences, the latter involving partners of judges attending, has been a feature of this. May I take this opportunity at this point to pay tribute to your wife Alice, who has played such an important part in this process. This has created a happy court in which mutual respect is the pervading social and working ethos. And as you no doubt appreciate, such a milieu tends to promote productivity in judges and to provide a more civil and civilised experience for litigants and the profession than perhaps was the case during some periods in the preceding forty years.

Secondly, this managerial skill has been matched by your skill and acumen in dealing with government and attorneys-general. Your ability to work with them, but maintaining independence from the executive, has led to the healthy working relationship between the courts and the other branches of government, consistent with judicial independence, to the great advantage of the people of New South Wales.

Thirdly, and I exclude myself from this comment, you have been able to influence critically the appointment of a remarkably talented body of judges. This is a court of international stature and reputation. That is based on that judicial talent. This was a legacy you inherited, which you pass on enhanced.

Fourthly, you have been instrumental in taking the Australian legal system, through this court and its judges, into the Asia Pacific region and the wider world. You understand the importance of the Australian judiciary being recognised around the world for its quality and taking its place in the training of, and engagement with, the judiciary in other countries. This is not an exercise in legal jingoism or judicial hubris or the promotion of judicial holidays. Rather, you recognise that if the Australian legal system does not embrace and engage with counterparts in Asia and the wider world, it, its judges and its practitioners will be left to their life of tranquil provincialism, over time eroding the quality of justice administered by them.

Photo: Courtesty of the Supreme Court of New South Wales.

To this end, you have been active in developing and strengthening the relationships between the Supreme Court and Chinese courts and judges. Judges from the court have, on an annual basis, taught at the National Judicial College in Beijing. You have recently effected memoranda of understanding with the courts of Hubei and Shanghai to co-operate on judicial exchange.

Similar memoranda of understanding are likely with Guandong courts and the Chinese National Judicial College. Together with the present chief justice of Hong Kong you began and developed a regional conference of commercial law judges every eighteen months to two years. These meeting have involved

commercial judges from China, Japan, Korea, Hong Kong, Singapore, Malaysia, Thailand, India, Pakistan, Bangladesh, Australia and New Zealand. The next conference is in Singapore. This is a now a standing forum for commercial law in the region. You have put in place memoranda of understanding with Singapore and New York courts regarding the proof of foreign law by judicial declaration rather than the use of expert evidence.

As president of the Judicial Commission you have supervised and guided the important work of that body in particular in encouraging and fostering its role as a judicial educator in New South Wales and in many other places in the region and in fostering greater awareness of the issues affecting Indigenous people in this state and the legal system.

You have fostered a regular exchange of judges between the United Kingdom and this country to maintain and broaden the bonds that lie between our two systems.

All this, and I have yet to mention your work as a public intellectual through your many speeches and publications as chief justice since 1998 and as a commandingly great judge.

Your judgments have been outstanding. All crafted with great intellect and remarkable speed.

You have in thirteen years delivered dozens of speeches. All have been of the highest intellectual quality. They range over many topics – history and historical reflections, the rule of law, judicial administration, the legal profession, criminal and civil law, public law, human rights and other issues important to our society. Some, such as your speeches on construction and interpretation of contracts and statutes, have been influential in affecting the law's direction. All have been influential on the profession in this country and wherever jurisprudence in the English language is read.

Your historical works on Beckett and Henry, Bacon and Coke are not only significant historical interpretations in themselves, but they also speak to modern society and those interested in its development. When I read the book on Beckett and Henry some years ago the only comparison I thought appropriate to draw was with

Photo: Courtesty of the Supreme Court of New South Wales.

the work of the great medievalist Professor Richard Southern. The comparisons were clear – his work and yours revealed a simply-expressed grasp of power, law, government, history and humanity. It awaits a further occasion to explore the extent to which these works of history illuminate your work as a great chief justice.

Your judgments have been outstanding. All crafted with great intellect and remarkable speed. They reveal the strongest possible attachment to precedent and legal principle. Never, however, did that see them take the form of gnarled shapes of weatherbeaten rules determined by the ratio decidendi of past cases. Rather, your sense of principle and insightful intelligence always produced a clearly written and elegantly formed piece of work reflecting the common law as it stood by reference to precedent or with incremental change born of contemporary legal policy.

Your judicial technique was founded on a respect for the intellectual labour of others, including colleagues and predecessors and was directed to the creation of coherent legal principle, not merely to the destruction of contrary views or the expungement of error.

Within months of your swearing in you initiated a series of important criminal sentencing judgments. Over the years, this body of work (*Jurisic*, *Henry*, *Ponfield*, *Wong and Leung*, *Whyte*, *Attorney-General's Applications No 1, 2 and 3* of 2002) has had a lasting significance on the law of sentencing.

Numerous other notable decisions on the criminal law reflect your important work on the court. Perhaps your decisions on open justice (*John Fairfax Publications v District Court* as an example) best illustrate your capacity to write commanding and comprehensive judgments

that state the field. Other cases, such as JW, reveal not only a consummate command of legal technique, but your humanity towards those unfortunate enough to be the necessary subject of legal technique in criminal law.

You also took the Court of Criminal Appeal to regional centres of New South Wales bringing the work of the court to the people it affected.

Your work in civil law in the Court of Appeal has been similarly influential. You sat over the full range of the court's jurisdiction and have contributed to the jurisprudence of this country in many subjects, administrative law, constitutional law, corporations law, contracts, equity, environment and planning law, evidence, industrial law, contractual and statutory interpretation, private and public international law, real property, torts and workers compensation.

The important series of cases concerning the Industrial Commission and Industrial Court and its jurisdictional relationship with this court, ultimately endorsed by the High Court, are of immense importance to the administration of justice and the resolution, in particular, of commercial disputes in this state.

Your judgments and other writing on statutory interpretation have given penetrating and sure guidance to the principles, as well as explaining the, at times, less than clear expressions of others in the legal firmament on the subject.

Your command of principle and logic allowed you to write the great judgments of *O'Halloran* and *Seltsam* in the fields of equity and common law, both dealing with the questions of causation, now made less intractable by your work, and the illuminating expression of equitable principle in Rob Evans on equitable remedies.

This is an entirely inadequate expression of the breadth and quality of your judgment writing.

Your decision to have a welcome to country at the beginning of this sitting reveals that you still recognise, just as you did in 1965, the year of the Freedom Ride, the existence of a foundational issue confronting this society: the just reconciliation of those who have come to this ancient land in the past 223 years, and their descendants, with the original inhabitants who lived here for tens of thousands of years, and their descendants. This is a profound and difficult issue, involving, in part, the recognition that a legal system

Photo: Courtesty of the Supreme Court of New South Wales.

founded on the rule of law and constitutional traditions of centuries must provide a framework of justice, fairness and human dignity for all, so that all may commit their loyalty to the legal system out of respect and consent, not imposition of will of others. These notions, together with those aspects to which I referred earlier, have attended your work and time on the bench.

Australia is an immeasurably better place for your work as a judge, as a leader of this court and as a public intellectual.

On behalf of all judicial officers in this state and those who play their part in the administration of justice, I thank you for your work and time as chief justice of this state.

On behalf of the judges of this court and their partners, I thank you and Alice for all that you have both done in and for the life and well-being of this court.

Australia is an immeasurably better place for your work as a judge, as a leader of this court and as a public intellectual.

Farewell from the chief

The following speech was delivered by the Hon JJ Spigelman AC upon the occasion of his retirement as chief justice of New South Wales at ceremony in the Banco Court, 31 May 2011.

Photo: Courtesy of the Supreme Court of New South Wales.

The welcome to country with which this ceremony began has particular significance for me. As I think most people here will be aware, association with the cause of Indigenous Australians has been an important part of my personal journey. The welcome has an additional symbolic significance.

Just as the elders of the Gadigal clan of the Eora people have been the custodians of the land on which we meet, the 16 chief justices of New South Wales, including myself, have been the custodians of the institutional traditions of the rule of law, since this court was established almost exactly 187 years ago.

Most people in this audience will have heard me speak, probably more than once, of the significance for our society of the longevity of our fundamental institutions of governance. It was a theme of my first address upon my swearing-in as chief justice. It has featured as a basic theme in the address I have given at each of the 400 ceremonies I have conducted for the admission of legal practitioners, during the course of which just over 23,000 lawyers were admitted. The point might by now seem belaboured, but it is a point worth belabouring.

Many of you would have been present on the occasion of the ceremony to mark the court's 175th Anniversary, in May 1999. I addressed on this theme, as did the then premier, Bob Carr. At my request, the two presidents of the professional associations stood aside and permitted the former prime minister, E G Whitlam QC to speak on behalf of the bar and the then serving prime minister, John Howard to speak on behalf of the solicitors. A feature of that occasion was the welcome to country.

I believe that was the first time at any official ceremony in this nation that a welcome to country had been delivered. The then presiding officers of the two houses in the New South Wales Parliament informed me that it was that occasion which gave them the mantle of respectability to introduce a welcome to country in parliamentary ceremonies.

Only the speakers on that day and the president of the Court of Appeal were aware of my intention in this respect. You could have heard, to use a still serviceable cliché, a pin drop during the course of the welcome. Most of the people in the room had never heard one and had no idea what was happening. The position is different now. A welcome to country has become a familiar mode of commencing many public events. Contrary to the practice of some, I have not adopted it as universally applicable but best reserved for occasions, such as this, where it has, for the reasons I have mentioned, particular relevance.

I wish to make it clear that I have not come here to get anything off my chest. Having once before in my career made the transition from rooster to feather duster, I do not intend to emphasise my imminent powerlessness by exploiting the presence of an audience of this size.

In my address on the occasion of my swearing-in as chief justice I indicated that I looked forward to the intellectually creative process of writing judgments

because I regarded the judgments, of this court as part of a broader public discourse by which our society and polity affirms its core values, applies them and adapts them to changing circumstances. My expectations in that regard were fulfilled. The process was intellectually satisfying in the way I anticipated.

What I did not then anticipate was that I would also develop a substantial body of written work in the form of speeches. During the term of my office I delivered 180 speeches that were of sufficient substance to justify recording on the court's website. In this respect, also, I sought to make a contribution to the public discourse on a wide range of matters not limited to the law but extending, particularly, to history which, for a serving judge, is a comparatively safe haven.

Expressing my views in the form of public addresses had two distinct advantages. First, I choose the topic, rather than have the subject matter determined by the issues about which litigants choose to appeal. Secondly, the High Court cannot do much damage to a speech.

In my speeches I developed a number of themes. One theme was the significance for the legal profession and the nation of global engagement by the Australian profession, particularly engagement with our region, culminating in my address to the Law Society's annual Opening of Law Term Dinner this year. The skills of our lawyers and judges, together with their reputation for professionalism, competence and impartiality, is a significant national asset. It is what the economists call a sphere of comparative advantage.

The initiatives I undertook in this respect included reinforcing our traditional ties with the judiciary of England, with the result that English senior judges have attended each annual Supreme Court Judges Conference. In the Asian region I negotiated, with the support of Chief Justice Gleeson, with three successive chief justices of India leading to the first, now regular, exchange between the judiciaries of our two nations; I organised the first judicial exchange with the Supreme Court of Japan; I initiated the Asian/Pacific Judicial Seminar on Commercial Litigation, the third such seminar having been held in Sydney two months ago, jointly organised by the Supreme Court of New South Wales, the High Court of Hong Kong and the Supreme Court of Singapore, attended by high level delegations from virtually all the major nations of the region.

Perhaps the relationship I have worked hardest to establish is the exchange with the judiciary of the People's Republic of China. I have led several delegations to China and judges of the court have participated in the judicial training of the National Judges College of China, virtually every year for the last seven years.

There was always a prospect that this relationship was personal rather than institutional. I am very pleased, therefore, that, after my most recent visit to Beijing, I was able to negotiate a number of Memoranda of

Photo: Courtesty of the Supreme Court of New South Wales.

Understanding on Judicial Exchange which will ensure that this relationship continues. It is necessary in a nation as large as China to select particular regions and, with the support of the Supreme People's Court, I approached three provinces and the National Judges' College. In the last week I have signed memoranda of understanding with the presidents of the High Courts of Hubei Province, Guangdong Province and Shanghai and anticipate that a memorandum with the National Judges' College will be finalised soon.

From the point of view of our nation this is one of our most important relationships. The significance of developing our understanding of China, including its culture and institutions, cannot be underestimated.

An occasion such as this gives me a public opportunity to thank all those many people with whom I have engaged in the course of serving on this court. My first, and most significant, recognition is to all of the judges, including those who have retired.

Without exception these are men and women of considerable capacity and dedication with many of whom I have had the closest of interchanges of a jurisprudential character, whilst sitting on the Court of Appeal and the Court of Criminal Appeal. All of those

judges made substantial contributions to my own understanding of the law during the course of that interaction.

I have interacted with every member of the court when organising the affairs of the court, whether it be in the context of legislative proposals, drafting rules and practice notices, developing case management, attending conferences, seminars and involvement in the full range of committees through which the court maintains and improves its capacity to serve the people of the state. As a collective and collegial body of men and women I could not have asked for a richer or more satisfactory experience.

It is invidious to single out particular people, however, I should acknowledge the particular role of the heads of the three divisions of the court with whom I have served: Keith Mason and James Allsop as presidents of the Court of Appeal; James Wood and Peter McClellan as chief judges at Common Law; David Hodgson, Peter Young and Paddy Bergin as chief judges of the Equity Division. Their contribution to the jurisprudence of the court is of the highest order. However, I, more than others, am aware of the contribution that they have made to ensure the effective and efficient operation of the court in the day-to-day administration of their respective divisions, particularly the performance of the pastoral functions that inevitably arise with respect to individual judges. They bear the principal burden of much of the task of running an effective and efficient court and the success of the court during my term of office is in large measure due to their dedication and competence.

The court operates through a structure of committees. It is not possible to list on an occasion like this all of the names of those who chaired these committees, let alone served on them. Critical areas of the court's activities – education, rules, information technology, the building – are dealt with either completely, or at first, by these committees.

I also express my appreciation to the staff of the library and to the registrars and staff of the court, led for most of my term of office with great skill by Megan Greenwood, now a magistrate. Their dedication, sometimes under great stress, has been of the highest order.

In consultations about legal policy and appointments to the court I have had the benefit of a close relationship with four attorneys general who held office during my period. The late Jeff Shaw, whose personal tragedy affected all members of the court, was a fine lawyer and a fine attorney. It was a pleasure to deal with him. With both Bob Debus and John Hatzistergos this close relationship continued and, albeit briefly, has also been manifest in my relationship with Greg Smith.

Of particular significance has been the consultation that has always occurred between each of the four attorneys and myself on the issue of appointments to the bench. There was never an occasion on which I had any doubt that each of these attorneys was determined to ensure that the appointment was of a person of whom the court would be proud.

Perhaps the most significant change during my term of office in this respect is the progress made to remedy the gender imbalance on the court. When I was appointed there were two women judges and one woman master. There are now ten women judges, one an associate judge, and we allowed one woman to go to the High Court.

I have had fruitful dealings with a number of public servants. I cannot name them all. However, Laurie Glanfield has been head of the Attorney General's Department throughout my 13 years of office. He was first appointed head of a government department under the Greiner government and his survival skills are comparable to those of Talleyrand. My dealings with him were always positive and purposeful. He also performed a very useful function for me. I could blame him for everything I did not want to do.

I also wish to acknowledge the contribution of those with whom I have served on the Judicial Commission of New South Wales, an organisation which makes an outstanding and internationally recognised contribution to judicial education, to criminal justice particularly sentencing statistics and by the handling of complaints against judges. It is the forum in which I have met and worked closely with each of the heads of jurisdiction of the other courts in New South Wales, together with the non-judicial representatives on the commission. We have been served exceptionally well by the dedicated staff of the commission, led ably by its chief executive, Ernie Schmatt.

Throughout my term of office I have had a first class

staff. My first associate, Sue Pearson, who began in the chief justice's office during the term of Sir John Kerr, served throughout the Street and Gleeson courts and for about half of my term. Her institutional knowledge was invaluable. Throughout she served with competence, tact and discretion. I very much regret that she left on somewhat unhappy terms.

Her successor, Susie Packham, has performed her duties with the highest level of competence and wisdom and consummate organisational skills. She is a woman with a wide range of interests, with whom it has been a pleasure to work.

Christine Leondis has served in the Chief Justice's Office since 1985. Her accumulated knowledge of legal terminology and the personalities of the law has ensured that she carried out her responsibilities with accuracy and speed. My driver, Sean Doherty, has been as delightful as a Tigers supporter could be. He has saved me enormous amounts of time, which I could devote to my principal functions.

I have had the intellectual joy of having as staff members an array of young legal talent, almost all of whom were with me for two years, during which they served principally as researchers for my judgments and speeches. There are too many to name. They were all intelligent young men and women, each of considerable accomplishment both in their studies and in extracurricular activities. I have thrived on the stimulus of interaction with the younger generation in a daily exchange of views. Collectively their contribution to my judgments and speeches has been of the highest order. I have watched with pride as their careers have developed since they left me and I look forward to their future success.

In conclusion, I want to publicly express my debt to my wife Alice. Our marriage and family life has been, and remains, the most important bond of my life. To some degree my role as chief justice and lieutenant governor has expanded our horizons. In other respects it has narrowed them. We have enjoyed many functions and events together. Some not quite as fascinating as others. You attended all with your grace and charm intact.

I have always admired and received inspiration from your dedication and competence as a companion, as a mother, as a psychologist, as a writer and in the wide range of public activities to which you have contributed. Your work at the Benevolent Society and on the boards of the Bundanon Trust, the Australian Institute of Music, the National Institute of Dramatic Art, the UN High Commission for Refugees, the UNSW Faculty of Architecture and Sculpture by the Sea have ensured that I remained engaged in a world beyond the confines of the law.

Photo: Courtesty of the Supreme Court of New South Wales.

I have relied on your counsel on numerous occasions, particularly in any context involving a human dimension, where your wisdom and instinct is unsurpassed.

You are my life partner and the prospect of spending more time with you is my sole consolation about leaving this court and the people I have come to know so well and whom I will miss.

For a final time, I can say: 'The court will now adjourn.'

Welcome to the new chief

The following speech was delivered by Attorney General Greg Smith SC at the swearing in of Chief Justice Tom Bathurst in the Banco Court on 1 June 2011.

Photo: Courtesty of the Supreme Court of New South Wales.

Your Honour, on behalf of the State of New South Wales – and the New South Wales Bar – I congratulate you on your appointment as chief justice of the NSW Supreme Court.

You are now custodian of one of the oldest public offices in Australia. The first chief justice, Sir Francis Forbes, took his place in 1824 – and you will be the 17th. However, No 5 – Sir Julian Salomons – stepped down after 15 days, before he even got to hear a case. His problem was that his appointment was not well received.

This is not a problem facing your Honour. In fact your elevation has been widely acclaimed – particularly among the Sydney commercial bar. One such beneficiary said: 'Tom was simply briefed in every commercial matter of any significance going – so much so that his appointment has resulted in the release on to the market of the workload of two or three silks combined.'

Your Honour was born on 17 March 1948, in Richmond, Surrey in the United Kingdom – the son of an engineer and a champion tennis player. Your mother, Joan Hartigan, won the Australian Open, or Championships as it was then, three times, in 1933, 1934 and 1936. You also have a great interest in tennis …and the combination of prowess on court and an unmistakeable gait earned you the nickname of … the Shuffling Assassin.

You were educated at St Ignatius College – and in that respect you are not alone at the Supreme Court. In fact your addition takes the figure to nine out of 49 full time judges now on the court. This approaches the critical 20 per cent, which requires a takeover bid to be announced under companies law. For the regulators among you, the number will fall to eight when Justice George Palmer retires on Friday.

You then went on to the University of Sydney and after graduating with degrees in arts and law in 1971 you were admitted as a solicitor in New South Wales in February 1972.

When you completed your articles, you joined the city firm of EJ Kirby and Co, where your mentor was Anne Plotke. Ms Plotke says you thrived at the firm, which specialised in commercial work. And they kept you busy to such a degree that you celebrated your 21st birthday in New Guinea while working on a matter.Ms Plotke also mentioned that she tried to teach you that it was important to show courtesy and respect to your fellow practitioners and clients. By all accounts she clearly succeeded.

So it was no surprise that the firm continued to brief you when you were called to the bar in 1977. Only 10 years later, you were appointed queen's counsel … proper recognition of the skill you exhibited and the respect you earned. Like your mentor at the bar, the late Peter Hely, you showed rare skill in being able to reduce complex matters to their very essence. Because you see things so clearly – and offer commercial commonsense

and sound judgment – your opinions have been widely sought … and valued. You have also commanded huge respect from the Bench because of your ability to get to the heart of the matter, and do it with great clarity and economy of language. Not a word is wasted. Although on occasion the three points you informed the bench you would be making turned into five – but only when circumstances intervened. And your skills as a cross-examiner were behind many courtroom triumphs. You were always logical and polite – and usually devastating.

As a result, your practice covered almost every aspect of commercial and corporations law, including trade practices, administrative law and revenue law, as well as commercial arbitration. It would be difficult to name a corporate or commercial case, of any size or substance in the last two decades, with which you have not had some involvement. You acted in one of the first matters in the era of blockbuster director's duties cases, *Daniels v Anderson* – a case which set out a statement of principles of the duties of non-executive directors. You have also been involved in a number of important cases on behalf of State and Federal governments. You appeared for the State of NSW in several cases involving ticketing for transportation systems and for the Reserve Bank of Australia in a case related to credit card interchange fee reforms. Then there are the landmark cases concerning the concept of good faith, liability for professional advice, the ranking of shareholder, claims in administration, and the ability to bind third parties with deeds of company arrangement.

That didn't mean you could escape some affectionate barbs from your colleagues, many of which focussed on your walk – or shuffle. At the 1998 Bench and Bar dinner, Ian Barker QC was president of the Bar Association and MC for the night. Your Honour was Mr Senior and Nicole Macfarlan (nee Abadee) was Madam Junior so it was 'Tom and Nicole' playing the lead roles. Coincidentally, James Spigelman was the guest of honour, soon after his appointment as chief justice. Mr Barker mentioned that his running sheet said that he was to call on Tom Bathurst to speak at 8.38 pm and that he would arrive at the lecturn at 8.43. I am advised Your Honour got there with moments to spare.

You are lucky to have friends like Mr Barker. When asked if there was any 'scandal' about your Honour, he replied: 'Stacks. But it's all subject to suppression orders'.

Those who remember you from the EJ Kirby days say you haven't changed much. You still have the same dry wit, but are not given to self-promotion. One senior judge suggested you offered a reminder of Sir William Deane, as a shy, retiring person who is very succinct in his observations.

This economy of words – and movement – means that when you speak, people listen. Thankfully, this has been put to good effect with your mentoring of countless young lawyers and the vital role you have played in issues concerning the legal profession. You are the immediate past president of the Australian Bar Association. You were president of the New South Wales Bar from 2009 until your appointment.

As president of the Australian Bar you proved a strong leader at time when the move to a unified national legal profession was in doubt. Should this ultimately come to pass, the contribution of your Honour – who helped draft rules which have been adopted by all state bar associations – should be acknowledged.

As president of the New South Wales Bar, you went out of your way to go to legal education events in regional, and rural or remote areas so that you could hear first-hand the concerns of people in these areas. So it was not surprising to see you have declared one of your priorities will be to continue efforts to make the justice system more accessible at a reasonable cost.

You have also said you want to make the best use of technology in the courts – which shows you are prepared to embrace change. But some things will stay the same; such as the morning swim followed by the crossword on the way to work. On the home front, you are a devoted husband to wife Robyn and father to daughters Emma and Sophie, who will no doubt be very proud of you on this occasion. But Emma, a lawyer who works on refugee cases, was puzzled at your career transition. She asked: 'Why do you want to be the referee, when you can still be a player?'

She chose a metaphor that would get through to her rugby–mad dad, who has shown laudable – if not tragic – devotion to the NSW Waratahs. You might also have mentioned to her – as you did to others who asked why – that it was 'your duty'. It is this attitude of public service that will serve the court – and the people of NSW – well over the next decade.

We all wish you well.

Chief Justice Tom Bathurst

The following speech was delivered by the Hon TF Bathurst as chief justice of New South Wales in the Banco Court on 1 June 2011.

Your Honours, premier, attorney, distinguished guests, fellow members of the legal profession, ladies and gentlemen.

Thank you for your presence here today. It both honours and humbles me but more importantly it honours the court.

Mr Attorney and Mr Westgarth, thank you both for your kind remarks. You have wildly exaggerated such qualities which I have, whilst charitably ignoring my many failings.

To say that I am daunted by the task which lies ahead of me would be an understatement. In my time at the bar I have appeared before three chief justices of this court: Sir Laurence Street, Chief Justice Gleeson and my immediate predecessor and good friend, Chief Justice Spigelman. Chief Justice Gleeson, of course, went on to become chief justice of the High Court. Sir Laurence Street and Chief Justice Spigelman, along with Sir Frederick Jordan are recognised as the three finest legal minds in this State not to serve on the High Court bench. Of equal importance in addition to their judicial skills each of them led the courts with distinction, meeting the challenges they faced, maintaining the independence of the court and preserving and enhancing its reputation as the premier State superior court in this country. These are very large shoes to fill indeed. I am comforted, however, that Chief Justice Spigelman could not have left the court in better shape and by the warmth with which the judges of the court have welcomed my appointment and by the encouragement which they have already given me. To know that I will have their support and cooperation is very important to me.

I practised as a barrister for over 30 years. That was a long time, some would say an inordinately long time. It did not feel like that to me. I love the profession and even after that time it was a wrench to leave it. I remain convinced that dialogue between the Bench and a well prepared advocate aided by focussed written submissions provides the best mechanism for quickly identifying the real issues in dispute in any litigation even in the most complex case, and in assisting the court to reach the most appropriate result. It is vital for the continued success of that process that advocates recognise their paramount obligation to the court, an obligation which, in my opinion, extends not only to conducting cases with integrity and fairness but also

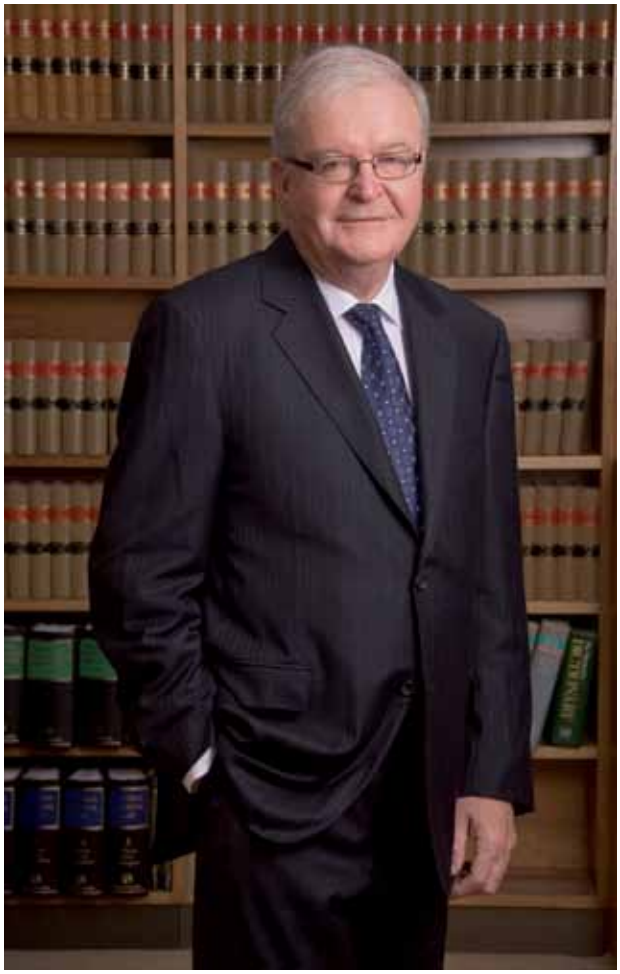


Photo: Courtesy of the Supreme Court of New South Wales.

seeking in the interests of their clients, other litigants and the court that cases are efficiently conducted, focusing on issues which are of real substance in the dispute. It must be said most advocates in my experience seek to do that.

In making these remarks, I am not ignoring the vital role that solicitors play in the administration of law. They are generally speaking the immediate contact members of the public have with the law and the legal profession both in litigious and non-litigious matters. It is from contact with them that most members of the public derive an impression favourable or otherwise of the legal system and its practitioners. I have had the privilege over the years of working with many fine practitioners. Their skill and dedication to their clients' affairs was outstanding. Their clients knew they could be relied upon to give them sound advice and to carry out their instructions in an expeditious fashion. That conduct, which I think is common to most solicitors,

does much to enhance respect for the legal system in the community at large.

I should add that I practised as a solicitor for about four years. I was entirely hopeless. The most helpful thing I did for that branch of the profession was to leave it. I sincerely hope that the same will not be said about me when I leave this office. Having said that the two solicitors for whom I worked, Ernest Kirby and Ann Plotke, gave me a thorough grounding in the field in which I have mainly practised.

Underlying what I have said is the notion that the legal profession is exactly that, a profession. The object of all of us should be to serve the community in a way consistent with the rule of law and the traditions of the profession. The courts succeed in that task if they administer justice impartially regardless of the wealth of the client, his or her ethnic background, gender or otherwise. The profession succeeds if its members bear in mind that they are not merely conducting a business for profit, or to blindly serve the whim of the client, but rather there to assist the client in a manner consistent with their ethical obligations as members of the profession and consistent with their duties to the court.

The court and the profession generally face different challenges with each generation. The present time is no different and I would just like to dwell on a few of the issues. As you all know, there has been a significant movement towards a national legal profession. I have been privileged, first, as president of the Australian Bar Association and then as president of the New South Wales Bar Association to be involved in some of the discussions leading towards that goal and it is an objective which I regard as desirable. However, it cannot be achieved at the risk of the independence of the judiciary or for that matter the whole of the legal profession. Any surrender of that independence may seem inconsequential at the time it occurs, but an erosion of it over time can be equally damaging as an immediate surrender of independence. The separation of powers and the independence of the judiciary from the Executive Branch of government are the foundation on which our democratic institutions are built. It is of crucial importance that that independence be maintained. Fortunately, the members of the Executive Branch are alive to this issue and appreciate the need for the maintenance of judicial independence.

Technology presents a challenge. It provides enormous benefits to the court in the conduct of its operations just as it does in most other areas of life today. However, it is important that it be utilised in the best possible manner. The convenience of downloading large quantities of material on a disk and tendering the disk in evidence should not become a substitute for a careful consideration of whether material will be actually of assistance in the presentation of a case and in the achievement of a just, quick and cheap result. On a number of occasions in recent times I have heard a judge confronted with a great deal of documentary evidentiary material saying that he or she would look at it only if it was referred to in the submissions. A judge should not have to say that. Further, a judge should not have to sift through many pages of submissions to see whether it is in fact referred to. It is my hope that the profession and the courts will cooperate to ensure that this does not occur and to use technology in the most efficient manner possible to further the ends of justice.

Photo: Courtesty of the Supreme Court of New South Wales.

Courts today are subject to increasing media and public scrutiny. Indeed, a request was made that this ceremony be televised live. Fortunately for the viewing public the structure of the court did not permit it. I cannot imagine anyone more unlike a television personality than myself. That said courts in my view should welcome media scrutiny. It is important that the public knows and understands the functions of the courts and how they operate. Judges speak primarily through their judgments and that should remain the case. That does not mean that judges should lead a monastic life and decline to comment on how the court operates and at least in general terms the process by which the court arrives at its decisions. I certainly do

not intend to disengage myself from the community. It would be a mistake to do so. It is important that judges do all they can to keep abreast of the expectation that communities have of the courts. I regard it as part of my function to explain the working of the courts to the media and to do all I can to assure the public that the judges of this court are committed to seeking to administer justice in a fair and impartial manner.

The costs of litigation are an ongoing problem. This, of course, in part due to the labour intensive nature of the process and, to some extent, unavoidable. However, we should be vigilant to ensure that access to the courts is not restricted to the very wealthy or the limited group of people who are entitled to Legal Aid. This court has for some time been putting systems and procedures in place to ensure that litigation will be conducted as cheaply and efficiently as possible. That process will continue.

In recent times there has been an increasing emphasis on alternative dispute resolution particularly mediation. It is appropriate for courts to encourage these processes and on many occasions insist that mediation be attempted. However, that should not be taken to the extent where parties believe rightly or wrongly that they are being denied access to the courts. It is fundamental to the rule of law that parties have access to the courts to settle their disputes.

I have avoided up to now any reminiscing on my past life. As I said, I love the bar. When I first came to the bar I knew next to nothing about being a barrister. The help I obtained not only from members of the floor which I joined but from other members of the bar at that time was fundamental to whatever success I had as a barrister. So too was the support of many solicitors who initially took me on trust and subsequently briefed me regularly throughout my career. Many of those who assisted me are here today and know to whom I am referring and I will not embarrass them by mentioning their names. However, I would like to mention my debt to the late Justice Peter Hely and the late Doug Staff QC who particularly mentored me in the field in which I spent most of my practising years.

For the last 25 years I have been a member of the 6th Floor Selborne and Wentworth Chambers. The friendship and support all the members and staff of those chambers gave me over the years is what has made my practising career such a happy one. I will be

Photo: Courtesty of the Supreme Court of New South Wales.

joining a number of past members of that floor from today on. I know that those who remain on the floor will always be good friends.

I have been fortunate to have wonderful support staff over the years. My personal assistant, Victoria Bradshaw, and her predecessor, Ruth Adam, have been untiring in their support. My clerk, Lisa Stewart, also has always been ready to provide assistance when needed. Without them it would have been impossible for me to carry on my practice in a way that was remotely efficient.

I had the privilege of being both the President of the Australian Bar Association and the New South Wales Bar Association. They were both wonderful experiences and I would like to record my thanks, in particular, to the Executive Director of the New South Wales Bar Association and the Association staff with whose assistance I was able to undertake the task of those offices whilst maintaining a reasonably busy practice.

Finally, but most importantly, I would like to thank my wife of 34 years, Robyn, and my two wonderful daughters, Emma and Sophie. They have always been on hand to support me and quick to discourage any sense of self-importance that I may otherwise have had. The debt I owe to them, particularly to Robyn, is enormous and impossible to repay.

All that remains is to thank you for your attendance today and to assure you that I will endeavour to discharge this office to the best of my abilities.

The court will now adjourn.

The Hon Justice Alan Robertson

Alan Robertson SC was sworn in as a judge of the Federal Court of Australia at a ceremonial sitting in Sydney on 18 April 2010.

His Honour went to school in England and after a year at University College London came to Australia with his parents. His Honour graduated from the Australian National University in 1973 with a Bachelor of Arts with honours and then joined the Commonwealth Public Service, spending five years with placements at Treasury, the Public Service Board and the Department of the Capital Territory. His Honour then studied law part time and then full time at the Australian National University, graduating with a Bachelor of Laws with honours in 1980. His Honour commenced practice as a legal officer in the Attorney-General's Department, in the Deputy Crown Solicitor's Office and then the Advisings Division.

Between 1981 and 1983 his Honour worked for the then Commonwealth solicitor-general, Sir Maurice Byers. At the conclusion of Sir Maurice's term as solicitor-general, his Honour followed Sir Maurice to the New South Wales Bar, reading with WMC Gummow. His Honour commenced practice on the Ground Floor Wentworth Chambers, moving in 2003 to 5th Floor St James Hall. His Honour was appointed senior counsel in 1995.

His Honour was the convenor of the Administrative Law Section of the New South Wales Bar Association between 1988 and 2008, and from 2008 convenor of the constitutional and administrative law section. His Honour was a member of the Administrative Review Council for five years and for 22 years consultant editor of the CCH High Court and Federal Court Practice.

The solicitor-general for the Commonwealth, Stephen Gageler SC, spoke on behalf of the Australian Government. Stuart Westgarth spoke on behalf of the Law Council of Australia and the solicitors of NSW. The president of the Bar Association, Bernie Coles QC, spoke on behalf of the Australian Bar Association and the New South Wales Bar. Robertson J responded to the speeches.

His Honour said that indirectly that KE Enderby QC was responsible for his interest in the law:

> He was Minister for the Capital Territory in 1973 and I was working in that department. The government decided there should be residential rent control and price control of certain goods, which I will come back to, in the ACT. The Landlord and Tenant Ordinance 1949 was revived as well as a Price Control Ordinance. The first case that I ever read was *Rathborne v Abel*, decided in 1964; a rent control case. Thus I came to be exposed to the analytical and linguistic skills of Sir Garfield Barwick who wrote the main judgment. His analysis of the statutory language and his own muscular prose were revelations to me as a student of English. I decided I should learn more and began my legal studies at the ANU in 1976.

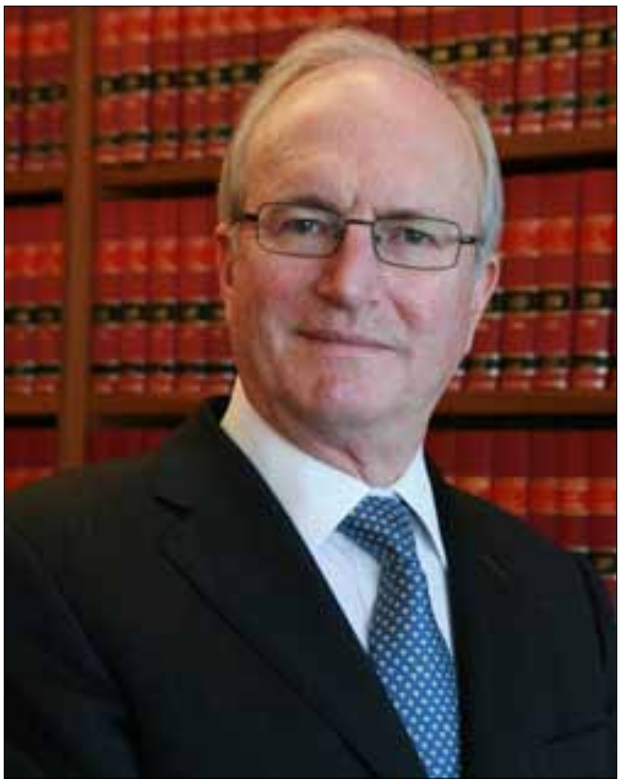


Photo: Courtesy of the Supreme Court of New South Wales.

You will be pleased that only the necessities of life were the subject of price control orders in Canberra in 1973 and those goods were petrol, bread, milk and beer.

Robertson J said of Sir Maurice Byers:

> I worked with him as Solicitor-General on many cases between 1981 and 1983 and benefited immeasurably from what I then learned. He was a man of large intellect, large vision and wide interests, although those interests did not extend to reading novels. He thought radically and in relation to the Constitution he said we must sit as students and understand what it teaches us and what it says without imposing on it what we want to hear. He wrote in a distilled way, sticking close to those radical issues he had identified and dispensing with non-essentials. …

The solicitor-general referred to his Honour's advocacy style with an example from the UN Oil for Food Program Royal Commission conducted by the Hon Terence Cole QC in 2006:

> The Commission held 70 days of public hearings before delivering its final report in November 2006. Each of those 70 days of public hearings was the subject of intense media scrutiny. A national newspaper reporting on one of them noted that a witness named "Snowball" had responded to a lawyer who had risen to ask him a question with a question of his own, "Who do you work for?" The newspaper report continued as follows:
>
> "It is of no concern to you, Mr Snowball," snapped the Commissioner. "Mr Snowball, your obligation is to tell the truth no matter who asks you the question".
>
> No doubt seeking to capture the tension of the moment the newspaper report went on as follows:
>
> Terence Cole QC is known as one of the hard men of the law. He is sharp, he snaps, he asks withering questions but this was ugly. Snowball's barrister protested but Cole ordered the questioning to proceed but then –
>
> said the report –
>
> the mystery lawyer, Alan Robertson SC, courteously apologised to the man in the witness box, "I didn't hear the question, Mr Snowball. I represent the Department of Foreign Affairs."

Mr Westgarth quoted a *Sydney Morning Herald* journalist on the same topic:

> …trying to conjure up an image of you reminiscent of a character in a Dickens or Peter Carey novel …. *The Herald*'s opening line read:
>
> A strange and rumpled figure had risen from among the lawyers to quiz the witness.
>
> This seems a rather unfair description, given that your Honour acquires your suits from the highly reputed Sydney tailor, J.H. Cutler. The word "strange" seems particularly inapt. Your Honour has been described by many colleagues and those who had briefed you as a real gentleman, a hard-working, trustworthy and honourable opponent, courteous, highly intelligent and possessing a dry sense of humour; all wonderful attributes for the bench and the task ahead. One colleague, while describing you as her favourite silk to appear with, did concede that she looked forward to appearing before your Honour because you would undoubtedly display the same incisive and unflappable characteristics that were apparent during your time at the Bar.

The president said:

> one senses a real degree of appreciation of loss amongst many of your Honour's admiring junior colleagues.
>
> They have, of course, been able to console themselves with the ready acknowledgment that today's ceremony was a predictable, indeed, inevitable outcome of your Honour's distinguished success. As one of your former juniors has said of your Honour that in his view, "He," that is to say, your Honour, "always has been a judge." …
>
> One of your readers with perhaps a knack for alliteration has described your Honour as constant, calm and confident and utterly unflappable. One senior counsel has observed of your Honour that, "He is the epitome of efficiency in preparation of opening address and cross-examination." Your Honour has been described as a precision-guided advocate. Australia's most pre-eminent appellate counsel has said of your Honour:
>
> His quietly spoken demeanour masks a very intelligent, very determined and very skilful advocate. Add to that a considerable knowledge of the Law, particularly in the constitutional and administrative areas, and he is … a formidable opponent.
>
> Not to be outdone by the praise of the Bar, your Honour's numerous instructing solicitors have been effusive about your encyclopaedic knowledge of cases, your Honour's ready ability to call to attention cases directly in point, as well as your Honour's grasp of detail. There has been a high degree of praise for your thoroughly collaborative approach, and many of those with whom you have worked have praised and commented upon your Honour's insight and readiness to work through problems with the members of your team, and to listen to, and absorb and to take into account the views of others.
>
> …
>
> Your Honour is indeed well recognised in a profession not given for manifestations of particular sloth, as a phenomenally hard worker, but your Honour has managed always to balance your Honour's practice with family commitments. It is said that your wife once took you on a cruise out of the range of mobile telephones so that you couldn't be contacted, but your Honour's particular skill and ingenuity was put to use and your Honour managed to find a fax machine on board the ship and at some expense, managed to communicate with your secretary some urgent amendments to an advice then nearing completion. Your Honour's IT skills have often been noted, to the admiration of your numerous juniors, most of whom have not had that experience with other skills by whom they have been led. One junior observed that your

> Honour was the first silk she knew that could actually edit a document and return it with comments, all via email.

The president also referred to Robertson J's administrative law practice:

> The early 1980s heralded something of a considerable boom in the growth and expansion of the administrative law areas of jurisprudence, and your Honour was well positioned with the coming into operation of the *Administrative Decisions Judicial Review Act 1977* for the areas of practice and the opportunities which the commencement of the Act promoted with effect from the early 1980s. Your Honour was junior counsel to the Commonwealth Solicitor-General, Gavin Griffith QC in the Spycatchers case. Your Honour appeared in *R v Murphy, Georgiadis v The Australian and Overseas Telecommunications Corporation, Commonwealth v Evans, Deakin Industries*, to name but a few cases of significance in those areas.
>
> Your Honour also made as counsel, a significant contribution in the area of the law of privilege and notable cases in this regard included the *Commonwealth v The Northern Land Council* and *Waterford v The Commonwealth*. Your Honour's particular insight into the areas of constitutional law and Section 92 include such leading cases as *Cole v Whitfield* and *Street v The Queensland Bar Association*. Increasingly in recent years, your Honour has argued successfully for the Commissioner of Taxation in a number of High Court cases. These include, but of course are not limited to the *Commissioner of Taxation v Linter Textiles, Bluebottle v The Deputy Commissioner of Taxation, Raftland v The Commissioner of Taxation, W.R. Carpenter Holdings v The Commissioner of Taxation* and *The Commissioner of Taxation v Reliance Carpet Company*, all decisions which illustrate propositions of significantly more extensive importance than the particular issue of revenue law which they resolved for the immediate parties.

Your Honour's prowess at taxation law should not have come as a surprise, given early indications in the late 80s when your Honour appeared in a case called *Air Caledonie International v The Commonwealth* as junior to Mr Rodney Meagher QC, that being a constitutional case regarding whether an immigration fee was in fact a tax. Perhaps your Honour's early dipping into the experiences of the revenue law came as some measure of light relief from the emerging thicket of jurisdictional error.

Robertson J said on the same topic:

> I have practised, as you have heard, mainly in this Court, and I have regarded this Court as my professional home. I have been in cases in most, if not all of its jurisdictions, and in a few where the question was whether it had jurisdiction at all. It has more now than it had then. Indeed, as I understand it, the court only does not have general jurisdiction in federal matters because the court was not seen as the place to have cases involving collisions with federal telegraph poles and running down cases involving federal post office vans. Federal jurisdiction can, of course, be very complicated. I, myself, have never been unduly troubled by identifying it. I have proceeded on the robust basis that if I was in a case then it was very likely to be in federal jurisdiction.
>
> The Federal Court Reports post-dated the establishment of the Court by some years. But I was interested to see that I appeared in a case in volume 1 with WMC Gummow, with whom I was reading, as you have heard, and most recently, at least thus far, in a case reported in volume 189. That suggests that I was at the Bar a very long time ago or that too much is reported or both of those things.
>
> The first case in the Commonwealth Law Reports where I was listed as appearing was Clunies-Ross in 1984; a section 51(31) case. I was led by one AR Emmett and by Sir Maurice Byers QC and despite these advantages, we lost. I, of course, no longer have any opinion on whether the case was rightly decided.

Robertson J concluded with two stories in answer to the question, 'why go to the court now?':

> In the middle of argument in *Tasmania v Commonwealth* in 1983 the Solicitor-General's Office was moved from the administration building to the brand new Robert Garran offices. When I was in Canberra for a case last year with Stephen Gageler, that new building, finished in 1983, had been demolished. This had a chilling effect on me. I thought that the cycles of life were getting shorter. There was less time than I had thought.
>
> The second and last story is that four years ago, as you have heard, 2007, I was briefed in an inquest into the death of one of the journalists in Balibo, some 30 years before in 1975. I had a very bright and capable assistant from the Australian Government Solicitor and we were thinking about evidence. And I said to him, Andrew, just remind me, who was the Minister for Defence in 1975? A quizzical look passed his brow and the short answer was, "I was three".

The Hon Justice Ashley Black

On 4 July 2011, Ashley John Black was sworn in as a judge of the Supreme Court of New South Wales, following an illustrious career as a solicitor of the court and a partner for many years of Mallesons. He is a noted expert and prolific writer in the field of corporations law, in particular, being the joint author of Austin & Black's *Annotations to the Corporations Act* and also a joint author of *Securities and Financial Services Law*. He follows in the large footsteps of the late Justice Kim Santow, and justices Austin and Barrett in bringing great corporations law expertise to the Equity Division of the Supreme Court.

Justice Black holds first class honours degrees in History and Law from the University of Sydney as well as a LLM from that university for which he was awarded the Law Graduates Association Medal. At the time of his appointment, he was also an adjunct professor in the Faculty of Law at the University of Sydney and a visiting fellow in the Faculty of Law at the University of New South Wales. In 1988 he was associate to the late Justice Lockhart of the Federal Court of Australia and between 2002-2005 served as a member of the Legal Subcommittee of the Corporations and Markets Advisory Committee, which provides independent advice to the government on issues that arise in corporations and financial markets law and practice.

Speaking on behalf of the State of New South Wales and the New South Wales Bar, the attorney general, the Hon Greg Smith SC noted that Justice Black had been a champion schoolboy and university debater, observing his highly successful partnership in that context with Anthony Fisher, now bishop of Parramatta. The bishop was evidently the source of much of the attorney's 'background file' on the new judge, and from that file the attorney entertained the gathering in the Banco Court of the travels and travails of the young debaters. On a more serious note, the attorney observed that:

> You have advised several major Australian corporations in significant dispute matters, acting for Telstra in proceedings to injunct the satellite joint venture between Australis Media Limited and Optus Vision; for AMP in relation to the GIO scheme of arrangement and for Hungry Jack's Pty Limited in substantial proceedings against Burger King Corporation in the Commercial Division. You have extensive experience in the conduct of regulatory matters and have acted in numerous Australian Securities & Investments Commission (ASIC) regulatory inquiries. These include licensing matters and allegations of breach of the continuous disclosure provisions, market manipulation, insider trading and breach of the takeover provisions. You have also conducted the defence of criminal proceedings brought by ASIC in Corporations Act matters. And you are the litigator of choice for the big investment banks – having acted for Credit Suisse, Macquarie Group Limited, National Australia Bank and UBS among others.

The attorney noted Justice Black's 'reputation as an outstanding commercial litigator with a tremendous capacity for working through detail, but never losing sight of the bigger picture' and his renown for hard work, discipline and meticulous preparation. In this context, the attorney noted that his Honour, who

had a large litigation practice, was invariably the best prepared lawyer in the room, noting that:

> One leading silk discovered this to his cost when deciding to cross-examine you on an interlocutory application in the complex Ingot proceedings. Those who were there report that each question was hit for six, with your Honour having scored a century before lunch. It confirmed the view of many that you would have been a fine barrister; indeed you surprised many by resisting the move.

In replying, Justice Black paid tribute to various formative influences on his career, including the lectures he received from Meagher, Gummow, Lehane and Heydon in equity and from Jennifer (now professor) Hill in company law. He noted the privilege of having worked for Justice Lockhart and acknowledged the late judge's 'great intelligence, integrity and charm', observing that 'I would be very satisfied with my own time on the bench if I could show a portion of his qualities.' His Honour also paid tribute to his professional colleagues at Mallesons two of whom he will join on the Supreme Court Bench: Justice Richard White for whom he was a summer clerk and Justice Julie Ward who was his initial supervising partner on his commencement at Mallesons. He also paid tribute to his wife, Leonie, principal of Manly Village Primary School, 'whose very strong commitment to serving the community good in the New South Wales public school system will serve as an example to me.'

DPP Lloyd Babb SC

On 18 July 2011 Lloyd Babb SC became the new director of public prosecutions in New South Wales.

Lloyd Babb attained his Bachelor of Arts and Bachelor of Laws degrees from Macquarie University in 1989. He was awarded a Rotary International Foundation Scholarship, which enabled him to complete a Masters in Criminal Justice from the University of Illiniois at Chicago. He was admitted as a solicitor of the Supreme Court of New South Wales in 1991, but this was soon followed by another period of study abroad, this time as a visiting fellow at Copenhagen University's Institute of Criminology between September 1992 and June 1993.

He returned to Australia in November 1993 and after a brief spell in DJ Fisher and Associates he moved to the Office of the Director of Public Prosecutions, where he served as a solicitor advocate.

Lloyd Babb began practising at the bar in August 1995, at 5th Floor Wentworth Chambers. He gave generously of his time and expertise, serving on the Bar Association's Criminal Law Committee, Professional Conduct Committee 4 and the Bar Council between 1997 and 2001.

In 1999 he was appointed as a crown prosecutor and so began more than a decade of service to the people of New South Wales. In 2004 he was appointed director of the Criminal Law Review Division of the Attorney General's Department. In 2007 he was appointed as crown advocate for a seven year term and in October of that year he took silk.

In making his announcement about the appointment of Mr Babb, Attorney General Greg Smith SC said: 'Mr Babb has proven himself to be a lawyer of the highest quality, who is well versed with all aspects of criminal law'.

Mr Babb's appointment is for 10 years.

Geoffrey Wills Pulsford (1953–2011)

The following eulogy was delivered by Steve Rickards at a thanksgiving service on 21 June 2011.

Geoff has been my dear friend, business partner and professional colleague for close to 30 years. There are many colleagues of Geoff's who would speak of him today. These words are a collaboration with Les Einstein who, since Geoff went to the bar, was his mentor, supporter and friend. Les is not able to be present here but he will join us later.

It is impossible to differentiate Geoff the lawyer from Geoff the man. To the practice of his profession he brought the same passion, energy and enthusiasm he brought to every aspect of his life. Geoff is Geoff in all circumstances and at all times. Likewise, I find it impossible to differentiate our professional and personal relationships. To use a metaphor that Geoff liked to use, they are a tapestry.

Geoff was admitted as solicitor in 1979 after graduating from Sydney Uni with a BA LLB with Honours in English.

After graduating, Geoff joined the firm then named Hall and Hall where he trained under two fine lawyers, Dick Toltz and now Judge Margaret Sides.

In 1985 we at Ferrier and Associates were running a mammoth piece of litigation acting for about 80 plaintiffs. This case consumed almost the entire staff resources of the firm for almost 2 years. Geoff came to us at that time as a locum. There we first saw his prodigious energy at work. Les was managing the litigation and remembers thinking, 'I just want to be his friend'.

During that time Geoff made his foray into the world of fashion design with his label 'Geoffrey Wills'. As always, he went at it with gusto. He had a showing in New York. I recall going to one in Sydney, at the Hilton Hotel. Bronwyn can still remember the Geoffrey Wills outfit she wore that day and another colleague told me recently she had only just now consigned her Geoffrey Wills creations to the charity bin.

The big case finished but Geoff remained with Ferriers as a senior commercial litigator and from 1989 as a partner. He stayed with Spencer Ferrier until he made his move to the bar in 2005 and from 1995 until the move they worked very closely together.

Spencer says of that time:

> Geoffrey was a remarkable lawyer. He could focus so sharply and identify information so quickly and clearly.
>
> He was always initially dubious about the value of the cases that came to him and would quite quickly see the part that the client was playing in the problem they were involved with.
>
> Once Geoffrey had worked his way through the thicket of the moral turpitude of his client (and there is always some of that) he was also very quick to forgive when he had seen the true extent of the case he was faced with. Geoffrey would not take on a case where there was outright trickery or chicanery in his client. In that respect his high moral standards shone through. Fortunately most of the people who he worked for understood this about him and he understood them.
>
> His abruptness and harshness in first contact with anything made him like a case hardened marshmallow he was tough at the start, but rapidly became very human, understanding and kind. That was his apparent paradox, but it wasn't a paradox at all: it was the way that he was.
>
> I miss him already, I will miss him. I will continue to miss him.

Geoff had long had a wish to go to the bar but the bar is financially risky and, with a large young family, it was not until the mid 2000s that it became a real possibility for him. In 2003–04 he completed a Masters degree in Criminology.

In 2005 he became a member of the New South Wales Bar.

After he joined the bar Geoff was always my first port of call in any litigation that came my way. Having seen Geoff's abilities at Ferriers, I had always thought that if I ever became personally involved in litigation, he is the one lawyer I would want on my side. With Geoff as a barrister, I could rely completely on the thoroughness of his research, his application to the work, his availability when needed, the promptness of his responses, his ability to get to the point, his preparedness to take on new cases

in areas outside his experience and his ability to recognise when he was out of his depth.

With Les, we worked together on two major cases in the last couple years. I always felt safe knowing Geoff was in the case. For me that statement epitomises Geoff. You always feel completely safe with Geoff, as a colleague and as a friend. You know there'll be no censorship of any view he's formed, nor any malice in the harsh observations he makes about you. You also know that your confidences are completely safe with him. My goodness he can be difficult, but you never feel unsafe with him.

Geoff is a warm, generous and caring person. Yet the abruptness of his manner is legendary. Rarely would a phone conversation with Geoff end without the phone being peremptorily slammed down by way of indicating Geoff had said and heard all that was necessary. Geoff's forthrightness and fearlessness was not reserved for his colleagues. Clients and witness got exactly the same the same treatment. One witness who was half way through being interviewed and who was getting the classic Geoff treatment rang me and said timorously, 'Do I have to see Mr Pulsford again, couldn't you do the interview.' The answer of course was No, because Mr Pulsford drills down into the case relentlessly and that's why he's so good.

Geoff, of course, was completely unaware of this. When I once pointed out that his manner seemed rude, he was genuinely uncomprehending and hurt. For all his fearlessness Geoff is sensitive and vulnerable. We had one little routine that I love. He'd expound away on some point and when he'd finished and saw my mouth begin to open, he'd yell, 'I know, I know, you think that's complete bullshit and I don't know what I'm talking about, right.'

Geoff chose a hard road in going to the bar. He was a late starter and the competition for work is strong. It can be difficult to get the work and having got it, it can be difficult to get paid. Geoff had his share of those problems. But he was clear about building up his practice in the criminal jurisdiction.

Part of Geoff's life at the bar was a free legal advocacy and advice service of last resort for people in desperate circumstances.

It became known as 'the Law Kitchen', a concept developed by Geoff, Les and me. Geoff pursued it with a passion. For Geoff, there was never a shortage of customers and they were not of the pin stripped variety.

Nor were they to be found in Geoff's Chambers waiting room between 9 and 5. He found them on the streets late at night and into the early hours of the morning in areas ranging from Martin Place to Darlinghurst, Surry Hills and Central Station.

Geoff and I spent one memorable night together as two homeless men. We set up with about a dozen homeless people on the steps of the Mitchell Library. Geoff wanted some insight into what it was like to be homeless. Typically, Geoff thought the highly publicised sleep out night for CEOs at Luna Park was missing the point.

For Les, Geoff's presence in the Law Kitchen, on a day to day basis, was his rudder and keel. Les says that whatever success the future of this organisation meets owes itself to Geoff's passion and drive to give back to the community and to leave this world in a better state than he found it. This, Geoff achieved in spades.

Geoff's pro bono contribution did not end with the Law Kitchen; he was also an active participant in the NSW Bar's Legal Assistance Referral Scheme and one of the NSW Bar's duty barristers.

So there you have it. Geoff's life as a barrister spanned an astonishing spectrum, ranging from areas of complex commercial litigation to criminal law to cases for people whose circumstances - physically, emotionally and financially - were desperate beyond measure.

For Les, at the bar Geoff was his very best friend. Les's sorrow is best described in an email received from Liz Giles, head of the Homelessness Unit at Sydney City Council. This is the email:

> ... There aren't words to properly describe the hole in the Universe that occurs when a man like Geoff departs these earthly corners of it; he was giant in soul and person. I can only imagine how much you will miss him.

Me, right now I'm just feeling empty and a bit lost.

The Hon Roderick Pitt Meagher AO QC (1932–2011)

The following eulogy was delivered by the Hon Justice JD Heydon at St Mary's Cathedral, Sydney on 8 July 2011.

Roderick Pitt Meagher was born in Temora on St Patrick's Day 79 years ago. That simple fact at once announces three themes of his later life.

The first is his Irishness. To be called Roderick Meagher and be born on St Patrick's Day – it is not possible to be more Irish than that. From his Irishness flowed the fantastic and mysterious worlds, peopled with half-mythical variations on real figures, he liked to create. Like one of the great eighteenth century Irishmen, Edmund Burke, he believed change was less harmful when it proceeded organically and pragmatically. Like another, Jonathan Swift, he could sometimes be roused to savage indignation.

Secondly, his birthplace and his early upbringing there stamped him forever. Country people then had – and even now still have – a talent for detecting and combating pretence, phoniness and self-congratulation. Roddy came to share that talent, and certainly made it his business to take many people afflicted by these vices down a peg. And his employment of the leg-pull as a style of humour – once common, now rare – must have been influenced by its frequent use in the bush of his childhood.

The third theme is suggested by his name 'Pitt'. For he was distantly related by blood to Pitt the Elder, the great Imperial statesman. Like his kinsman, Roddy was a life-long constitutional monarchist and a patriot: no toying with Fenian republicanism for him. He was happy enough with the changing arrangements under which Australia was governed at all stages of his life, though after complete independence came in 1986, he was not pleased with the way some organs of Australian government used it.

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Roddy was born into a happy family which in due course became a large one. He was the second child after Peter. He was to be followed by Christopher, Mary Ann and Phillip. His childhood in Temora left many vivid memories. There was, for example, his recollection, slightly telescoping events, of the day in the dreadful month of May 1940 when he walked down to the shops to get the morning papers and learned that the Netherlands had collapsed to the Germans, and then walked down later to get the afternoon papers and learned that Belgium had surrendered.

At the age of nine he was sent to board at that most beautiful of schools, St Ignatius College, Riverview. It was then even more beautiful than it is now. It was not then hemmed by suburbia, but was surrounded by water, green fields and bush. It was much smaller than now, and it was small compared to its main Sydney rivals. But it was among the best schools, if not the best school, in the country for intellectual training. It was largely staffed by members of the Society of Jesus, who had the ability and the opportunity to identify and develop talent in the ablest pupils. Among the teachers were Father Austin Ryan, whom Roddy regarded as the best Classics master in New South Wales, and Father Frank Dennett, whom he called an excellent historian and litterateur. Under their guidance he became dux of the school in 1949.

In 1950 he went to another beautiful place – St John's College in the University of Sydney. First he spent four years in the Faculty of Arts, then at the apogee of its greatness. He studied English I and II and Classical Archaeology I but he concentrated on Greek and Latin, graduating with First Class Honours in Greek. After a further four years in the Law School, he graduated with First Class Honours and the University Medal. This

was an admirable education for the career he was to choose. He served as house president at St John's in 1954–1955, as a member of the Senate of the University of Sydney in the early 1960s, as a Fellow of St John's College from 1960 to 1998, and as a part-time teacher of Roman law and equity at the University of Sydney from 1960 for more than four decades. So, to put it mildly, he can be said to have done the university some service.

Aided by neo-Churchillian speech characteristics, he became famous as a wit. Much of that wit depended on teasing the gullible.

After extensive foreign travel, and a short time working at Minter Simpson, he was called to the bar in 1960. He had the good fortune to read with a great common law counsel, Gordon Samuels. In 1963, when the current Selborne Chambers building was opened, he joined a new floor, the Eighth, led by Jack Kenny and supported by the incomparable Bill McMahon as clerk. Its members were capable barristers of varied interests. They included Harold Glass, John Kearney, Tom Reynolds and Peter McInerney. Both Bill and Peter are here today. Roddy took silk in 1974. He served on the Bar Council for six years from 1975, and as president from 1979 to 1981.

In the 1960s he was invited to work on a second edition of the book on trusts written by that great lawyer, Sir Kenneth Jacobs, happily still alive. With co-editors, he produced five editions from 1967 to 1997.

Then in 1975 a signal event occurred: the publication of Meagher, Gummow and Lehane's *Equity: Doctrines and Remedies*. It soon became clear that this was the greatest law book ever published in Australia. Its authors had the irreverence and vitality of youth, as well as the erudition and passion of learned scholars. The work therefore had an immense and sombre power. It was published at a time of troubling tendencies. In England Lord Denning MR and Lord Diplock were in different ways seeking to rationalise equity into insignificance, and the distant but sinister surge of the restitution tsunami, less predictable but more dangerous, was starting to gather strength. That these troubling tendencies did not prevail in Australia, either in universities or in the courts, and were in some degree resisted elsewhere, is the great historical achievement of Meagher, Gummow and Lehane. It vindicated the separateness of equity as a distinct component in the rule of law.

In 1989 Roddy was appointed to the Court of Appeal of the Supreme Court of New South Wales. An anonymous but trenchant barrister supported the appointment thus: 'He's bright. And he's got guts.' He remained there for 13 years until reaching the compulsory retirement age of 72 in 2004. He then returned to his old chambers on the Eighth Floor. His advice was of advantage to no small number of clients, and his return gave considerable pleasure to his colleagues. In 2005 he was rightly appointed an Officer of the Order of Australia.

Although for much of his life he had enjoyed excellent health, when his maladies came, they came not as single spies, but in battalions. He was seriously ill in the early 1990s. He had many more troubles after he retired. But he was able to overcome them for one more achievement. Shortly before he became largely housebound, he delivered a memorable lecture on Roman law to a crowded Bar Common Room.

All through his adult life he had

developed a public persona of eccentricity. He assumed Bohemian tastes. He sniffed snuff. He smoked Havanas. He dressed, as Sir Maurice Byers said long ago, as if he were a cross between Oscar Wilde and a Regency buck who had mislaid his valet. Aided by neo-Churchillian speech characteristics, he became famous as a wit. Much of that wit depended on teasing the gullible in words delivered in a throaty, earnest and confidential manner, but experienced observers could always detect the technique by examining the slight bulging and glistening of his eyes. Reports of his sayings and other tales about him spread with lightning speed around the legal profession. His delight in the folly of the human comedy made him the best of companions. There was all summer in a chuckle by Roddy. Indeed he recklessly squandered his talent and his time on friendship. But his wit played to wider audiences. He and A W B Simpson must be accounted the wittiest legal writers in English of the last 50 years. He and Gordon Samuels were the two best after dinner speakers in Australia. He and the prince of Wales once spoke on the same occasion, and each spent some time expressing his admiration of the other's skills. Roddy's skills were also displayed in his address on the retirement of Sir Garfield Barwick: it stood out against the stereotyped and listless offerings of others as he described the talents of that remarkable man with warmth, enthusiasm and admiration.

To the end of his life he displayed a hostility to the humdrum modern world. Thus late in life he took much pleasure in organising a series of concerts in his home, with numerous intervals in which the finest dishes and beverages were served. He presided over these cultivated events like some Medici Duke or some Venetian nobleman in the age of Vivaldi.

He was and forever will be the most discussed, remarkable and memorable of Phillip Street characters.

Putting the eccentricity on one side, this was a career of distinction. The real personalities of some who have distinguished careers in truth fall below the level their worldly achievements suggest; a few rise above it.

Roddy Meagher was a supreme example of the latter category.

Any attempt to see the real man was obscured by a mask which to some extent he fashioned himself and which to some extent the world forced on him whether he wanted it or not. It is, if not tragic, at least unfortunate that many people took the mask to represent the whole man. As a result, if a single word could sum him up, it would be 'misunderstood'.

To begin with, some thought him to be a rather indolent barrister, gliding effortlessly and amusingly along, burning up his intellectual capital without adding to it. No-one who worked with him, or appeared against him, could rationally have thought that for a moment. His forensic technique depended on determination, on striving, and on detailed and thoughtful preparation. You could forgive juniors anything, he would say grimly, as long as they *worked*. He himself would start work early in the morning, stop at 5.00pm for drinks in Jack Kenny's chambers, and resume work at home. But his forensic work, like his legal writing, was

discriminating. He concentrated only on what was crucial and decisive. Advice, both oral and written, was given with briskness and brevity. His notes for use in court, whether for conducting his skilful cross-examinations or his trenchant addresses, would consist of little more than a few cryptic but deadly phrases. Even in his day the tide of documents was rising unconscionably, but he would select the three or four key ones with precision and master them. His penetration of mind, and the compressed lucidity with which he expressed himself, made him one of the very few elite barristers of his generation.

The next popular fallacy concerns his judicial performance. For the most part his judgments were short. But, again, the brevity was based on labour and discrimination. He prepared thoroughly in advance of the hearing in order to understand the position of the parties. He refined his analysis of their positions during oral argument. He finalised his views thereafter, in the light of a lifetime's learning and a lifetime's experience of human folly. Then the careful planning, writing, chiselling, polishing and shortening of his reasons for judgment took place. His tipstaves will confirm all that. So, if they search their minds and hearts honestly, will those who sat with him. In this country, unlike some others, there are no standard approaches to the judicial task, and, depending on the court's function and the circumstances of each case, more than one method can be effective. He accepted that trial judges might have to write at length as they sifted masses of complex evidence in order to find the facts, although Mr Justice Malcolm McLelland was an outstanding exponent of managing that task within a short compass. He saw that the High Court might sometimes have to devote substantial space to the question whether the law should be developed in a particular way or how the Constitution or some other statute should be expounded. But, like Mr Justice Glass, he conceived his own role, in an intermediate appellate court, as being to decide whether the parties had experienced a fair trial according to law. Close analysis of his judgments will reveal that he fulfilled that role superbly.

Then there is the misconception about his attitude to physical exercise. It is true that sport did not rank high among his interests, but he was not ignorant of it. He once conducted a long conversation about rugby with the only All Black captain ever to win a World Cup, although it is true that his own contributions did not go far beyond sagacious conversational nudges like 'Indeed?' and 'Then there's the scrum problem.' But, despite his large waistline – for, as was said of King Edward the Seventh, he had a splendid appetite, and never toyed with his food – he did take exercise. He had prodigious physical strength, and walked a lot, especially in the country. He often walked some miles from his farm outside Mittagong to dine with friends at a restaurant in that town. He also went on long walks with his dogs – although in the case of his much loved Alsatian, Didier, this often involved a bit of middle-distance running in an attempt to prevent that excitable creature from adding to its long list of mutilated victims.

Then there are misconceptions about Roddy's manner. Some thought he had an excessively aristocratic air of disdain. Some thought him rude. These perceptions were not sound. In fact he had deep human sympathies – for clients in trouble or friends in distress. He did not care for mobs who gloated in the misfortunes of others. Bill McMahon remembers him saying as he walked past those waiting for the moment when a barrister was to enter the witness box in the proceedings brought to strike him off: 'Have you all brought your knitting?' To those who had earned his loyalty, he was deeply loyal. He had an extraordinary range of friends in many circles, often non-intersecting circles. He was extremely generous. He possessed considerable dignity and faultless courtesy. The receipt by him of any hospitality or

He once conducted a long conversation about rugby with the only All Black captain ever to win a World Cup, although it is true that his own contributions did not go far beyond sagacious conversational nudges like 'Indeed?' and 'Then there's the scrum problem.'

present immediately stimulated a handwritten letter of thanks, containing no false formality and composed in a fresh and pointed way. He was particularly courteous to a stranger, or a member of a conversational group being ignored by other members. And he was much loved by young people, particularly small children. They liked to engage in correspondence with him – indeed it has been arriving even since his death. The brightest light on his true nature is cast by his family life. After 33 years of marriage, which Roddy said were years of 'unalloyed bliss', his wife Penny died aged 60 in 1995. This was a massive blow. Roddy always stayed in seclusion on the anniversary of her death. He rightly said of her that she was 'by nature, very sympathetic and tender. She was the gentlest person I ever met.' Her gentleness sometimes caused her to be distressed by the storms into which controversy led him. He was particularly proud of her artistic skill, and published after her death a fine book illustrating it. As he said, it was work 'of an extraordinarily high standard'. Just as he loved and was proud of Penny, so he loved Amy, and was proud of her ability, her drive and her professional successes. And in due time he took pleasure in her marriage to Mark and the arrival of his two grandchildren, Orion and Astin.

The final group of misconceptions concern his supposed Toryism, and the style of his wit. He could certainly be cutting. Moderation in criticism was never one of his failings. But on the whole he was good-humoured. He departed from that vein only when deeply

provoked by the fake, the foolish or the hypocritical, in whatever mind or creed he detected it. He attacked many persons and institutions on these grounds in the late 1970s and 1980s – a period which, if one now looks back on it fair-mindedly, was in truth very rich in examples of those flaws.

In his youth he had observed the exchanges between Mr Menzies and Mr Chifley on important political issues, in which opposing but sincerely held ideas were debated intelligently, respectfully and politely...How was he, with his deep patriotism, to react to the many occasions since his youth when the Menzies-Chifley standard was not met?

These complaints about his Toryism and his wit must be put in context. In some ways they are simply false. He was no stuffed shirt. He tolerated many human failings. He approved of the decline in sectarianism since his childhood. He also approved of the decline in Grundyism.

But he was, below the laughing exterior, a deeply serious man. If it was correct in any way to think of him as a clown, as some critics have, he was a tragic clown, creating laughter because without it reality was painful.

He was devoted to the Catholic Church into which he had been born. He admired the rich beauty of its liturgy, its role through the monks in Ireland and Iona in preserving classical civilisation, its lengthy traditions. He loved the old words, and the old forms. He had close friends among the priesthood. Although he affected to disparage those whom he called 'schismatics', he was grateful to the Protestant Reformers for one thing – the work of the successors of William Tyndale who produced the Authorised Version of the Bible. Those who sat next to him in church while any version of the Bible but the Authorised Version was read had to experience much

gutteral grumbling. Every Easter he would reread the Gospel accounts of the Passion, Crucifixion and Resurrection, and ponder them.

He was a supremely brilliant and civilised man. He was interested in all the arts. He admired the main corpus of English and European literature – but not Dickens, whom he despised for sentimentality. He could talk intelligently of books from many cultures, in numerous disciplines, in several languages. He was just as well-versed in art, having collected and studied paintings and sculptures all his life. He loved classical music; in contrast, when he used the words 'Mantovani' or 'Khachaturian', his voice dripped with contempt. He followed politics and the day-to-day issues of public debate closely. In his youth he had observed the exchanges between Mr Menzies and Mr Chifley on important political issues, in which opposing but sincerely held ideas were debated intelligently, respectfully and politely.

His acuity caused him to become deeply troubled about the future of the country he loved. He saw terrible threats to the civilisation – general and legal – he admired, and of which he was a supreme example. How was he, with his deep patriotism, to react to the many occasions since his youth when the Menzies-Chifley standard was not met? How was he, who loved beauty, to respond to the ugliness of modern life in all aspects of behaviour? How was he, who admired and had a mastery of language, to deal with its persistent and increasing degradation? How was he, brought up in the judicial age of Sir Owen Dixon, to cope with a different age? Ionescu said: 'To think against one's age is heroism, but to speak against it is folly.' He repeatedly showed the heroism and committed the folly. He collected enemies as a result. Yet paradoxically his very achievements in part disproved the evils he feared. The prophet of community doom and of cultural collapse was to a considerable degree living proof that doom had not yet come to the community and that its culture still retained vitality.

A man of vivid, rich, complex and magnificent personality has departed. He was formidable, sensitive to the suffering of others, stoical about his own, and a hater of cant. He had no moral doubt or mental lethargy. He had no fear. He was not insipid or prissy or bloodless. Peter McInerney said that if his life were in danger he would brief Roddy to appear for him. Jack Kenny thought he was the only genius he had had the privilege to know. No-one who knew him could ever forget him. He had honesty of purpose, clarity of mind, probity of character and generosity of spirit. However much he was misunderstood, it was generally and rightly accepted that he was supremely loving to his family.

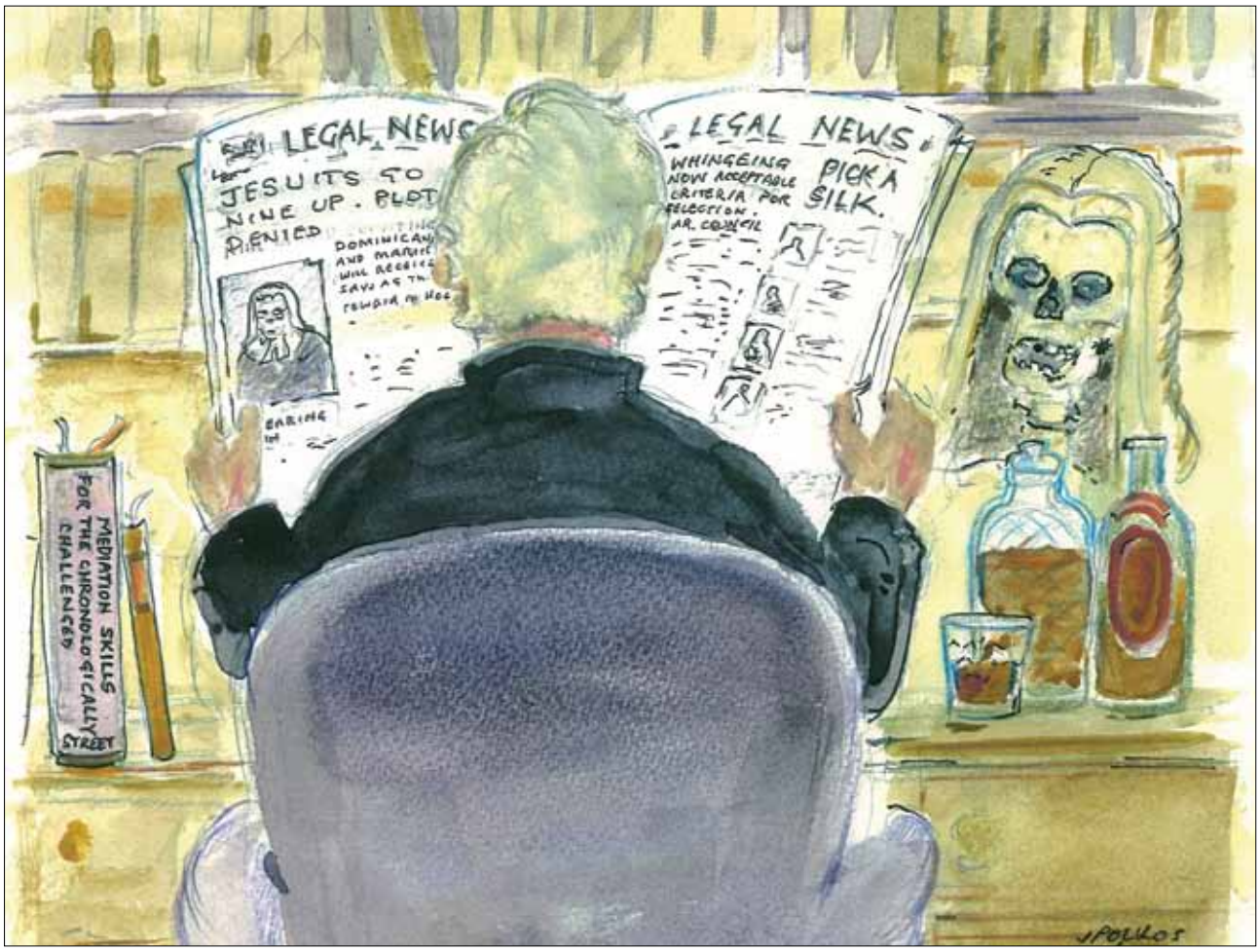
In court until the end: Roddy Meagher at the farewell for Spigelman CJ a little over a month before his death.

To that grieving family – Amy, Mark, Orion and Astin, and Peter, Christopher, Mary Ann and Phillip – go our deepest sympathies.

A man of vivid, rich, complex and magnificent personality has departed.

Bullfry and the 'magic list'

By Lee Aitken (illustrated by Poulos QC)



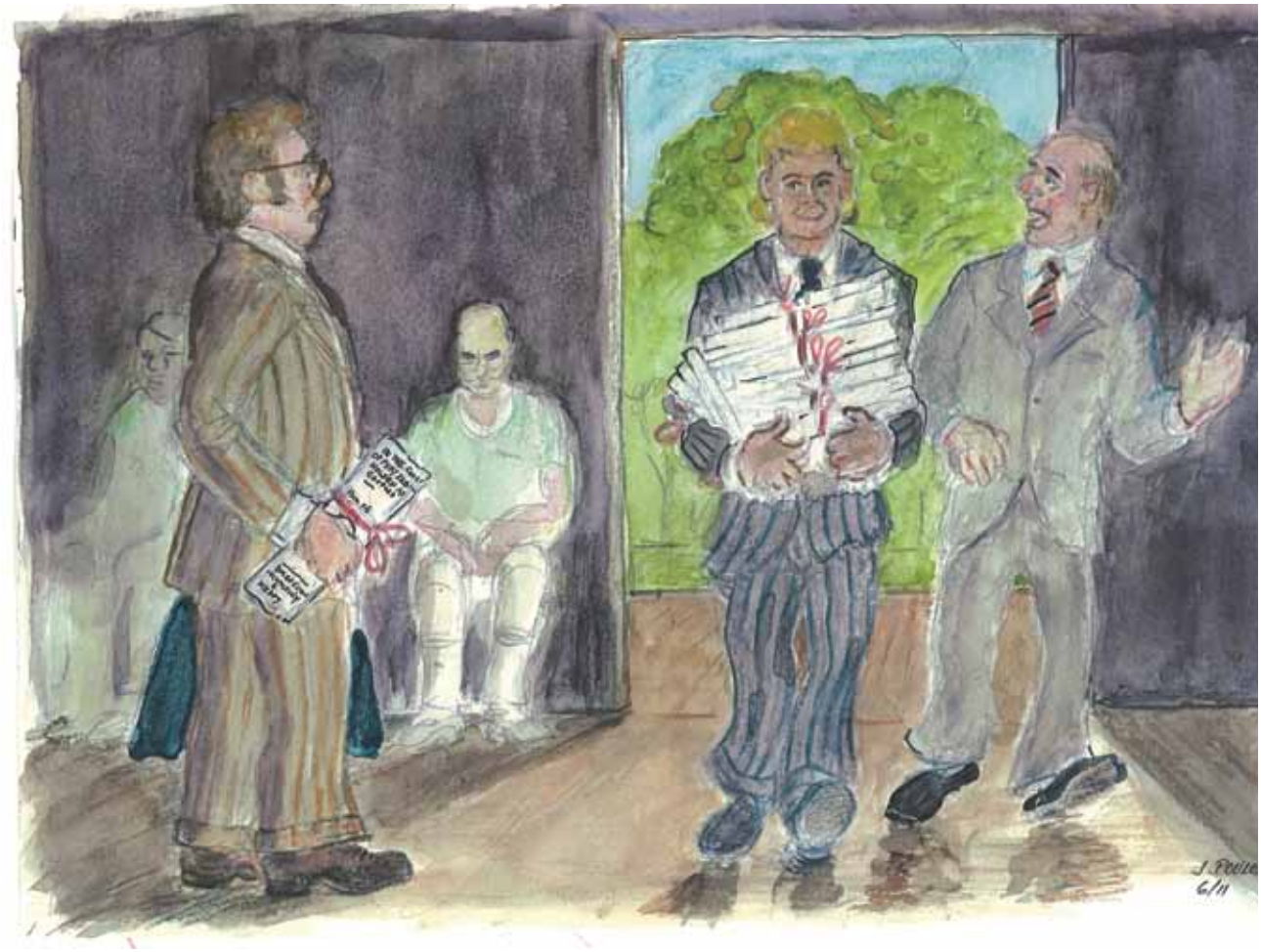
'Ah, yes! Here it is'. Bullfry was anxiously scanning the Friday Legal Pages of a leading organ. 'Eureka!'

In the third column down, at the very bottom of the List, 'J Bullfry QC'. Bullfry looked doubtfully at the category – a reference to the index brought him up sharply –'If no-one else available'!

What jackanapes had composed this List? It was claimed by the commercial mob hawking it about at great expense that it represented the 'distilled wisdom of endless interviews with practitioners across the City'. Yet, the emollient sentiments expressed about the bellwethers ('the Bet-the-Company-men' [sic]) conveyed no specific information about them at all. 'A wonderful performer', 'very popular with female instructors', 'usually attends court when briefed to appear', 'never 'jammed'', 'has often read the brief', 'always has a clean jabot' – what a load of rubbish it all was, although, to be fair, none of those comments could ever be applied to Bullfry.

But, to a perplexed laity, no doubt it provided some comfort. The fact that it contained a large number of serious factual errors (surely most of the men listed as third tier juniors were all silks, if not judicial officers, or the solicitors-general of lesser states?) raised some doubts about its credibility, or perhaps the editing? And how was it possible to pontificate upon the incommensurable? Furthermore, it was not entirely clear at whom it was aimed – barristers were, by definition, consultants – unless, like Bullfry occasionally, you were happy to take a 'direct' brief from a client over a latte. So, it was highly unlikely that any of the more reputable law firms would be hastening to confirm the standing of their counsel of choice.

No doubt, it was aimed at the *clients* of the largest firms of solicitors – the in-house counsel would have little guidance on which barrister to deploy. In fact, if the client was US-based, it would



... his opponent was holding 16(!) plaintiffs' briefs – he was a scion of the relevant local firms.

be very difficult indeed for the largest firm to explain precisely why, despite its vaunted expertise, the actual conduct of the most important part of the proceedings *in court* had to be entrusted to some independent operative entirely, rather than the firm's managing litigation partner. Thus, for a handsome cover price, it was useful to have some 'Legal Guide' in the firm's library, so that if Delores (the in-house counsel) inquired about the proposed barrister's standing the partner could confidently reply: 'I have looked up the latest listing and it is very comforting for us – Bloggs QC is a 'bet-the-company-man', who has 'often read the brief' and 'always has a clean jabot' – and listen to this, Dolly – 'very popular with female instructors!'

How was the quality of counsel to be measured? This was always a difficult question to answer. Among themselves, each counsel who appeared frequently in the same tribunal always knew to a nicety his respective standing. But the wholesale broadcast of the sobriquet 'senior counsel' to all and sundry had, in an example of Gresham's Law, driven lower the value of good counsel, with the bad. Many successful applicants now had very little court practice indeed – a successful application was thus a prerequisite to appointment to a minor judicial post, or the commencement of a 'mediation practice'!

The problems had really begun when the 'two counsel' rule was abolished on grounds of 'efficiency', and 'competitive practice'. In the old days, there was always a big risk attached to a successful application for silk – it meant that the barrister concerned was holding himself out as running only larger, and more important, matters which would justify two counsel being retained.

By default, if the new silk was not able to attract such a practice, he would fail. Now, SCs could be found who exulted in a practice entirely at the 'paper end' of the Equity Division, or advising on costs.

There was no doubt an element of a 'positional good' in it – you could bump up the fees substantially. However, the granting of silk in itself (despite several 'inquiries' into the process), was opaque in the extreme. The awarding of silk bestowed an approbation which could easily deceive an unsuspecting laity, and even solicitors! It was anti-competitive – no examination, or other, formal process was required – merely being perceived to be, so it appeared, as a 'jolly good fellow' by one's peers.

And wasn't one of the most competent and sought-after counsel at the bar (by general repute and the scope of his practice) still a junior after 25 years, in petulant response to an unsuccessful, though not premature, application for silk decades ago? What did that say about the system?

But there was no longer any real éclat in the title – in olden times, a silk would only appear with at least one, and frequently two, juniors. Some silk in Chancery would appear only before a particular judge.

Sir Patrick Hastings in his autobiography tells of a wonderful English system in which you needed to be briefed 'special' to go on a Circuit which was not your own, with an appropriately (much) larger fee. Desperately ill with chickenpox, he had been so briefed as junior to Montague Shearman QC at the Maidenhead Quarter Sessions to defend a businessman on a charge of indecency. He had never heard of his instructing solicitors before the brief arrived. He staggers to Maidenhead desperately ill to discover that the grand jury has thrown out the bill of indictment. He goes home to bed, pocketing the fifty guinea brief fee. And why did he get the brief? Because the solicitors had to brief a junior from the relevant Circuit; Hasting was a member of it, while Shearman was not, the solicitors' usual junior counsel was a Mr Hart, who was unavailable, and Hastings was the next junior in alphabetical order on the Bar List!! Imagine, thought Bullfry, if the entire state was divided into similar precincts so that one had to go with a 'special' junior to Bathurst, or Coffs Harbour.

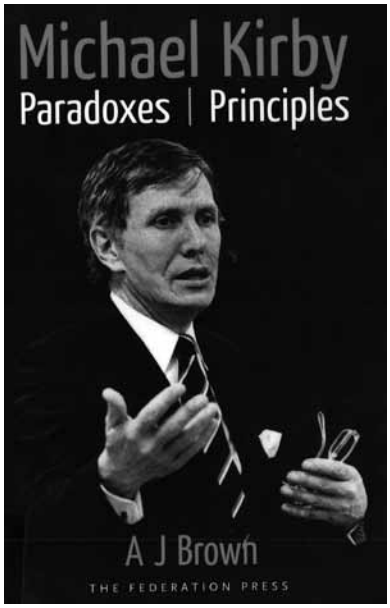
Before the Civil Liability Act had destroyed a common law practice, such opportunities of that type had still existed. Bullfry in his youth recalled appearing for an insurer at a Local Court on the Central Coast where his opponent was holding 16(!) plaintiffs' briefs – he was a scion of the relevant local firms. The presiding magistrate had inquired about the state of the 'running list' in chambers at morning tea, and then said, laconically, in Bullfry's presence, to his opponent: 'You had better settle eight of them before lunch, and we can see out tomorrow'. Ah, those were the days, when success at the common law bar might support the ownership of one, and maybe, two hotels!

But how was Bullfry to improve his own 'profile'? He made a short list. First, a memo to Alice – 'Clean all jabots!' Secondly, read all briefs when delivered and make sure that they did not 'disappear' into the morass on the floor of his chambers; finally, attend court, and avoid being jammed.

Oh dear – Bullfry reached for his first Scotch of the day – it was a counsel of perfection which at his age was unattainable. *Capax imperii nisi imperavisset.*

Michael Kirby: Paradoxes and Principles

By Professor AJ Brown | The Federation Press | 2011



Professor AJ Brown's long awaited biography of Michael Kirby deserves much acclaim. As with all biography, its interest in part lies in the degree of interest of the underlying subject. This was never going to be a problem with Michael Kirby who, it must be acknowledged, has had an extraordinary career. Indeed one might venture he has had a number of extraordinary careers. But good biography does much more than simply relate the narrative of the careers of famous and impressive people. It puts the subject career in the wider political, social and institutional context, bringing it alive and bringing its importance out against that background. This biography achieves that goal, and does so in a highly readable and attention holding style.

Correctly described by Malcolm Turnbull at the book's launch as the best Australian judicial biography since David Marr's biography of Barwick, this is the account of a singularly driven individual whose life has been lived extraordinarily publicly for the past 50 years. For the most part, that has not only been a matter of choice but desire and indeed tactic. Even the private dimension, shielded so deliberately and carefully from the public eye for so many years, became an increasingly important part of the public dimension following Kirby's famous 1998 amendment to his *Who's Who* entry and thus publicly, but without the usual Kirby fanfare, 'outing' himself and acknowledging his long-standing relationship with Johan von Bloten. Once public, Kirby, as if to make up time, referenced that relationship to illustrate continuing inequality and discrimination in the treatment of same-sex couples when it came to matters of fundamental social and economic importance such as superannuation arrangements. Brown skillfully integrates the personal, private side of the Kirby story with the public dimension.

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The biography follows a conventional chronological path, and thus tracks the Ulster background, the modestly circumstanced upbringing, the opportunity classes and the selective high school, Fort Street, the story of whose then most famous alumnus, HV Evatt, in many ways suggested a pathway for future achievement. Unlike Evatt, Kirby never followed a party political path although, as Brown makes clear, his political patrons were very much of the ALP – Lionel Murphy, Neville Wran and Gareth Evans, each of whom was instrumental in key appointments. Notwithstanding such connections, part of the Kirby paradox, captured by Professor Brown in the title to the book, is that this liberal progressive was and is also an ardent constitutional monarchist who worked closely with conservative figures such as Tony Abbott and Lloyd Waddy in the republican debates. This is not the only paradox to which Brown points.

Absence from party politics did not mean that Kirby was not a skilled politician, and those political skills were refined during no less than a 14 year period of engagement with student politics at Sydney University, overlapping with his years at Hickson Lakeman & Holcombe and then at the junior bar. Brown attributes Kirby's prolonged involvement in public student life in part to a loneliness occasioned by the lack of a private life bound up with Kirby's homosexuality and the social constraints of the time. In due course, Brown demonstrates those political skills being deployed in the early work of the Australian Law Reform Commission to which, Brown discloses, Kirby was a slightly reluctant appointee but through which he began to build both a domestic and international public

profile and reputation.

Brown makes the valuable point that many of the early law reform projects were not necessarily 'big ticket', attention grabbing sweeping reforms but rather involved the reform of areas of great practical importance. Early projects were to be of lasting significance including the insurance reference which led to the passage of the *Insurance Contracts Act 1984* (Cth) and the admiralty reference which resulted in the *Admiralty Act 1988 (Cth)*. The account of the Australian Law Reform Commission years, the intellectual vibrancy and energy harnessed under Kirby's leadership, and the very significant legislative reforms which emerged from its work serve sadly to highlight the diminished institution it has become as a result of successive funding cuts, with now only one permanent commissioner.

Kirby's drive and ambition is referenced in his somewhat audacious request, on being appointed president of the Court of Appeal in 1984 to continue concurrently as chairman of the Australian Law Reform Commission, a request not acceded to. Brown captures well the paradox that, at the time of the announcement of his appointment as president of the New South Wales Court of Appeal, Kirby was Australia's best known judge but had hardly ever sat in that capacity. This flowed largely from the fact that he had retained, and exercised, the right to refer to himself as Mr Justice Kirby – a title to which he became entitled on appointment as a deputy president of the Conciliation and Arbitration Commission but which role he in truth only discharged for a handful of months – throughout his many years as permanent chair of the Australian Law Reform Commission. The public perception of him as a 'judge' was further reinforced by his 1983 Boyer Lectures entitled 'The Judges' which, Brown correctly observes, not only further raised Kirby's profile but also shed unprecedented public light on the role and importance of the third arm of government. The significance of those lectures in terms of building the public's understanding of the work of the courts and their societal importance cannot be underestimated.

The story of the six days following Senator Heffernan's cowardly assault on Kirby under the cloak of parliamentary privilege and based upon forged Commonwealth car records makes for compelling reading.

Brown gives a fine account of Kirby's years on the Court of Appeal, his notable judgments such as *Osmond* and the *BLF* case, and what is generally acclaimed as the 'rescue' of that court, under his courteous leadership, from a low period of unattractive incivility which reflected poorly on the institution and which was corrosive of relations between bench and bar. The important role of Sir Laurence Street in easing Kirby's entry to the Supreme Court of New South Wales and embracing the Kirby enthusiasms and energy, when a less welcoming course was open, is given some emphasis. The Street/Kirby relationship was tested, however, in the case of *Bailey v DPP* where, as Professor Brown records, Kirby fell foul of failing to resist the temptation of referring to a recently argued but still reserved case in one of his many public international addresses, leading to a stubborn impasse only ultimately resolved, it would appear, by Sir Laurence and Justice Slattery joining in a terse and delphic judgment of such an unusual character that it was bound, on further appeal, to result in a retrial, the only result that the chief justice saw as acceptable following Kirby's foray into the public arena. Brown notes that, despite counsel of varying degrees of directness from friends and colleagues upon his taking up the presidency of the Court of Appeal, Kirby continued to speak publicly on topics which could compromise his ability to participate in cases including following his elevation to the High Court. This was one of a number of matters that contributed to considerable tension from time to time with his judicial colleagues.

The biography tracks a number of Kirby's key professional relationships through the course of his career. These include his early encountering in law student politics of the younger Mary Gaudron, of whose forceful style, it appears, Kirby was somewhat disapproving. Her later rapid elevation to the deputy presidency of the Conciliation and Arbitration Commission was something of a professional wake-up call and challenge to the ambitious Kirby, and it was to that same commission in an identical role that Kirby was soon

after appointed. For all this rivalry, more apparent on Kirby's part than Gaudron's, it was Gaudron, Brown points out, of all the High Court judges who stood up most for Kirby in relation to the Heffernan Affair, dealt with by Brown in a dramatic and absorbing chapter entitled 'Six Days that shook the Court'. The story of the six days following Senator Heffernan's cowardly assault on Kirby under the cloak of parliamentary privilege and based upon forged Commonwealth car records makes for compelling reading. The partial disclosure of the stances taken by individual justices during that period may be viewed by them, with the probable exception of Mary Gaudron, as involving gross breaches of confidence and it remains to be seen whether or not they, and in particular Chief Justice Gleeson, will choose to respond.

Kirby's relationship and interaction with Gleeson is one topic that recurs as the progress of Kirby's career is tracked. As Brown portrays it, from Kirby's perspective at least, this relationship was deeply competitive, from law school days, through the Supreme Court of New South Wales and to the High Court. Certainly the contrast in personality could not be starker. Brown's account appears to be given very much from Kirby's perspective although he acknowledges interviews with Gleeson in 2009 and 2010.

Other key relationships tracked include those of Kirby with Gareth Evans and Sir Gerard Brennan. The relationship with Evans originated in national student politics, was harnessed through the law reform commission and ultimately took the form of Evans' political patronage and influence leading to Kirby's appointment to the High Court in 1996, following Sir William Deane's surprise appointment as governor general. Kirby's relationship with Sir Gerard Brennan, chief justice at the time of his appointment to the High Court, also had its origins with the law reform commission, with Brennan an undoubted Kirby supporter. Sir Gerard's naturally cautious instincts, however, and deep concern for the institution of the judiciary led him, on Kirby's initial appointment to the Court of Appeal, to counsel Kirby politely against his engagement with matters that were or could come before an appellate court. The Brennan–Kirby relationship evidently became further strained on Kirby's elevation to the High Court as he continued to be engaged in and with an array of organisations, and to speak, locally and internationally, on a wide range of topics which could potentially imperil his ability to discharge his constitutional and institutional duty as one of a seven member bench. He was unable to sit, for example, on the *Stolen Generations Case,* because of an intervention by the International Commission of Jurists, and on *Croome's Case*, because of his past links to gay law reform.

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Kirby is on record as saying that he would have felt more at home on the Mason Court. That may well be, however it is difficult to imagine him in that very different milieu not following his apparent need to stand out and mark himself out as different in his reasons for judgment. Brown's biography contains a discussion of some of

Kirby's notable judgments on the High Court such as *Wik*, *Kartinyeri*, *Cattanach*, *Al Kateb, Workchoices* and *Thomas v Mowbray.* There is also a clear account of his judicial philosophy and methodology, based upon considerations of principle, policy and precedent which Brown links, presumably with input from Kirby, to Sir William Deane's judgment in *Oceanic Sun Line Special Shipping v Fay* (1988) 165 CLR 197, and which was fully articulated in Kirby's Hamlyn Lectures.

As to his time on the High Court, anecdotal evidence suggests that there is much truth in Brown's judgment that the professional dynamic of the High Court was one to which Kirby 'would never fully adjust, and which he never accepted'. Brown observes Kirby's isolation on the High Court, noting that whilst his 'judicial approach was now resonating with greater authority in the outside world, within the court, his audience had gone from small to vanishing'. The awkward occasion of Kirby's unofficial farewell sitting in Court Room No 1 of the High Court upon his retirement, apparently and, on one view, unedifyingly boycotted by all of his sitting colleagues, was a graphic illustration of his isolation. Brown's insight into the almost institutionalised refusal of Kirby's colleagues to join in his reasons for judgment in the many cases where there was agreement as to the result, is interesting; he observes that Kirby had sought in his years on the Court of Appeal to reduce the number of separate opinions

in a case whilst in his later years on the High Court, and perhaps driven by a desire to rationalise his forced isolation, he spoke publicly and privately of the importance of 'vigorous intellectual independence' and the value of individual reasons for judgment.

History will, of course, be the ultimate judge but it may well be that one of Michael Kirby's more significant contributions whilst on the High Court will not be jurisprudential at all but rather will be the determined and principled change he caused to be brought about in relation to the acceptance of his de facto partner, Johan von Bloten, to the rights and entitlements of the spouses of other justices, a matter of principle with implications for lawmaking well beyond the instant case of the federal judiciary. Brown gives a detailed account of Kirby's campaign initially for equal travel and social entitlements and then more substantive superannuation entitlements. This was a campaign that spanned Kirby's entire tenure at the High Court and was a source of institutional tension both within the court and in terms of its relationship with the then federal Attorney General Daryl Williams. On Brown's account, the lack of support in the form of the deafening silence of Williams in response to a number of formal requests and inquiries from the court on this topic do not do him credit. Kirby's quest to secure equality of treatment in terms of entitlements and superannuation was eventually only won with a change of government on the eve of his retirement.

The great intellectual and physical demands of high judicial office are well known. What is so striking about the Kirby story is that, for the vast majority of his domestic judicial career, there was a concurrent international career of breathtaking proportions which included his work as chair of the OECD project on Transborder Data Flows and the Protection of Privacy, as the Secretary General's Special Representative to Cambodia, as a member of the Global Commission

on AIDS, as a member of UNESCO's Bioethics Committee, the Human Genome project, and presidency of the International Commission of Jurists.

Other aspects of the international engagement demonstrate how the skills of the advocate, in the marshalling of evidence and the clear and skilful presentation of rational argument based upon that evidence, can be applied well beyond the courts, and the common law world.

With the possible exception of the connotation implicit in the title to the final chapter – The Victory Lap – Brown does not really delve into just what the forces were that underpinned and seemingly continue to underpin Kirby's craving for recognition and accolade.

Working with a vast library of speeches and correspondence, Professor Brown skillfully weaves this extensive international engagement into the narrative and makes the valid point that, notwithstanding the burden of work assumed at both domestic and international levels, such was the drive, industry and diligence that Kirby never exposed himself to the charge of spreading himself too thinly. The detail of Kirby's international contribution will not be as well known to readers of this review as his judicial work, and Professor Brown's account creates a valuable historical record. It is a contribution for which Kirby has justly won much praise internationally. Some of the international work, such as the formulation in 1988 of the Bangalore Principles on the domestic application of international human rights norms, came to inform his domestic work.

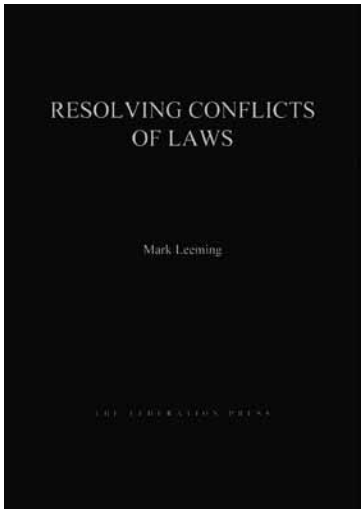
Unlike the recent biography of Mary Gaudron by Pamela Burton, this is a biography in which the subject not only cooperated but, it would appear, fully participated. So much so, indeed, that in the weeks following its publication, it was Kirby who appeared to be running the book's promotional campaign and publicity. The book's dust jacket makes reference to the author having been provided with exclusive access to 117 metres of personal and official papers, no doubt meticulously kept and indexed. This leads to the one paradox not really touched upon or grappled with in the book, and one that has puzzled me for many years. That is why, for a man of such undoubted talent and ability, generous spirit and sustained achievement in so many areas, so many of his speeches contain two or three opening paragraphs emphasising his own achievements and career in a way which is entirely unnecessary and, with the greatest respect, often simply self-indulgent. With the possible exception of the connotation implicit in the title to the final chapter – The Victory Lap – Brown does not really delve into just what the forces were that underpinned and seemingly continue to underpin Kirby's craving for recognition and accolade. Perhaps David Ash will explore this in his prosopography of Kirby due to be published in the 2023 winter issue of *Bar News*.

This last observation should not detract either from the immense contribution of the man himself to public life, both within Australia and globally, nor from the very high quality of the biography. It is a fine work to be read not only by lawyers but also by, to use a favourite Kirby phrase, his fellow citizens.

Reviewed by Andrew Bell SC

Resolving Conflicts of Laws

Mark Leeming | The Federation Press | 2011



The subject of this book is how the process of resolving conflicts between laws operates in Australia. This book is not about private international law but deals with inconsistency between laws: how to work out if they are inconsistent and how to resolve any inconsistency.

It is a major contribution to Australian constitutional law. Importantly, it reflects the experiences of a working lawyer.

The chapters are as follows:

1. Fundamental concepts
2. Australian sources of law
3. Resolving conflicts between laws having the same source
4. Repugnancy: A single test for legislative conflict
5. Inconsistent Commonwealth and state laws
6. Conflicts between state laws
7. Conflicts involving Territory laws.

The basic contention is that two stages are involved: the first is interpretative, that is to resolve apparent conflict as a matter of legal interpretation and only then, at the second stage, to apply conflict resolution rules.

The author makes the important and useful statement (at p 91.3) that it is not the case that two legal *texts* are inconsistent: inconsistency can only be determined by reference to the *legal meaning* of legal texts. Only after legal meaning has been given to the legal texts can the question whether they are inconsistent be addressed.

The book is informed by wide learning in relation to such difficult but important and very practical topics of federal jurisdiction; federal constitutional law; and state constitutional law and deals lucidly with whether there is a single common law of Australia and with states' extraterritorial legislative competence.

One of the themes of the book, expounded convincingly by reference to historical usage, is that 'inconsistency', 'repugnancy' and 'contrariety' are interchangeable terms in this context. Chapter 4 deals with this issue at length and contends for a single notion of legislative conflict:

> Either the rights, obligations, powers, immunities or privileges conferred by two laws conflict or they do not.

The book covers, in a spare style, principles of statutory construction, validity of delegated legislation and constitutional concepts.

It covers and refers to North American authority as well as United Kingdom and New Zealand materials. Much significant history is described and explained.

The conclusion on statutory construction is that to achieve a 'harmonious construction' of provisions claimed to conflict requires attention to identifying which provisions are leading and which are subordinate and which must give way to the other: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [70] and the words of Lord Herschell LC in *Institute of Patent Agents v Lockwood* [1894] AC 347 at 360 there cited.

Mark Leeming, rightly in my opinion, is harsh on metaphors whether those metaphors be 'laws standing together' or 'living together' or whether a law 'covers the field'.

Of course much has been written about inconsistent Commonwealth and state laws and s 109 of the Constitution; but very little has been written by judges on conflicts between state laws, as the author says in the opening to chapter six:

> This chapter contributes to a body of learning on a topic which courts have scarcely needed to address for the past 110 years: how is a conflict between the laws of two States resolved?

This chapter is particularly instructive as it addresses those real conflicts between states laws not able to be avoided by construction or by choice of law.

The book is informed by wide learning in relation to such difficult but important and very practical topics of federal jurisdiction; federal constitutional law; and state constitutional law and deals lucidly with whether there is a single common law of Australia and with states' extraterritorial legislative competence.

As the author notes in his Preface, much of the content of the book is material which is not otherwise readily to hand but which is necessary to analyse increasingly complex and interrelated and all-permeating legislative regimes.

The author is also robust in the views he expresses. This short extract from Chapter 6 illustrates the style and virtues of the book.

> Three heterodox accounts have been propounded by Michael Detmold, Justice Deane and Graeme Hill; these are addressed, but rejected. Instead, the solution propounded in this chapter is based upon the conventional "predominant territorial nexus" test, although modified in two main ways.

The author has succeeded in his aims of making the book useful and also readable. This is an excellent book from The Federation Press.

There are as well tantalising hints of other works in the series: an account of the jurisdiction of courts in the Australian legal system (page 16.1); the resolution of conflicts between statute law and common law (page 43.5); and the centrality of s 79 of the *Judiciary Act 1903* to the operation of the Australian legal system (page 79.9)

Reviewed by the Hon Justice Alan Robertson

Golf

By Tony Bannon SC

On Monday 20 December 2010, the 23rd Ken Hall Classic was held at St Michael's Golf Club in a wind of which any barrister in full flight would have been justly proud. As arriving players leaned determinedly into the breeze to achieve the modest ambition of entering the clubhouse to enquire whether the event was really going ahead in such conditions, it was clearly not going to be a day for settlers, other than of the alcoholic variety. News that the field would be joined by St Mick's regular Monday morning clergy contingent, reassured the barristers and judges that the boss was not unhappy with the majesty of the law, but with a Sunday sermon which had obviously gone awry. As play commenced, Richard Cheney announced himself and Brendan Sullivan as firm favourites to rid themselves of the choking tag. Keith Mason and Bill Kearns knew better and laughing off the impossible conditions, secured a stylish and comfortable victory (albeit on a quadruple countback) with the firm favourites yet another hand wringing second. Rob Macfarlan won nearest the pin, almost JAA'ing his tee shot, as one would expect. David O'Dowd won his umpteenth long drive (with 5 wood he reckons), Richard Beasley the panache award for a 5 putt double bogey (pretty impressive if you do the maths) and Fred Curtis took advantage of Alec Leopold's absence to secure the Bradman. David Hammerschlagg's ears are apparently recuperating from wind damage. The range of potential defendants is unclear but cross claims between the organising committee and the judge's playing partners are not out of the question. As usual, the real winner was the law, there being no suggestion of any of the field tossing it in for a career in golf.

Photo: iStockphoto.com