

THE JOURNAL OF THE NSW BAR ASSOCIATION | WINTER 2014

barnews

BARRISTERS AT GALLIPOLI

PLUS:

Tricky demurrers and frivolous pleas: the changing nature of the bar

Women at the bar: aspirations and inspirations

Interview with Attorney General Brad Hazzard

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ISSN 0817-0002

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, Jeremy Stoljar SC.

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The publication of this issue of *Bar News* coincides with the 100th anniversary of the commencement of the First World War.

As Tony Cunneen points out in his article commemorating that anniversary, a large number of NSW barristers served with distinction in the First World War. It was a different time. Cunneen notes that the then chief justice of NSW, Sir William Cullen, said that giving up one's life for one's country was the 'best gift a man could give'.

Cunneen emphasises that the contribution was not just to the fighting. The wives and families of many servicemen also carried out immensely valuable work, including to organisations such as the Red Cross and the Comforts Fund.

Indeed Cunneen observes that the important role played by the wives of judges and barristers in this work was a determining factor in the passing of the *Women's Legal Status Act 1918*, which gave women the right to become lawyers.

The bar was able to contribute to the war effort in other ways. Cunneen describes how a well known barrister, Langer Owen KC, with the encouragement of his wife Mary, established the Red Cross Missing and Wounded Enquiry Bureau – an organisation which collected and disseminated information about missing servicemen to their families back home.



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Owen KC advertised his private telephone number so that anyone could call him in an emergency; his motto was 'trouble does not exist'.

Other articles in this edition include an interview with the newly appointed Attorney General, the Hon Brad Hazzard MP. Justice Melissa Perry writes on women at the bar. We reproduce the speech given by the Hon James Spigelman AC QC at the launch of Michael Pelly's book *Murray Gleeson The Smiler*.

Peter Lowe has contributed a fascinating piece of forensic history, entitled 'Tricky demurrers and frivolous pleas'. And Caroline Dobraszczyk has written on the well-known prosecution of Amanda Knox, in Italy.

Bar News thanks the outgoing president, Phil Boulten SC, for his outstanding

efforts during his time in office. Boulten SC has agreed to be interviewed for this issue and he gives an insight into day to day life of – and pressures upon – the person serving in this office. Boulten describes, for example, attempting during the morning tea recess in court to deal with the 30 – 40 emails he would receive each day as president.

In this issue we also see the first column from the newly appointed president, Jane Needham SC. *Bar News* welcomes Needham SC and wishes her well in her new role.

Jeremy Stoljar SC

Building a supportive environment at the bar

By Jane Needham SC



At the beginning of this, my first column for *Bar News* as president, I would like to say two important things. The first is that I am very conscious of the honour and privilege of being president of this association, and I will be continuously striving to do my best in this important role. The second is that in so striving, I am very conscious of those who have undertaken the role before me; most recently, that very model of a modern president, Phillip Boulten SC. I have been on Bar Council for around 21 years, and have served as a councillor under many good men and two good women. I would like to thank Boulten SC for his service to the association and his strong leadership in what was a somewhat tumultuous time.

I had been hoping that my time would be slightly less tumultuous, but it appears that that is not to be. Since taking on the role (at time of writing, some six weeks ago) I have been plunged into issues concerning the new Bail Act, proposed amendments to the Motor Accidents Act and the workers' compensation scheme, and other matters which were previously outside my ken. It has, despite the learning curves required, been fascinating.

Starting off along with me is a new attorney general, Brad Hazzard. It is not the role of the president always to agree with the attorney general; sometimes vociferous disagreement is required. Despite some immediate differences of view, I am hopeful that we will be able to forge a good working relationship and to work together to improve access to justice in this state. The attorney general was good enough to submit to cross-examination by Arthur Moses SC for an interview in this issue of *Bar News*. I trust that that experience will not affect the working relationship which I hope to achieve.

Each president has an area of particular interest which he or she brings to the role. Mine is an aspect of life at the

bar which I had to work out as I went along, due to the complete lack of any formal guidance or structures to assist me. I am referring to the difficulties of combining an active practice at the bar with a need for flexibility, in my case, due to the birth and parenting of my three children. Each parent at the bar – male or female – has a story of juggling the various calls on their time, often culminating in tales of urgent advices being given by telephone in unlikely situations (mine involves the emergency room at Sydney Kids' Hospital and a Federal government agency). I am sure the same stories can be told by barristers who have carer responsibilities for elderly family members, or who have academic or other careers running in parallel to their practice at the bar.

I was able to maintain my practice over the period of having my children largely due to the assistance of my fellow Floor members. I was given a great deal of latitude to licence my room, and to share rooms when I returned from leave and was working part-time. In one case I shared a room with another floor member who was returning from paternity leave at the same time – a study in sleep deprivation. I was given significant assistance in ensuring that my



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working from home was supported by Floor technology. For that, I am entirely grateful. I was rather saddened, then, when I returned to full-time practice, to hear stories from other barristers who were not so supported, and who have had to sell their rooms, curtail their practices, or even leave the bar as a result of having children.

Most of these stories come from women, but of course, parenting is not solely a female endeavour. I am hopeful that the recently adopted Model Parental and Other Extended Leave Best Practice Guideline (an initiative of the Equal Opportunity Committee developed partly in response to the National Attrition and Re-engagement Survey by the Law Council of Australia or 'NARS') will provide a level of support to those barristers wishing to take career breaks for various reasons and enable them to return to their floor and to their practice when the time is right. The adoption of the Model Best Practice Guidelines by floors will enable both mothers and fathers who wish to spend more time with their children to be able to do so, as well as enabling barristers who need some flexibility for any number of reasons to structure their time off in a supportive environment.

In this edition of *Bar News* you will find an article on the NARS report. This survey highlighted the systemic and often unconscious bias against women in the legal profession and provided some worrying statistics on harassment, bullying and discrimination. The Bar Association's response to NARS is an ongoing one. The Council has already provided a response to the Law Council

I was rather saddened [when] I returned to full-time practice, to hear stories from other barristers who were not so supported, and who have had to sell their rooms, curtail their practices, or even leave the bar as a result of having children.

detailing the work undertaken by the bar to date, and has established two working parties; one to deal with longer-term responses to the issues raised by the NARS report, and the other to address equitable briefing issues. Further, Model Best Practice Guidelines have been approved by Council to assist Floors and members in dealing with harassment, discrimination and vilification; bullying; and grievance handling. I am looking forward to leading the work done by the various committees and working parties whose remits include issues raised by the NARS report, and seeking to make the bar a better working environment for every barrister.

May I commend the Model Best Practice Guidelines to each member of the bar for adoption by their chambers. The guidelines will be the subject of CPDs and information sessions, and it is to be hoped that their widespread adoption throughout the bar will assist in improving equality of access, diversity, and working conditions for all barristers.

At the risk of making this president's column sound like an editorial for *Girls Own Annual*, I am also happy to see a report in this issue of Justice Melissa Perry's speech to a forum held recently by the Women Barristers Forum. Ironically I was unable to attend that forum because of high school netball commitments. Justice Perry's words are inspiring and

deserving of general attention, and should be read alongside the speech given by Justice Ruth McColl at a NSW Women Lawyers' function 'Celebrating Women in the Judiciary' in February 2014, which was published in *In Brief*.

I am very much looking forward to working with the Bar Council and in particular with the Executive. The work that we do would not be possible without the enthusiastic support of the Bar Association staff, led by Philip Selth OAM. I have also been working particularly closely recently with Megan Black, senior policy lawyer, without whom a number of important recent initiatives would not have been possible (including the excellent childcare scheme which will enable those members who take up places to have a guaranteed spot at a city childcare centre). By singling out Philip and Megan I do not mean to imply that the rest of the staff are not worthy of mention; far from it. The Bar Association is extremely lucky to have such talented people working for us.

I am sure that you will enjoy this issue of *Bar News*. As ever, it is only possible through the hard work of the Bar News Editorial Committee under the leadership of Stoljar SC supported by Chris Winslow of the Bar Association, for which many thanks.



Row 1: (Back row): Peter Godkin, Mark Fozzard, Brin Anniwell, Daniel Roff, Thomas O'Brien, Patrick Meagher, Jonathon Dooley, James Mack, Quintin Rares, Edward Yin, Thomas Buterin, Adrian Coombes, Peter Aitken, Joanna Davidson

Row 2: Wai Kacy Soon, Steven Spadijer, Robert Clark, Sebastian Hartford Davis, James Willis, Slade Howell, Ben Mostafa, Victoria O'Halloran, Stephen Tully, Edmund Lee, Jocelyn Williams, Geoffrey Simpson, Rachel Mansted

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LETTERS

The Great Silk Debate



Daniel Klineberg's query (*Bar News*, Autumn 2014 at p 59) regarding re-issue of letters patent is addressed, first by the passage of the *Demise of the Crown Act 1901* (No. 57), s 2 ('the holding of any office under the Crown shall not be affected nor shall any fresh appointment thereto be rendered necessary by the demise of the Crown') which governed the issue from 1901 to 1986. In that latter year the *Constitution Act 1902* was amended by the insertion of s 49A in terms not materially different to the above, see *Statute Law (Miscellaneous Provisions) Act 1986* (No. 16).

Peter Lowe

In miners we trust

In an article entitled 'In miners we trust' by the Hon John Nader QC, published in *Bar News* Autumn 2014. The following proposals were made:

- the ownership of minerals extracted from the ground on Crown lands in Australia should not pass from the state until the state sells it for full value;
- that the minerals in such ground and after mining be held on trust for the people;
- that the minerals extracted from such ground be sold by the state for their value; and
- that the proceeds of sale would then be held on trust for the people.

Given the history of the involvement of the Crown and state governments in Australia in relation to mining and the collection of mining royalties in Australia, it is, in my view, certain that the states

would very strenuously resist the adoption of the proposals made by the Hon John Nader QC in his article and that the mining industry or large parts of it would conduct a massive campaign against the adoption of his proposals. In my respectful opinion, there is no real and genuine prospect of his proposals being adopted. This is especially so given the situation in relation to Commonwealth and state financial relationships. (I accept that a white paper is to be prepared in relation to such matters. However, there has not been a great deal of success in negotiations between the Commonwealth and the states over many decades.)

I leave aside questions which would inevitably arise as to the merits of his proposals.

Current state legislation in relation to royalties

Royalties on minerals are charged by

the Crown or the state and territory governments as owners of the minerals in the ground for the right to extract a mineral resource. In most cases, royalties are payable on an ad valorem basis (i.e. a percentage of value) or a quantum basis (i.e. flat rate per unit) depending on the mineral, except in the Northern Territory where a profit-based royalty regime applies.

Royalties are payable on the basis that the Crown or the state (for convenience I include the NT and the ACT in 'the state') generally has property in all minerals below the surface of the land.¹

In *Cadia Holdings Pty Ltd v State of New South Wales* [2010] HCA 27 (25 August 2010) the High Court dealt with provisions of the *Mining Act 1992* (NSW). The judgment of the plurality mentions the expression 'the Crown in the right of New South Wales' referred to in s 3 of the *Mining Act 1992*. The judgment of the plurality in *Cadia*

includes the following passage: 'The expression 'the Crown' (mentioned in Part 14 of the 1992 Act) is a reference to 'the Crown in right of New South Wales', and this in turn is to be read as identifying the body politic created by the *Constitution* as the state of New South Wales...'.'²

The provisions in the *Mining Act 1992* (NSW) dealing with the payment of royalty distinguish between recovery of a 'publicly owned mineral' and recovery of a 'privately owned mineral'. A 'publicly owned mineral' means 'a mineral that is owned by, or reserved to, the Crown' whilst privately owned minerals are those 'not owned by, or reserved to the Crown'.

The *Mining Act 1992* (NSW) has objects which are referred to as follows: 'The objects of this Act are to encourage and

facilitate the discovery and development of mineral resources in New South Wales, having regard to the need to encourage ecologically sustainable development. In particular the objects in the 1992 Act include an object designed 'to ensure an appropriate return to the state from mineral resources'. The NSW 1992 Act provides for royalty on a publicly owned minerals at the rate or rates applicable as at the time the material from which it is recovered is extracted from the land. The Act also provides for recovery of royalties.

The judgment of the plurality in *Cadia*, referring to royalty which must be paid by *Cadia* to the Minister, goes on to say that: 'An action in debt lies against the minister to recovery the amount in question'.

The Henry Review of Taxation

In 2008, the then Commonwealth government instigated what is now called the Henry Review of Taxation.

In its final report to the Commonwealth government made in December 2009 and released by the government in May 2010, the review panel recommended, amongst many other things, that revenue raising should be concentrated on four robust and efficient broad-based taxes. These taxes included rents on natural resources and land. In recommendation 45, which deals with charging for non-renewable resources, it recommended that current resource charging arrangements imposed on non-renewable resources by the Australian and state governments should be replaced by a uniform resource

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rent tax imposed and administered by the Australian government. It proposed that the uniform resource rent tax be levied at a rate of 40 per cent, with that rate adjusted to offset any future change in the company income tax rate from 25 per cent, to achieve a combined statutory tax rate of 55 per cent. It made other recommendations about the uniform resource rent tax which it proposed.

In its Executive Summary, the panel said: 'A tax on high-value resource rents would on average over time likely raise higher revenues than existing project-based royalties. In its Executive Summary, the review panel also said: 'Except for low-value commodities, existing resource royalties should be replaced by a project-based uniform resource rent tax set at 40 per cent'. In its Executive Summary, the panel also said: 'Clearly, implementation (of its proposals) will require agreement at the inter-governmental level, and will require detailed assessment of financial implications-likely in more than one step'.

In its report, the panel also said: 'The community, through the Australian and state governments, owns rights to Australia's non-renewable resources and should seek an appropriate return from allowing private firms to exploit these resources.'

40 per cent Super Profits Tax

In a joint media release by the Hon Kevin Rudd MP, prime minister, and the Hon Wayne Swan MP, deputy prime minister and treasurer, released on 2 May 2010, it announced a plan to apply a Resource Super Profits Tax of 40 per cent to the profits earned from resources. They said that it was a tax to the profits earned 'from resources that are owned by all

Australians'. They said that it would ensure Australians get a fair share from 'our valuable non-renewable resources'. They said that it will also rebate state royalties paid by resource companies. And they also announced a phased cut in the company tax rate to 28 per cent to assist the competitiveness of all Australian industries. They said: 'These reforms will make our tax system fairer, by providing all Australians with a fair return for our natural resource wealth and by providing better superannuation concessions for over two million lower income earners'. They also said: 'We will consult broadly on the changes, including with businesses, the states and the broader community'.

A resource rent tax was one of the five recommendations the Commonwealth government accepted from the 138 recommendations presented by the Henry Tax Review.

As part of the 2010-11 Budget, the Commonwealth government proposed to introduce the resource super profits tax from 1 July 2012.

Campaign by mining companies

A number of major mining companies conducted a campaign against the resource super profits tax proposed by the prime minister and the deputy prime minister and treasurer on 2 May 2010. That campaign was well-funded and has been characterised as 'massive'.

The then treasurer said in a lecture that the abovementioned campaign was against: 'a tax which asks (some of the people campaigning against it) to do no more than pay a fair return to the Australian people for the right to mine and export the non-renewable resources which belong to the whole nation'.

Change of prime ministers

On 24 June 2010, the Hon Julia Gillard MP was sworn in as prime minister as the head of a new Commonwealth government. On 25 June 2010, the treasurer, the Hon Wayne Swan MHR, welcomed the decision by the mining industry to withdraw their advertising campaign on the previous day and said: 'We are genuine in our desire to negotiate with the industry...'. He also said: '...we are committed to a profits based tax and to getting a fairer share of the value of our mineral resources owned by the Australian people 100 per cent'. On 24 June 2010, the new prime minister spoke about negotiating with the mining industry. On 2 July 2010, she had said: '...the policy goal was that Australians are entitled to a fairer share of the mineral wealth in our ground'. Subsequently, Julia Gillard participated in negotiations with three big miners.

The proposed new minerals resource rent tax upon iron ore and coal miners allowed them to make deductions for all current and future royalties paid by them to the states, and allowed them to deduct market value depreciation of their operations.

Mineral resources rent tax

Subsequently, agreement was reached between them on a new minerals resource tax of 30 per cent limited to iron ore and coal and which was to commence at a profit level of \$75 million a year.

On 2 July 2010, the key elements of the MRRT package were announced. It was to apply to mined iron ore and coal. All other minerals were excluded. The rate of tax was to be 30 per cent applied to the taxable profit at the resource. Taxable profit was to be calculated by

reference to the value of the commodity determined at its first saleable form (at mine gate) less all costs to that point and an extraction allowance equal to 25 per cent of the otherwise taxable profit was to be deductible to recognise the profit attributable to the extraction process was to be a resource rent tax applying to the resource, not a super profits tax. Various factors were involved in calculating the amount of the tax.

The MRRT is a tax on mining 'projects'. state mining royalties were specifically excluded from mining expenditure and, as a consequence, were not deductible in calculating profit. Instead, the MRRT Act included a 'royalty allowance' as one of seven MRRT allowances that are deductible from mining profit in determining the MRRT base.

The Minerals Council of Australia took it that the combination of the headline rate and the extraction allowance meant that the effective MRRT tax rate would be 22.5 per cent *after the payment of royalties*.

The Prime Minister Gillard announced on 2 July 2010 that the company tax rate would be cut to 29 per cent from 2013-2014.

The government also announced that the current petroleum resource rent tax would be extended to all onshore and offshore oil, gas and coal seam methane projects.

In the prime minister's announcement on 2 July 2010, she said: 'The breakthrough agreement keeps faith with our central goal from day 1: to deliver a better return for the Australian people for the resources they own and which can only be dug up once'.

On 23 November 2011, the MRRT Act was passed by the House of

Representatives. On 12 March 2012 it was passed by the Senate.

Section 1.10 of the MRRT Act provided as follows: 'The object of this Act is to ensure that the Australian community receives an adequate return for its taxable resources having regard to three factors, one of which was 'the extent to which the resources are subject to Commonwealth, state and territory royalties.'

On 30 May 2012, the prime minister said in a speech to a Minerals Council of Australia dinner: 'You don't own the minerals' and '*Governments* only sell you the right to mine the resource' and 'A resource we hold in trust for a sovereign people. They own it and they deserve their share'.

On 23 March 2012, shortly after the Senate passed the new MRRT legislation, Mr Forrest of Fortescue Group Minerals Limited announced plans for a possible High Court challenge to the (MRRT).

Fortescue Group Minerals Limited v The Commonwealth

The judgment of the plurality in *Fortescue Metals* made, amongst other things, the following points.

The plaintiffs submitted that a state is necessarily both a territorial entity and a polity with responsibility for the management and control of the waste lands of the Crown and is expressly given the right to appropriate the proceeds of sale and revenues from such land, including royalties, mines and minerals in such lands.

Once MRRT is payable...the formula by which its amount is calculated operates so that a reduction in the mining royalty payable to a state government would,

other things being equal, result in an equivalent increase in the amount of the MRRT liability, and an increase in the royalty, other things being equal, result in an equivalent decrease in the miner's MRRT liability. As it happens, state mining royalties differ between the states within the federation.

(The plaintiffs had made submissions as to the management of lands and mineral resources by the states). The plurality said: 'The extent and importance of the states' function of managing their lands and mineral resources must be acknowledged'.

The Commonwealth did not dispute that each state's ownership, management and control of its territory (including, particularly, the waste lands of the Crown within that territory) is a necessary attribute of statehood and that a state's ability by legislation to make laws to promote the development of its territory in the interests of, or to provide the welfare of the community of the state is important.

The Commonwealth submitted that the MRRT legislation does not subject (the ability of the states to determine the level of royalty to be paid as the price for extracting minerals from their territories) to Commonwealth control and proceeded on the assumption *that the states were free to fix royalties as they chose*.

The MRRT legislation does not impose any special burden or disability on the exercise of powers and fulfilment of functions of the states which curtails their capacity to function as governments. *The MRRT legislation does not deny the capacity of any state to fix the rate of royalty for minerals extracted by miners, and no burden upon a state attaches to any decision*

by the state to raise or lower that rate. As the plaintiffs asserted, the MRRT legislation affects the state's ability to use a reduction in royalty rate as an incentive to attract mining investment in the state, the MRRT legislation does not impose any limit or burden on any state in the exercise of its constitutional functions.

Crennan J or Kiefel J made, amongst other things, the following points in their respective separate reasons.

MRRT allowances include a royalty allowance. The effect of the royalty allowance is that full credit is given to a miner for the amount of any mining royalties paid to the Commonwealth, a state or a territory for the mining of certain resources.

The states have the capacity to alter the applicable rate of the mining royalties.

(In the MRRT Act) a 'mining royalty'

is defined as expenditure *made under a Commonwealth, state or territory law* in relation to a taxable resource extracted under authority of a product right'.

The only causal connection between the royalty allowance and a state is that mining royalties are only incurred by a miner because of a state law.

Any difference in the amount of the deduction for mining royalties results not from the MRRT Act but from the state legislation.

The MRRT legislation is not directed to the states and does not affect the government of a state. *It does not deny the ability of a state to fix a rate of mining royalties.*

The effect of the royalty allowance is that full credit is given to a miner for the amount of any mining royalties paid to the Commonwealth, a state or a territory

for the mining of certain resources.

French CJ said, amongst other things, the (MRRT) Act makes allowance, in fixing the MRRT liability of a miner, for mining royalties payable under state laws. Because the MRRT Act makes those allowances, the liabilities it imposes can vary according to the state mineral royalty regime.

Malcolm Cockburn

Endnotes

1. A Review of Mining Royalties in Australia – Publications – Be Informed – Minter Ellison
2. Interpretation Act 1987 (NSW), s 13



Non-specific gender

Joanna Davidson reports on *Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11.

Does the NSW Registrar of Births, Deaths and Marriages, on receipt of an application by an unmarried person who has undergone a sex affirmation procedure whose birth has not been registered in NSW,¹ have power to register the person's sex as 'non-specific'? On 2 April 2014, the High Court (comprising French CJ, Hayne, Kiefel, Bell and Keane JJ) unanimously held that the registrar's power to register a person's 'change of sex' did extend so far; but did not extend to registering further categories such as transgender, androgynous or intersex.

Background

Norrie was born in Scotland with male reproductive organs. In 1989 she underwent a 'sex affirmation procedure' within the meaning of s 32A of the *Births, Deaths and Marriages Registration Act 1995* (NSW).² Such a procedure is defined as 'a surgical affirmation procedure involving the alteration of a person's reproductive organs carried out: (a) for the purpose of assisting a person to be considered to be a member of the opposite sex, or (b) to correct or eliminate ambiguities relating to the sex of the person'. Norrie gave evidence below that she undertook the surgery to eliminate the ambiguity in relation to her sex.³ She was of the view that the surgery had not resolved that ambiguity.

On 26 November 2009, Norrie applied to the registrar under s 32DA of the *Births, Deaths and Marriages Registration Act* for her sex to be registered as 'non-specific'.⁴ Section 32DA imposes five conditions on an application to the registrar 'for the registration of a person's sex': an applicant must be 18 years or over; be an Australian citizen or permanent resident; live in NSW and have lived in this state for at least a year; have undergone a sex affirmation procedure; not be married and be a person whose birth is not registered under the Act or a law of another state providing for the registration of births.⁵ Under s 32DC(1), '[t]he registrar is to determine an application under section 32DA by registering the person's change of sex or refusing to register the person's change of sex.' Neither sex nor 'change of sex' is defined in the Act.

Despite the discrepancy between the language of ss 32DA and 32DC as to what is to be registered, it was not disputed that

these provisions provide for a first registration in NSW of an applicant's sex differing from an earlier record (outside NSW) of the applicant's sex.⁶ Norrie's application was accompanied by statutory declarations from two medical practitioners stating that she had undergone a sex affirmation procedure, in accordance with the requirements of s 32DB.⁷ The registrar approved Norrie's application in February 2010 and issued a Recognised Details (Change of Sex) Certificate. In March 2010, the registrar wrote to Norrie advising her that this certificate was invalid.⁸

Norrie applied for review of the decision by the Administrative Decisions Tribunal, which held that it was not open to the registrar to register Norrie's sex as 'non-specific'.⁹ The tribunal's Appeal Panel dismissed Norrie's appeal.¹⁰ Norrie's further appeal to the Court of Appeal was upheld, the court remitting the matter to the tribunal for consideration of whether Norrie might be registered using a specific category of sex not confined to male or female, e.g., intersex, transgender or androgynous.¹¹ The High Court dismissed the appeal but set aside the Court of Appeal's order remitting the matter to the tribunal. A Gender Agenda Inc was granted leave to appear amicus curiae. Its written submissions concerning classification of persons as 'intersex' indicate the challenges of future legislative reform in this area.¹²

Construction of the Act

The High Court recognised that the ordinary usage of language referring to the opposite sex invokes the contrasting categories of male and female. Nevertheless, the Act's reference to 'ambiguities relating to the sex of the person' and the context in which the relevant provisions were enacted enabled the court to find that the Act recognised that 'the sex of a person is not ... in every case unequivocally male or female'.¹³

The High Court construed the Act by reference to the purpose of the register and the limited role of the registrar. The registrar's role under s 32DC is confined to recording information provided by community members and does not involve 'moral or social judgments' or the making of decisions about the outcome of any surgical procedure.¹⁴ While accepting

While accepting the registrar's submission that the Act recognises only male and female as registrable classes of sex, the court also accepted Norrie's submission that the register's purpose is to state the truth about matters recorded therein, so far as possible.

the registrar's submission that the Act recognises only male and female as registrable classes of sex, the court also accepted Norrie's submission that the register's purpose is to state the truth about matters recorded therein, so far as possible. Classifying Norrie in the register as male or female would involve recording misinformation, because her sex remained ambiguous.¹⁵

The court had regard to the existing state of the law at the time ss 32DA–32DD were introduced into Pt 5A of the Act in 2008. Part 5A was inserted in 1996, by the *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996* (NSW). That amending Act introduced definitions of 'recognised transgender person' and 'transgender person' into the *Anti-Discrimination Act 1977* (NSW). The definition of 'transgender person' for the purposes of the Anti-Discrimination Act includes both a person 'who identifies as a member of the opposite sex' and 'who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex'.¹⁶ While Pt 5A of the Act does not use the term 'indeterminate sex', the High Court found that the provisions of Pt 5A are to be applied in the context of express legislative recognition of the existence of persons of indeterminate sex.¹⁷

These aspects of the statutory context, together with the reference to 'ambiguities' in the definition of 'sex affirmation procedure', were sufficient to enable their Honours to conclude that it was open to the registrar to register Norrie's change of sex pursuant to s 32DC by recording a change in classification from male to non-specific.¹⁸ The judgment does not address the registrar's submission that identification of two categories of sex is a fundamental principle or at least assumption of the general system of law.¹⁹

Effect of registration of change of sex

The High Court noted the registrar's acknowledgement that registration of a person's sex as 'non-specific' would not leave a person in 'no-man's land' to the extent that other state laws are premised on a binary male/female division of the sexes.²⁰ This is because the deeming effect of s 32J, which recognises a person whose change of sex is registered under Pt 5A as being of the registered sex for the purposes of other NSW laws, operates subject to 'any law of NSW'. The High Court rejected the registrar's submission that the recognition of more than

two categories of sex would generate unacceptable confusion with only a brief discussion, noting that with the exception of marriage 'for the most part, the sex of the individuals concerned is irrelevant to legal relations'.²¹

Conclusion

The decision removes the prospect that the potential categories of registration of sex under the Act are indeterminate. Registrable classifications of sex under Pt 5A are confined to male, female and non-specific. The judgment provides an example of the consideration of statutory context in the first instance for purposes of construction, in circumstances where references to any category of sex other than male and female in the Act and relevant extrinsic material were limited.

Endnotes

1. Or under a 'corresponding law': *Births, Deaths and Marriages Registration Act 1995* (NSW), s 32DA(1)(e).
2. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [9].
3. *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145 at [6].
4. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [11].
5. See the definition of 'corresponding law': *Births, Deaths and Marriages Registration Act 1995* (NSW), s 4.
6. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [17].
7. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [13].
8. *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145 at [8].
9. *Norrie v Registry of Births, Deaths and Marriages* [2011] NSWADT 102 at [54].
10. *Norrie v Registrar of Births, Deaths and Marriages* [2011] NSWADTAP 53 at [20].
11. *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145 at [204]–[205] per Beazley ACJ, [279] per Sackville AJA, [288]–[290] per Preston CJ (LEC).
12. Cf the provision for the registration of intersex persons in Pt 4 of the *Births, Deaths and Marriages Registration Act 1997* (ACT).
13. *AB v Western Australia* (2011) 244 CLR 390 at [23].
14. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [16], [38].
15. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [30], [32].
16. *Anti-Discrimination Act 1977* (NSW), s 38A.
17. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [18].
18. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [40].
19. See *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA Trans 36.
20. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [43].
21. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [42].

Submissions on sentencing ranges

Brin Anniwell reports on *Barbaro and Zirilli v The Queen*.

Introduction

In *Barbaro v The Queen; Zirilli v The Queen*¹ (*Barbaro*), the High Court dismissed two appeals from the Victorian Court of Appeal on sentences imposed on Mr Barbaro and Mr Zirilli (the applicants) who had both pleaded guilty to serious drug offences and were sentenced to life and 26 years imprisonment respectively. The High Court held that the prosecution is not permitted or required to make any submission on sentencing ranges.

The decision carries serious implications for prosecutors when making submissions on sentencing, and legislative reform of the court's decision has been recommended. However, the Federal Court has recognised that the decision does not prohibit the court from taking into account the submissions of the parties as to the agreed penalty amount in civil penalty proceedings.

The facts

The applicants each pleaded guilty to three counts charging offences against laws of the Commonwealth *Criminal Code* 1995, namely conspiracy to commit an offence of trafficking a commercial quantity of a controlled drug (MDMA)²; trafficking a commercial quantity of a controlled drug (MDMA)³ and attempting to possess a commercial quantity of an unlawfully imported border controlled drug (cocaine)^{4,5}.

Before the applicants indicated to the Commonwealth director of public prosecutions that they would plead guilty to certain charges, there were discussions between the lawyers for the applicants and the prosecution for the purpose of reaching plea agreements. During those discussions, the prosecution informed the applicants' lawyers of the 'sentencing range' that would apply to each applicant.

In the Supreme Court of Victoria, King J sentenced Mr Barbaro to a total effective sentence of life imprisonment and a non-parole period of 30 years was fixed. Mr Zirilli was sentenced to a total effective sentence of 26 years' imprisonment with a non-parole period of 18 years. The head sentences imposed on each applicant were greater than the 'sentencing range' expressed by the prosecutor.

During the sentencing hearing, King J made it clear to the prosecutor and the defence that she did not intend to ask any party what sentencing range the sentences to be imposed should fall within. Counsel for Mr Zirilli informed King J what the prosecution had said was the sentencing range for his client. Counsel then appearing for Mr Barbaro did not. The prosecutor made no submission about what range of sentences could be imposed on either Mr Barbaro or Mr Zirilli.

On appeal, the Supreme Court of Victoria Court of Appeal⁶ held that King J committed no error of law in refusing to entertain a submission from the Crown on sentencing range and that the effective sentences and the non-parole periods imposed were not manifestly excessive.

The High Court appeal

The grounds of appeal before the High Court were, first, that the sentencing hearing was unfair because the sentencing judge refused to hear submissions from the prosecution about what range of sentences she could impose. Secondly, that by not hearing submissions on range of sentences, her Honour precluded herself from taking into account a consideration relevant to sentencing.

The applicants did not contend that King J made a factual or legal error in sentencing; it was not argued that the sentences imposed were manifestly excessive. However, the applicants argued that the prosecutor should have been permitted to submit to the sentencing judge that the sentences should be fixed within a range because plea agreements had been made and the matters had been 'settled' on the basis of what the prosecution had said to be its views of the available sentencing range for each applicant. Further, it was submitted that the applicants could have used these views to their advantage in the course of the sentencing hearing had the prosecution been permitted to put them forward.

The High Court granted special leave but dismissed the appeals⁷, finding that the applicants were not denied procedural fairness because the sentencing judge would not receive statements of what the prosecution considered to be the bounds of the available sentencing ranges. Not receiving such a statement was not a failure to take account of some material consideration.⁸

The reasoning in the plurality judgment (French CJ, Hayne, Kiefel and Bell JJ) may be distilled into three key issues.

The distinction between judge and prosecutor

The High Court held that a statement by the prosecution of the bounds of an available range of sentence might lead to an erroneous view about its importance in the process of sentencing. As a consequence, there would be a blurring of what should be a sharp distinction between the role of the judge and the role of the prosecution in that process.⁹

In *R v MacNeil-Brown*¹⁰, a majority of the Victorian Court of Appeal held¹¹ that 'the making of submissions on sentencing range is an aspect of the duty of the prosecutor to assist the court'. Accordingly, a sentencing judge could reasonably expect

the prosecutor to make a submission on sentencing range if either 'the court requests such assistance' or, 'even though no such request has been made, the prosecutor perceives a significant risk that the court will fall into error regarding the applicable range unless such a submission is made'.¹²

In *Barbaro*, the court observed that the practice that had developed from *MacNeil v Brown* assumed that the prosecution's submission on the bounds of the available range of sentences would assist the sentencing judge to come to a fair and proper result. It depended on the prosecution acting not only fairly but as a 'surrogate judge'¹³, which was not the role of the prosecutor.

Consistency and the use of sentencing statistics

The High Court distinguished the setting of bounds to the available range of sentence from the proper and ordinary use in submissions of sentencing statistics and other material indicating what sentences have been imposed in other comparable cases.¹⁴ The court acknowledged that in seeking consistency, sentencing judges must have regard to what has been done in other cases and those cases may well establish a range of sentences which have been imposed. The court noted that consistency of sentencing is important, however, what is sought is consistency in the application of relevant legal principles, not numerical equivalence¹⁵.

Statement of opinion, not a submission of law

The plurality held that, contrary to the Victorian Court of Appeal's view in *MacNeil v Brown*, a prosecutor's submission about the bounds of an available range of sentence is a statement of opinion, not a submission of law.¹⁶ It purports to identify the points at which conclusions of manifest excess and inadequacy arise, giving rise to an inference of appealable error in the sentencing discretion but without otherwise identifying such an error. Accordingly, a statement of bounds states no proposition of law.

Interestingly, Gaegler J found that a submission on the bounds of the available sentencing range was a submission of law, not opinion. His Honour held that:

[i]t is a submission that a sentence within that range would or would not meet a limiting condition of the discretion conferred on the court to sentence for the offence and therefore would or would not fall within the limits of a proper exercise of the sentencing discretion. In the specific context of sentencing for a federal offence, it is a submission that a sentence within that range would or would not

answer the specific statutory description in s 16A(1) of the Act of a sentence that is of a severity appropriate in all the circumstances of the offence.¹⁷

Practical implications

While a prosecutor is not permitted to proffer his or her view about an available range of sentence, the High Court has made it clear that the sentencing judge should be properly informed about comparable sentences. To that end, the High Court has distinguished a submission setting bounds to the available range of sentences (which impermissibly assumes responsibility for the judicial exercise of sentencing discretion) from the proper and ordinary use in a submission of sentencing statistics and other material indicating what sentences have been imposed in more or less comparable cases (which assists the judge in determining the appropriate range).¹⁸

The permissible scope of the prosecution's sentence submissions following *Barbaro* is that, beyond facts and comparative sentence information, the prosecutor must confine itself to addressing the relevant sentencing principles that should be applied by the court in exercising its discretion rather than making submissions as to the sentencing range that may be appropriate in the case at hand. The practical outcome of this limitation is that an accused may not rely on any agreement with or representation from the prosecutor as to the available upper range that may be put to the court when making a decision as to whether to enter a guilty plea.

The New South Wales Bar Association considers that, for a number of reasons, the judgment of the High Court will produce an unsatisfactory situation in sentencing proceedings. The Bar Association has written letters to the attorneys-general of the Commonwealth and New South Wales submitting that the decision will preclude the prosecutor, a party to sentencing proceedings, from making a submission as to the ultimate outcome of those proceedings; will limit the assistance that the prosecutor can provide to the sentencing court to avoid appealable error; is inconsistent with the guidance provided to prosecutors in Rule 93 of the *New South Wales Barristers' Rules*; and will preclude the encouragement of pleas of guilty which might result from plea negotiations where the prosecutor agrees to make a submission as to a specified sentencing range.

The Bar Association has recommended that Part 3 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and s 16A of the *Crimes Act 1914* (Cth) be amended so as to permit a prosecutor (and the offender) to make a submission as to the penalty to be

imposed for an offence and to require the court to have regard to that submission in determining the appropriate sentence.

Extension to civil penalty proceedings?

The High Court's decision in *Barbaro* has broader implications. Present practice and authority recognises a clear role for civil regulators to assist the court through submissions on the appropriate penalty. The Full Court of the Federal Court has recognised in cases such as *NW Frozen Foods Pty Ltd v ACCC*¹⁹ (*NW Frozen Foods*) and *Minister for Industry, Tourism and Resources v Mobil Oil Australia Ltd*²⁰ (*Mobil Oil*) (decisions which continue to be regarded as binding authority²¹) that a regulator and respondent could jointly propose specific penalty amounts to the court and that there was a strong public interest in imposing that penalty, even if the court may otherwise have selected a different figure for itself. The court has recognised that it will be assisted by the views of the specialist body set up to protect the public interest on whether a proposed penalty will be sufficient to deter particular conduct.

Recently, Middleton J considered the application of the High Court's decision in *Barbaro* to civil penalty proceedings in *Australian Competition and Consumer Commission v Energy Australia Pty Ltd*²². His Honour did not consider that the High Court's decision went so far as to prohibit the court from taking into account the submissions of the parties as to the 'agreed' penalty amount in civil penalty proceedings, or that the High Court's decision implicitly overruled *NW Frozen Foods* or *Mobil Oil*.²³ His Honour noted the important differences between the criminal sentencing context and the civil penalty context, and the position of the crown prosecutors and regulators, including that a regulator does not have, and is not expected to have, the independent role and characteristics of the prosecutor.²⁴

His Honour disagreed with the approach taken by Logan J in *Australian Competition and Consumer Commission v Flight Centre Limited* (No 3)²⁵ who assumed the correctness of the application (by analogy) of *Barbaro* to the civil penalty proceeding before him and did not take into account the ranges of penalty referred by the parties in those civil penalty proceedings.²⁶

McKerracher J agreed with the reasoning of Middleton J in *Australian Competition and Consumer Commission v Mandurvit Pty Ltd*²⁷ accepting that parties' joint submission on the quantum of penalty addresses the primary object of civil penalties under the *Australian Consumer Law* so that the parties have informed the court of the penalty that they regard as having appropriate deterrent effect, and the reasons for that conclusion.²⁸

Endnotes

1. [2014] HCA 2.
2. Contrary to ss 11.5(1) and 302.2(1) of the Criminal Code (Cth).
3. Contrary to s 302.2(1) of the Criminal Code.
4. Contrary to ss 11.1(1) and 307.5(1) of the Criminal Code.
5. Mr Barbaro admitted his guilt in respect of three further Commonwealth offences and, pursuant to s 16BA of the *Crimes Act 1914* (Cth) asked that the further offences be taken into account in passing sentence on him for the offences to which he pleaded guilty and for which he was convicted.
6. *Barbaro v The Queen; Zirilli v The Queen* [2012] VSCA 288.
7. His Honour Gageler J joined in the orders granting each application for special leave to appeal and dismissing each appeal. However, his reasons for doing so differed from the majority.
8. *Barbaro* [2014] HCA 2 at [50].
9. *Barbaro* [2014] HCA 2 at [33].
10. (2008) 20 VR 677. The first appellant in that case applied for special leave to appeal to the High Court but the application was refused: [2008] HCATrans 411.
11. (2008) 20 VR 677 at 678 [2].
12. (2008) 20 VR 677 at 678 [3].
13. Endorsing observations of Buchanan JA in McNeil-Brown at [128].
14. *Barbaro* [2014] HCA 2 at [40].
15. Hili (2010) 242 CLR 520 at 535 [48]-[49].
16. *Barbaro* [2014] HCA 2 at [42].
17. *Barbaro* [2014] HCA 2 at [59].
18. Para 40.
19. (1996) 71 FCR 285.
20. (2004) ATPR 41-993.
21. *Australian Competition and Consumer Commission v AGL Sales* [2013] FCA 1030 per Middleton J at [12]-[44].
22. [2014] FCA 336.
23. [2014] FCA 336 at [115].
24. [2014] FCA 336 at [140].
25. [2014] FCA 292.
26. [2014] FCA 292 at [56].
27. [2014] FCA 464.
28. [2014] FCA 464 at [70].

Priority of the liquidator's lien

Melissa Tovey reports on *Stewart v Atco Controls Pty Ltd (In Liquidation)* [2014] HCA 15

Introduction

In *Stewart and Anor v Atco Controls Pty Ltd (In Liquidation)*, the High Court has re-affirmed the well-established principle that voluntary administrators,¹ provisional liquidators² and official liquidators³ are entitled to an equitable lien in respect of remuneration and expenses properly incurred in preserving and realising the company's assets, and that such lien will take priority over a secured creditor's claim on a fund realised by the insolvency practitioner.

Background

Newtronics was a wholly owned subsidiary of Atco. Atco provided financial support to Newtronics and took a fixed and floating charge over its assets. Between 1993 and 2001, Atco provided financial support to Newtronics, including letters of support promising to provide funds to allow it to meet Newtronics' trading obligations, and further promising that it would not call upon the debt owed within the relevant period to the detriment of unsecured creditors (the representations). As at December 2001, prior to Newtronics being wound up, it was indebted to Atco in the sum of \$19 million.

In January 2002, Atco appointed receivers to Newtronics after it was ordered to pay damages of \$8.9 million to a former customer, Seeley International Pty Ltd (Seeley). The receivers sold the business of Newtronics to another subsidiary of Atco for \$13 million, paid by way of a loan account adjustment against the funds advanced by Atco to Newtronics, such that no amount was actually received by Newtronics.

In February 2002, Newtronics was wound up on the application of Seeley; James Stewart was appointed as liquidator. The liquidator obtained funding, pursuant to an indemnity agreement with Seeley, to bring proceedings against Atco alleging that it was not entitled to the loan account adjustment or to enforce its security, as a result of the Representations.

Initial proceedings

In 2006 Newtronics commenced proceedings against Atco and later that year joined Atco's receivers, alleging they had been improperly appointed and had therefore converted Newtronics' property. Newtronics succeeded against Atco at trial but failed against the receivers. Atco brought an appeal against the trial judge's decision; on the day that appeal was to be heard the receivers settled with Newtronics and agreed to pay it \$1.25 million (the fund). The appeal otherwise proceeded and the trial judge's decision was overturned, the Victorian Court of Appeal holding that Atco's security was valid.

In September 2009, the liquidator of Newtronics received

the fund from the receivers and proceeded to pay the fund to Seeley, as a reimbursement to Seeley of funds it had provided the liquidator pursuant to the indemnity agreement.

Atco demanded that the fund be paid to it as it was an asset of Newtronics that was caught by Atco's charge. The liquidator refused to pay the fund to Atco, claiming an equitable lien over it which operated to defeat Atco's charge, at least in relation to the fund.

Proceedings below

Atco brought proceedings under s 1321 of the *Corporations Act* as a person aggrieved by the liquidator's decision. The proceedings were initially heard by an associate judge, who upheld Atco's claim and ordered the liquidator to pay the fund to Atco.⁴ On an appeal from the associate judge's decision, Davies J found for the liquidator.

Atco appealed to the Victorian Court of Appeal, which reversed the decision of Davies J, ordering Newtronics to pay the fund to Atco. The court held that no equitable lien arose in favour of the liquidator over the settlement sum, finding in particular that the liquidator, in bringing the proceedings against Atco and its receivers, was acting at all times in the interests of a third party and against the interests of Atco, and more specifically, Atco's security, which was a relevant consideration as to whether it would be unconscionable of Atco to claim the settlement sum.

The High Court

The principal issue for determination was whether the well-established and recognised equitable lien that arises in favour of insolvency practitioners, enunciated by Dixon J (as his Honour then was) in *In re Universal Distributing Co Ltd (In Liq)*,⁵ applied to the fund so as to allow the liquidator to assert a lien in priority to the secured claim by Atco.

The principle in *In re Universal* is that where a secured creditor participates in a winding up in order to discharge the relevant security, the secured creditor is entitled to receive principal and interest in priority to the general costs and expenses of the liquidation – but the costs of realising the assets, by the liquidator in this case or another practitioner generally, must be borne by the assets themselves. Put another way: a secured creditor should not get the benefit of having assets of the company realised in order to pay out the security, without that creditor having to pay the cost of that realisation.

The court was of the view that the *Universal Distributing* principle should apply to the facts of this matter and in coming to that view addressed the arguments advanced by Atco to the

Court of Appeal. The principle argument put by Atco below was that as the proceedings that realised the assets (which had resulted in the creation of the fund) had not been in Atco's interests, it would be unconscientious for the liquidator to retain the fund to meet his claim for an equitable lien.

The High Court identified three main grounds upon which Atco relied in the Court of Appeal to distinguish this matter from one to which the *Universal Distributing* principle should apply:⁶

- that a challenge to Atco's security was involved;
- that the proceedings were not brought to pursue Atco's interests as a secured creditor; and that the proceedings were in fact in the interests of Seeley.

In accepting those submissions, the Court of Appeal came to the view that the appropriate test was whether Atco would be acting unconscientiously if it were to receive the fund without meeting the costs of its creation.⁷ The Court of Appeal accepted Atco's submission that it had not willingly participated in the creation of the fund and that it had not 'come in' to the liquidation by proving and surrendering its security, factors which should distinguish *Universal Distributing*.

The High Court found that the reference to 'com[ing] in' in *Universal Distributing* is not a technical term and simply means a secured creditor who makes a claim against a fund created by the actions of a liquidator in realising assets.⁸ Moreover, the subjective intention of a liquidator in bringing proceedings to recover an asset is not relevant in applying the *Universal Distributing* principle.⁹ Accordingly, Atco's resistance to, and lack of participation in the creation of the fund was not relevant to the application of the principle.

The High Court emphasised that the proper, and perhaps only, enquiry which flows from the *Universal Distributing* test is whether the remuneration the subject of the asserted lien was generated in the getting in or realisation of the assets which in turn create the fund.¹⁰ The High Court also rejected an argument by Atco that no lien could have arisen at equity at the time of creation of the fund as the liquidator had been paid his costs and expenses under the indemnity agreement by Seeley. The court held that that argument ignored the obligation of the liquidator, under the indemnity agreement, to repay to Seeley any amount paid by it under that agreement. Similarly, Atco's argument that a clause in the indemnity agreement purporting

to engage s 564 of the Corporations Act (which provides a court with power to make orders regarding the distribution of property which has been recovered under an indemnity for costs of litigation that give the creditors providing the indemnity an advantage over others, in consideration of the risk assumed by them) was held not to prevent a lien arising, because it was inapplicable to the interests of third party creditors.¹¹

Ultimately, the High Court emphasised that the nature and purpose of an action brought by a liquidator to get in or realise assets, which in turn create a fund, is irrelevant to the determination of whether an equitable lien will arise in priority to a secured creditor's claim.

The liquidator's statutory duty to get in and realise assets is one which exists independently of, and is not subject to, the wishes or demands of any one or more creditors, secured or otherwise. Even to the extent that proceedings may be said to be in the interests of one creditor only (here Seeley), that *per se* will be insufficient to prevent an equitable lien arising.¹²

It remains the case that secured creditors who wish to challenge the priority of a liquidator's equitable lien will have to establish that the work carried out by the liquidator was not referable to the getting in or realisation of the assets which ultimately create the fund against which the secured creditor makes a claim. It similarly remains the case that a secured creditor laying claim to a fund created by the actions of a liquidator in realising assets will be 'coming in' to the liquidation within the meaning of *Universal Distributing*, regardless of the creditor's attitude to the conduct of the liquidator in getting in the fund.

Endnotes

1. Section 443F of the *Corporations Act 2001* (Cth) creates a statutory lien over the company's assets generally for the balance of their remuneration and properly incurred costs and expenses, but that statutory lien is subject to the priorities specified in s 556 of the Corporations Act.
2. *Shirlaw v Taylor* [1991] FCA 415.
3. *Re Universal Distributing Co Ltd (in liq)* (1933) 48 CLR 171 at 174.
4. *Atco Controls Pty Ltd v Stewart (in his capacity as liquidator of Newtronics Pty Ltd (In Liq))* unreported, Supreme Court of Victoria (Commercial and Equity Division), 20 April 2011.
5. (1933) 48 CLR 171 at 174.
6. *Stewart and Anor v Atco Controls Pty Ltd (in liq)* [2014] HCA 15 at [29].
7. *Ibid.*, at [30].
8. *Ibid.*, at [37].
9. *Ibid.*, at [40].
10. *Ibid.*, at [41].
11. *Ibid.*, at [56].
12. *Ibid.*, at [61].

Withdrawals under a managed investment scheme

James Willis reports on *MacarthurCook Fund Management Limited v TFML Limited* [2014] HCA 17.

In *MacarthurCook Fund Management Limited v TFML Limited* [2014] HCA 17, the High Court considered whether the redemption of certain interests in a managed investment scheme constituted 'withdrawal' from the scheme within the meaning of Part 5C.6 of the *Corporations Act 2001* (Cth) (the Act). The High Court held, in a unanimous decision, that a member does not 'withdraw' from a scheme, for the purposes of Part 5C.6 of the Act, merely by reason of the responsible entity performing an obligation to redeem, which arises under the terms of issue of a class of interests, if that obligation is required by those terms to be performed independently of any act on the part of the member.

Background

RFML Ltd (RFML) was, at the relevant time, the responsible entity of an unlisted unit trust which was a registered managed investment scheme pursuant to Chapter 5C of the Act (the trust). RFML was later replaced as the responsible entity of the trust by the respondent, TFML Limited.

In late 2007, the appellant in the proceedings (being MacarthurCook Fund Management Limited) subscribed for, and was issued, 15 million 'subscription units' in the trust, at an issue price of \$1 per unit. The subscription units constituted a separate class of units and the appellant was the only holder of these units. The terms of issue of the subscription units contained a provision in the following form:

Subject to compliance with any requirements under the Corporations Act and the Constitution, during the Subscription Period [being 12 months from the date of subscription], subscription units held by MacarthurCook must be redeemed by [RFML] for their Issue Price, using funds received by the trust as a result of accepted applications under the [public offer], such redemptions commencing six months from the Subscription Date.

By 29 September 2008, the trust had received funds totalling \$12,347,079 as a result of accepted applications under a public offer. On that date, RFML gave notice that it had suspended all 'withdrawals' from the trust until further notice (which, relevantly, purported to include the redemption of any subscription units).

The appellant brought proceedings in the New South Wales Supreme Court where it argued that Part 5C.6 of the Act, which regulates the circumstances in which a responsible entity is permitted to allow a member to 'withdraw' from a scheme, was not applicable as the redemption of the subscription units did not constitute a 'withdrawal'. Both the primary judge and,

The High Court gave some guidance as to what type of conduct would and would not constitute 'volition' for the purpose of Part 5C.6.

on appeal, the Court of Appeal held that Part 5C.6 of the Act applied in respect of the redemption of the subscription units.

The meaning of 'withdraw'

On appeal to the High Court, the appellant contended that the redemption of the subscription units by RFML was not a withdrawal by the appellant from the trust within the meaning of Part 5C.6 of the Act.

In discussing the operation and scope of Part 5C.6 of the Act, the High Court held that:

- Part 5C.6 regulated the exercise of a member's 'right to withdraw', which is not limited to a right of a nature which would require the existence of a correlative obligation; and
- the act of 'withdrawal' must involve some act of 'volition' on the part of the member.¹

Accordingly, the High Court found that no withdrawal will occur, for the purposes of Part 5C.6, where there is no 'volition' on the part of the member but the responsible entity is merely exercising a power, which it was obliged to exercise under the terms of issue of an interest, to redeem the interest of a member. For this reason the court unanimously upheld the appeal on the basis that the terms of the subscription units required RFML to redeem the units and there was no exercise of a right or 'volition' on the part of the appellant.

In coming to this conclusion, the High Court had regard to the purpose of Part 5C.6² and found that Part 5C.6 operates to address problems associated with investors exercising choice to exit the scheme, particularly when the scheme is not liquid, rather than problems associated with investors exiting a scheme otherwise than through the exercise of choice, even when the scheme is not liquid.³

What constitutes 'volition'?

The High Court gave some guidance as to what type of conduct would and would not constitute 'volition' for the purpose of Part 5C.6. Relevantly, the court held that:

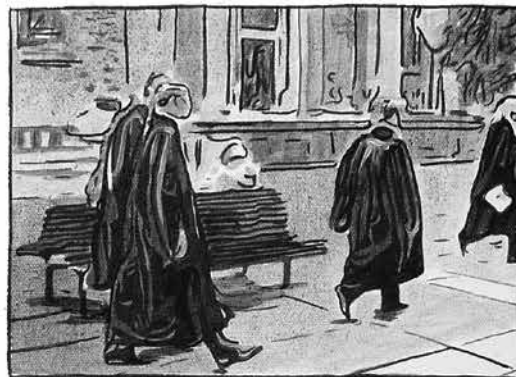
- the volition necessary for there to be a withdrawal by a member is not to be found merely in the choice to

become a member by subscribing to units on the terms on which they are issued (even in circumstances where those terms were the subject of prior arrangement between the responsible entity in the putative member);⁴

- the volition relevant to withdrawal by a member could not be found merely in the choice of the member to sue or not to sue to enforce the terms of the issue of the interest in the managed investment scheme;⁵ and
- there is a ‘real difference’ between the creation of a separate contractual obligation for a responsible entity to redeem an interest, and the creation of an obligation for the responsibility to redeem as part of the terms of issue of the interest. Accordingly, it may be the case that the requisite volition can be found in the terms of a separate contractual obligation on the responsible entity.⁶

Endnotes

1. [2014] HCA 17 at [23].
2. Which the High Court noted was considered extensively by the *Australian Law Reform Commission and the Companies and Securities Advisory Committee* in a joint report published in 1993; [2014] HCA 17 at [24] – [27].
3. [2014] HCA 17 at [28].
4. [2014] HCA 17 at [31].
5. [2014] HCA 17 at [31].
6. [2014] HCA 17 at [31].



The limits of purposive statutory construction

Victoria O'Halloran reports on *Taylor v The Owners of Strata Plan 11564* [2014] HCA 9.

On 2 April 2014 the High Court delivered its judgment in *Taylor v The Owners of Strata Plan 11564* determining that s 12(2) of the *Civil Liability Act 2002* (NSW) does not limit a claim for damages under the *Compensation to Relatives Act 1897* (NSW).

The case is important for two reasons. First, it defines the intersection between the Civil Liability Act and the Compensation to Relatives Act. Secondly, it clarifies the High Court's approach to the limits of purposive statutory construction.

Facts

The husband of the appellant, Susan Joy Taylor, was killed in December 2007 when an awning outside a chemist shop in Balgowlah on Sydney's northern beaches collapsed on him. Mrs Taylor commenced proceedings in the Supreme Court of New South Wales claiming damages pursuant to ss 3 and 4 of the Compensation to Relatives Act for the loss of financial benefits that she and her children had hoped to receive had her husband not been killed.

Prior to his death, Mr Taylor was a successful land surveyor in private practice. The central issue to be determined in this case was whether s 12(2) of the Civil Liability Act operated to limit Mr Taylor's gross weekly earnings and thereby limited the damages which his family was entitled to receive for the loss of expectation of financial support under the Compensation to Relatives Act.

The Civil Liability Act

Section 12 of the Civil Liability Act relevantly provides:

This section applies to an award of damages:

for past economic loss due to loss of earnings or the deprivation or impairment of earning capacity; or

for future economic loss due to the deprivation or impairment of earning capacity; or

for the loss of expectation of financial support.

In the case of any such award, the court is to disregard the amount (if any) by which *the claimant's* gross weekly earnings would (but for the injury or death) have exceeded an amount that is three times the amount of average weekly earnings at the date of the award [emphasis added].

In the Supreme Court proceedings it was accepted by the parties that Mr Taylor's income would have substantially exceeded three times the amount of average weekly earnings. On this

The case is important for two reasons. First, it defines the intersection between the Civil Liability Act and the Compensation to Relatives Act. Secondly, it clarifies the High Court's approach to the limits of purposive statutory construction.

basis, the parties agreed to the preliminary determination of the question of whether an award of damages to Mrs Taylor and her children under the Compensation to Relatives Act was limited by the operation of s 12(2) of the Civil Liability Act.

The primary judge in the Supreme Court found that s 12(2) of the *Civil Liability Act 2002* did limit the claim for damages for loss of an expectation of financial support to three times gross average weekly earnings.

The New South Wales Court of Appeal found that the literal interpretation of s 12(2) did not apply to the deceased's gross weekly income and so would not limit the award of damages. However, while the Court of Appeal unanimously concluded that the literal meaning of s 12(2) does not apply the limitation to the gross weekly earnings of the deceased, the majority of the Court of Appeal found that the court could construe the provision as if it contained additional words to give effect to its evident purpose to limit the award of damages in respect of high earning individuals.

Mrs Taylor appealed and ultimately, the question before the High Court was whether the s 12(2) limitation was to be construed as applying to the deceased's gross weekly earnings.

The High Court's decision

The majority of the High Court (French CJ, Crennan and Bell J; Gageler and Keane JJ dissenting) found that s 12(2) of the Civil Liability Act did not limit Mrs Taylor's claim for damages pursuant to the Compensation to Relatives Act because s 12(2) did not require the court to disregard the amount by which Mr Taylor's gross weekly earnings would have exceeded three times the average weekly earnings, but for his death.

The High Court found that damages awarded in a Compensation to Relatives Act action are personal injury damages within Part 2 of the Civil Liability Act. However, the claimant in a Compensation to Relatives Act action does not have the same meaning as 'claimant' in s 12 of the Civil Liability Act. In a Compensation to Relatives Act claim the claimant is usually the spouse or child of the deceased. In a Civil Liability Act claim

the claimant is the person who has suffered loss or damage. The Civil Liability Act looks to the gross weekly earnings of the claimant to determine whether their entitlement to damages is limited. This is not the case in a Compensation to Relatives Act action, where the claimant's income is generally not relevant and the deceased person's gross average weekly earnings is not capped by reference to s 12(2) of the Civil Liability Act.

The majority expressed the view that the purpose of s 12 of the Civil Liability Act was to limit the component of an award of damages that is determined by reference to a claimant's high earnings in a claim for personal injury damages brought by or on behalf of high-earning individuals.

On no view in this case could the deceased, Mr Taylor, be considered to be the 'claimant' and as such no limitation should be applied to the deceased's gross weekly earnings.

Purposive statutory construction

Mrs Taylor argued that the NSW Court of Appeal had erred by not giving s 12(2) of the Civil Liability Act its ordinary grammatical meaning.

The majority of the High Court agreed.

The respondents to the High Court appeal contended that s 12(2) of the Civil Liability Act should be given a *purposive interpretation* and as such, words should be added to the section to ensure that the legislative purpose was upheld.

The primary judge in the Supreme Court took the view that the legislative purpose of s 12(2) was to 'limit claims for tortiously caused damage, and to restrict financial loss claims for high-earning individuals'.

As such, the phrase in s 12(2) – 'the claimant's gross weekly earnings' means 'the gross weekly earnings on which *the claimant relies*'.

The majority of the High Court did not support this approach and took the view that the word 'claimant' should be given its ordinary meaning, that is, a person who makes or is entitled to make a claim.

In the majority's view a purposive construction of the word 'claimant' may allow the reading of a provision as if it contained additional words or omitted certain words with the effect of expanding its operation. However, the High Court concluded that any modified meaning must be entirely consistent with the language actually used by the legislature. If a purposive construction is given that departs too far from the statutory text it could violate the separation of powers in the Australian Constitution (citing *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85; *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389). The minority High Court judges (Gageler and Keane JJ) agreed with the conclusion reached by Justice Garling at first instance and by the majority in the Court of Appeal, although noted that their reasoning differed slightly from that of the majority in the Court of Appeal in that their Honours considered that the construction adopted by the majority in the Court of Appeal was 'very strained'.

In their view, damages recoverable under the Compensation to Relatives Act are plainly 'personal injury damages' in respect of which Part 2 of the Civil Liability Act applies and the damages that Mrs Taylor was seeking should be limited to three times the average weekly earnings. Their preferred construction of s 12(2) was to construe the reference in s 12(2) to 'the claimant's gross weekly earnings' as a reference to the gross weekly earnings *on which the claimant relies* in the claim for damages that is the subject of an award of damages, rather than the gross weekly earnings of the person who happens to be the claimant.

Conclusion

The High Court has clarified that s 12(2) of the Civil Liability Act does not limit a claimant's entitlement to damages under the Compensation to Relatives Act.

The High Court also clarified that while a purposive approach to statutory interpretation is permissible the proposed modified meaning of the statute must be consistent with the actual language used by the legislature.

‘I love you ... I want you to have a home here with me’: Proving reliance in proprietary estoppel

Rachel Mansted reports on *Sidhu v Van Dyke* [2014] HCA 19 (Court of Appeal *Van Dyke v Sidhu* (2013) 301 ALR 769; Supreme Court *Van Dyke v Sidhu* [2012] NSWSC 118).

A scenario which would not have been out of place on the Jerry Springer Show provided rich material for the High Court in a recent judgment on proprietary estoppel.

Ms Van Dyke lived with her son and husband in Oaks Cottage, on part of a large rural property, Burra Station. Mr Sidhu and his wife lived in the main house on the property, and owned Burra Station as joint tenants. Mr Sidhu's wife and Ms Van Dyke's husband were brother and sister. When Ms Van Dyke commenced an intimate relationship with Mr Sidhu, her husband soon left the property and after separation, a divorce was finalised. Ms Van Dyke and Mr Sidhu continued their relationship between 1997 and 2006. During this time, Mr Sidhu's wife remained on the property, and Ms Van Dyke continued to live in Oaks Cottage with her son. Mr Sidhu, on several occasions throughout the relevant period, made clear statements (some in writing) to Ms Van Dyke to the effect that he wished her to have Oaks Cottage. He even promised to rebuild the cottage and gift it to her, after the cottage accidentally burned down in early 2006. In mid-2006, the relationship between Mr Sidhu and Ms Van Dyke came to an end.

During the time she lived in Oaks Cottage, considering that it would one day be transferred to her, Ms Van Dyke did not seek full time employment, and carried out significant repair and maintenance work on the cottage and other parts of the rural property for no remuneration. She did not seek a property settlement in the divorce from her husband, on the strength of Mr Sidhu's assurance that she did not need a settlement, because Oaks Cottage was now hers.

All five members of the High Court decided that Ms Van Dyke was entitled to equitable compensation for Mr Sidhu's failure to transfer title to the Oaks Cottage. The two issues in the case were whether Ms Van Dyke had sufficiently proved the element of detrimental reliance required to make out an estoppel; and if so, what was the appropriate basis for equitable compensation in circumstances where the property was not Mr Sidhu's to give.

The courts below – a portable palm tree

Justice Ward at first instance held that reliance was not made out. Her Honour held that it was 'entirely possible that [Ms Van Dyke] would have remained living on the property, carrying out tasks on the property (even if not to the extent of the work she in fact carried out) and working part-time, whether or not the

promises had been made'.¹ There was therefore no detriment, given Ms Van Dyke was likely to have done all these things regardless of the promises made by Mr Sidhu. Ward J quoted from an English decision where it was bluntly opined that, if the court had a jurisdiction to hold people to mere moral obligations, 'one might as well forget the law of contract and judge every civil dispute with a portable palm tree'.²

Ward J's decision was reversed by the Court of Appeal, on the basis that the promises alleged by Ms Van Dyke were of a nature to create a presumption of reliance, being 'commonsense and rebuttable presumption of fact that may arise from the natural tendency of a promise'.³ Barrett JA (with whom Basten JA and Tobias AJA agreed) said that, 'Where inducement by the promise may be inferred from the claimant's conduct, as is the case here, the onus or burden of proof shifts to the defendant to establish that the claimant did not rely on the promise'.⁴ Mr Sidhu could not show that Ms Van Dyke did not rely on his promises to her detriment.⁵

In relation to relief, the Court of Appeal declined to order Mr Sidhu to take all necessary steps to procure the actual transfer of the land. This would have involved both obtaining his wife's consent, given they were joint tenants; and council approval for the subdivision. Instead, equitable compensation was awarded, to be measured by a 'sum equal to the value [Ms Van Dyke] would now have had the promises been fulfilled'.⁶

Onus of proof in the High Court – no reversal for reliance

Mr Sidhu appealed to the High Court, submitting that the Court of Appeal had improperly reversed the onus of proof in relation to detrimental reliance. The High Court agreed, holding that the authorities relied on by the Court of Appeal as supporting a presumption of reliance did not do so, and that Ms Van Dyke had the burden of proof in all circumstances.⁷

Nevertheless, the appeal was disallowed, on the basis that Ms Van Dyke had (contrary to Ward J's findings) met the onus of proof for detrimental reliance. In so finding, the High Court reviewed 'the whole of the evidence' that was before the primary judge, to show that Ms Van Dyke had made out 'a compelling case of detrimental reliance'.⁸

The High Court pointed to four reasons why Ms Van Dyke's case on detrimental reliance was made out. First, it was likely 'as a matter of the probabilities of human behaviour' that Ms

Van Dyke's evidence – to the effect that she made certain decisions on the basis of the promises by Mr Sidhu – was true.⁹ Second, Ward J's finding that Mr Sidhu's promises 'played a part' in Ms Van Dyke's willingness to spend time and effort on maintenance warranted the conclusion that she had discharged the onus, notwithstanding that the promises were not the sole inducement for this course of conduct.¹⁰ Third, the fact that Ms Van Dyke had, from time to time, displayed a concern that Mr Sidhu honour his promises (it is assumed the court is here referring to the requests for Mr Sidhu to commit to the promises in writing), indicated that the promises were material to Ms Van Dyke's choices.¹¹ Finally, the court found the applicant's argument, that the promises were 'not a real inducement' to Ms Van Dyke's decision to conduct herself as she did, was simply 'not compelling', following a review of the key parts of her testimony under cross-examination.¹² The High Court recast the question about reliance, asking 'Whether the respondent would have committed to, and remained in, the relationship with the appellant, with all that that entailed in terms of the effect upon the material well-being of herself and her son, had she not been given the assurances made by the applicant.' The court found that it was likely Ms Van Dyke would have conducted herself differently had Mr Sidhu told her, when she elected to remain on the property after her divorce, that she would only remain on the property while it suited him and his wife.¹³

Promising the moon – the measure of relief

At the time of hearing, Mr Sidhu's wife would not consent to the transfer of their jointly held land, and the council had not yet approved the subdivision of the property. This formed part of Mr Sidhu's argument that his promises to Ms Van Dyke were conditional and could not form the basis for reliance. The High Court disagreed, holding that what he had represented to Ms Van Dyke was that he would procure the consent of his wife and the subdivision of the property. In circumstances where Mr Sidhu could not achieve these things, the High Court affirmed the decision of the Court of Appeal to order equitable compensation, rather than requiring Mr Sidhu to take active steps to ensure the transfer of property.¹⁴

Side note – an unrepresented litigant wins the day

Ms Van Dyke's claim started inauspiciously. Unrepresented in the Supreme Court, her claim was struck out by Gzell J, on the basis that Mr Sidhu's wife was not a party, and the promise was only to be fulfilled when the land had been subdivided.¹⁵ However, the Court of Appeal – Young JA (with whom Bathurst CJ and Hodgson JA agreed) – set aside the orders of Gzell J, on the grounds that the learned primary judge 'reacted too quickly' in striking out the claim. The Court of Appeal found that Gzell J should have considered the material more carefully and concluded that it was possible for Ms Van Dyke to succeed.¹⁶

Endnotes

1. *Van Dyke v Sidhu* [2012] NSWSC 118 at [204].
2. *Taylor v Dickens* [1998] 1 FLR (Eng) 806; in *Van Dyke v Sidhu* [2012] NSWSC 118 at [261].
3. *Van Dyke v Sidhu* (2013) 17 BPR 32,545; [2013] NSWCA 198 at [79].
4. *Van Dyke v Sidhu* (2013) 17 BPR 32,545; [2013] NSWCA 198 at [83].
5. *Van Dyke v Sidhu* (2013) 17 BPR 32,545; [2013] NSWCA 198 at [103].
6. *Van Dyke v Sidhu* (2013) 17 BPR 32,545; [2013] NSWCA 198 at [138], [140].
7. *Sidhu v Van Dyke* (2014) 308 ALR 232; [2014] HCA 19 at [55], [61].
8. *Sidhu v Van Dyke* (2014) 308 ALR 232; [2014] HCA 19 at [67].
9. *Sidhu v Van Dyke* (2014) 308 ALR 232; [2014] HCA 19 at [69].
10. *Sidhu v Van Dyke* (2014) 308 ALR 232; [2014] HCA 19 at [70]-[73].
11. *Sidhu v Van Dyke* (2014) 308 ALR 232; [2014] HCA 19 at [74].
12. *Sidhu v Van Dyke* (2014) 308 ALR 232; [2014] HCA 19 at [75].
13. *Sidhu v Van Dyke* (2014) 308 ALR 232; [2014] HCA 19 at [76]-[77].
14. *Sidhu v Van Dyke* (2014) 308 ALR 232; [2014] HCA 19 at [86].
15. *Van Dyke v Sidhu* [2011] NSWSC 167 at [38].
16. *Van Dyke v Sidhu* [2011] NSWCA 187 at [13]-[14], [19].

Legal professional privilege and national security

Stephen Tully reports on *Timor-Leste v Australia*.



International Court of Justice. Photo: the Peace Palace Library, International Court of Justice.

Can federal investigative agencies covertly acquire your legal advices and other communications sent to your client – which you assume to be protected from disclosure by privilege – without your knowledge or permission for national security reasons? Under Australian common law, yes. National security is capable of falling under the crime or fraud ‘exception’ so as to abrogate privilege. The same conclusion is likely under international law. This note explores recent proceedings where this issue was put by Australia to the International Court of Justice (ICJ or Court) in light of Australian common law and recent law reform developments.

The proceedings in *Timor-Leste v Australia*

The question whether legal professional privilege can be abrogated by national security under international law arose for consideration in *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*. In late 2013 the Australian Security Intelligence Organisation (ASIO) executed search warrants on the Canberra premises of the legal adviser to the Democratic Republic of Timor-Leste (Timor-Leste). Timor-Leste sought provisional orders (that is, interim measures of protection) before the ICJ, the principal judicial organ of the United Nations (UN), claiming that the confidential documents and data seized by Australia related to its legal strategy in a pending Timor Sea Treaty Arbitration between the two states and its future maritime negotiations with Australia. The subject matter of that arbitration included

allegations, reported in the Australian media, that Australia had committed espionage in relation to Timor-Leste’s position during negotiations for a treaty concerning maritime rights in the Timor Sea. The allegations referred to a witness who was said to be a former Australian intelligence officer.

In its submissions, Australia expressed concern that an Australian intelligence officer may have committed an offence under Australian law by disclosing that Australia had allegedly conducted espionage against Timor-Leste during treaty negotiations. It contended that, even if there was an international legal principle akin to legal professional privilege, such a principle was inapplicable when the communication concerned the commission of a crime or fraud, threatened national security or the public interests of a state, or undermined the proper administration of justice. Australia’s argument reflected the common law position.

Legal professional privilege under the common law

Legal professional (or client legal) privilege attaches to confidential communications between clients and lawyers made for the dominant purpose of giving and receiving legal advice, or for use in existing or anticipated litigation. The rationale for the privilege is furthering the administration of justice by fostering trust and candour in the lawyer-client relationship.¹ However, the protection afforded by the privilege only attaches to communications intended for a proper or lawful purpose.

Privilege cannot be claimed over communications that frustrate legal processes.² Nor can privilege be used to protect communications made to further deliberate abuses of statutory power.³ These communications are not within the ordinary scope of professional employment.

Privilege does not attach to communications made to further the commission of an offence or fraud. For example, a search warrant executed in *Propend Finance* concerned privileged material concerning tax evasion.⁴ The improper and dishonest purpose considered in *AWB Limited* was knowingly and deliberately inflating transportation prices to work a trickery on the UN contrary to international and Australian sanctions regimes.⁵ In the latter case, Young J concluded that expression of the principle by reference to communications that facilitated a crime or fraud did not capture its full reach. The principle encompassed a wide species of fraud, criminal activity or actions taken for illegal or improper purposes. The scope of conduct included all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery, and sham contrivances.

The crime or fraud exception would include offences against national security. Given the broad scope of the exception, committing a national security offence would, by reason of that illegality or impropriety, be sufficient to displace the privilege under Australian common law.

Covert investigations and abrogating privilege

A further issue that confronted the ICJ and has already received attention from Australian law reform organisations and legal institutions is whether covert federal investigations for national security purposes can abrogate privilege.

Some federal agencies, including ASIO, possess covert powers including the power to search and seize documents and things.⁶ Their enabling legislation does not contemplate a national security exception for privileged material.⁷ Because targets are unaware that information is being accessed, there is no opportunity to assert privilege at the time of access. Notifying targets may prejudice an investigation.

Concerns have been expressed in the United States that privilege is being eroded under the rubric of national security.⁸ Following press reports of foreign government surveillance of American lawyers' confidential communications with overseas clients and the sharing of privileged information with the National Security Agency (NSA), the president of the American Bar Association

(ABA) expressed his concerns to the NSA.⁹ The NSA responded that it was firmly committed to the rule of law and the bedrock principle of attorney-client privilege.¹⁰ It stated that it had and would continue to protect privileged communications in accordance with legislated privacy procedures.

In 2007 the Australian Law Reform Commission (ALRC) proposed that, in special circumstances, the Australian Parliament may legislate to abrogate client legal privilege in relation to federal investigations.¹¹ Abrogation could be justified on several grounds, including where the nature and gravity of the matter was one of major public importance such as national security. The ALRC concluded that abrogation was appropriate where there was a higher competing public interest.¹² Where exceptional circumstances existed, parliament could legislate to abrogate the privilege for a particular investigation undertaken by, or a particular power of, a federal body.

...states who are settling an international dispute by peaceful means could expect that the preparation and conduct of their case is conducted without interference.

It is difficult to contend that national security is not a significant public interest. However, the effects of encroaching upon legal professional privilege in service of national security are difficult to assess.¹³ Unrestricted communication between a lawyer and client is necessary for the proper functioning of the legal system. If inroads can be made by invoking a higher public interest, in such a way as to exclude the opportunity to assess the competing interests, then application of the privilege becomes uncertain and the underlying policy is effectively undermined.¹⁴ Such challenging questions were neatly sidestepped by the ICJ.

The ICJ's provisional measures order

The majority of the ICJ was satisfied at this stage of the proceedings that Timor-Leste's claimed rights were plausible.¹⁵ The asserted inviolability of a state's right to confidentially correspond with its lawyers could be derived from the sovereign equality of states. States who are settling an international dispute by peaceful means could expect that the preparation and conduct of their case is conducted without interference.

Australia had also argued that there was no risk of irreparable prejudice to Timor-Leste's rights following several undertakings

provided by the attorney-general, the effect of which were to limit the use of the information to national security purposes and ring-fence the information from those involved in negotiations regarding resource exploitation, the ICJ proceedings or the Timor Sea Treaty Arbitration.

A majority of the court reasoned that the undertakings significantly contributed to mitigating the imminent risk of irreparable prejudice created by seizure of the material to Timor-Leste's rights, but did not eliminate this risk entirely. There remained a risk of disclosure because Australia envisaged the possibility of using this confidential and sensitive information in circumstances involving national security. Any breach of confidentiality might be incapable of remedy or reparation. Furthermore, the confidentiality of Timor-Leste's communications with its lawyers was left unaddressed.

Australia was ordered to keep the seized material under seal, ensure that it was not used to Timor-Leste's disadvantage and not to interfere in communications between Timor-Leste and its legal advisers. These orders are binding upon Australia.

Only Judge ad hoc Callinan explicitly considered Australia's submissions in relation to exceptions to the privilege, considering it unlikely that any state would treat national security as inferior, or subject to, legal professional privilege.¹⁶ Judge ad hoc Callinan also considered the undertakings proffered by Australia to be sufficient for the circumstances of the case.¹⁷

Conclusions

The ICJ accepted, on a provisional basis, that a state has a right to conduct arbitration or negotiations without external interference, including the right of confidentiality when communicating with its lawyers. It is probable that, like the position under Australian common law, national security is a lawful reason for abrogating legal professional privilege under international law. However, as Judge ad hoc Callinan cautioned, the extent to which there is a settled principle of legal professional privilege under international law, and moreover immunity to any limitation in an international or national interest, requires further analysis. Assuming the ICJ will find it has jurisdiction, it is hoped clarification will occur at the merits phase of these proceedings.

Endnotes

1. *Attorney-General for the Northern Territory v Maurice* [1986] HCA 80; (1986) 161 CLR 475, 487 (Mason and Brennan JJ).
2. *R v Bell; Ex parte Lees* [1980] HCA 26; (1980) 146 CLR 141.
3. *Attorney-General (NT) v Kearney* [1985] HCA 60; (1985) 158 CLR 500.
4. *Commissioner Australian Federal Police v Propend Finance Pty Ltd* [1997] HCA 3; (1997) 188 CLR 501.
5. *AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5)* [2006] FCA 1234, (2006) 155 FCR 30 [210]-[212] & [229].
6. E.g., s 25, *Australian Security and Intelligence Organisation Act 1979* (Cth).
7. Legal professional privilege is not abrogated by statute without a clear indication that was intended: *Baker v Campbell* [1983] HCA 39; (1983) 153 CLR 52.
8. E.g., Cohn M, 'The Evisceration of the Attorney-Client Privilege in the Wake of September 11, 2001' (2003) 71(4) *Fordham L Rev* 3.
9. Letter from J Silkenat, President, American Bar Association (ABA) to General K Alexander, Director, and R De, General Counsel, National Security Agency (NSA), 20 February 2014.
10. Letter from General K Alexander, Director, NSA to J Silkenat, President, ABA, 10 March 2014.
11. Australian Law Reform Commission (ALRC), Discussion Paper 73: *Client Legal Privilege and Federal Investigatory Bodies*, 2007, Proposal 6.1 & [6.151].
12. ALRC, *Privilege in Perspective: Client Legal Privilege in Federal Investigations* [2007] ALRC 107, [6.136], [6.142]-[6.143].
13. *Carter v The Managing Partner, Northmore Hale Davy and Leake* (1995) 183 CLR 121, 157 (Toohey J).
14. *Attorney-General (NT) v Kearney* [1985] HCA 60; (1985) 158 CLR 500, 53 (Dawson J).
15. International Court of Justice, Questions relating to the Seizure and Detention of Certain Documents and Data (*Timor-Leste v Australia*), Order on Request for the Indication of Provisional Measures, 3 March 2014, [26] & [28].
16. Dissenting opinion of Judge ad hoc Callinan, [26].
17. Dissenting opinion of Judge ad hoc Callinan, [21], [31].

The change of position defence

Tom O'Brien reports on *Australian Financial Services Ltd v Hills Industries Ltd* [2014] HCA 14.

For most, the High Court's decision in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*¹ provides welcome clarification of the rationale, scope and application of the defence of change of position in restitution claims. For some unjust enrichment enthusiasts, particularly those across the globe, the decision may cause some consternation.

Facts

A fraudster procured payments by Australian Financial Services and Leasing Pty Ltd (AFSL) to two companies, Hills Industries Ltd (Hills) and Bosch Security Systems Pty Ltd (Bosch). AFSL were defrauded into believing they were purchasing equipment from Hills and Bosch. Hills and Bosch were defrauded into believing that AFSL's payments were being made to discharge the fraudster's outstanding debts.

After receipt of the money, both Hills and Bosch:

- treated the fraudster's debts as discharged;
- recommenced trading with the fraudster; and
- refrained from taking steps they otherwise would have taken to enforce the debts. In particular, Bosch consented to the setting aside of default judgments and discontinued proceedings in respect of the fraudster.

After six months, AFSL discovered the fraud and demanded repayment from Hills and Bosch on the basis that the payments had been made by mistake. The demand was rejected by Hills and Bosch, so AFSL instituted proceedings for recovery of the payments. By that time the fraudster was insolvent.

Issue

The issue before the High Court was whether AFSL's claim for recovery of the monies paid by mistake should be refused because Hills and Bosch had changed their position upon receipt of that money. AFSL submitted that any change of position must be valued, and that the defence should only operate to the extent of that value. For example, if \$10 is mistakenly paid, and the recipient in reliance on that payment gives \$2 to charity, the remaining \$8 should still be recoverable, as opposed to the recipient's partial change of position acting as a complete bar to recovery.²

High Court decision

The High Court unanimously dismissed the appeal, holding that the defence of change of position provided a complete defence to AFSL's restitutionary claims. Three judgments were delivered: French CJ; Hayne, Crennan, Kiefel, Bell and Keane JJ; and Gageler J.

Three points of importance are highlighted for the purpose of this short note.

First, the High Court indicated that the ultimate question in determining whether the defence is available is whether recovery of the money would be inequitable³ or unconscionable.⁴ One circumstance in which recovery will be inequitable or unconscionable is where the recipient has changed their position by relying on the receipt of the money in good faith by taking certain actions or by omitting to act, such that they will suffer substantial detriment if they are required to return the money received. For this purpose, the plurality noted the relevance of the 'equitable doctrine concerning detriment' in connection with estoppel.⁵ Gageler J almost⁶ went a step further, to find that the defence of change of position was merely a particular application of the doctrine of estoppel. According to his Honour, this step would avoid uncertainty in defining the scope of the defence and difficulties reconciling it with estoppel.⁷

Second, for the purposes of the defence, detriment is not a narrow or technical concept,⁸ so that it need not consist of expenditure of money or other quantifiable financial detriment.⁹ Gageler J stated:¹⁰

Material disadvantage must be substantial, but need not be quantifiable in the same way as an award of damage. Material disadvantage can lie in the loss of a legal remedy, or of a 'fair chance' of obtaining a commercial or other benefit which 'might have [been] obtained by ordinary diligence' (Footnotes removed).

As the enforcement opportunities forgone by Hills and Bosch were substantial, they were sufficient to ground the defence, despite not being easily quantifiable.¹¹ It was held that it was not appropriate for the court to attempt to quantify such detriment in the same way as an award of damages. Where such detriment could not be easily quantified, the change of position provided a complete answer to the restitutionary claim.¹² However, according to French CJ and Gageler J, where detriment could be easily quantified, the defence may operate pro tanto, so that a payer may recover the money paid, less the monetary detriment incurred by the recipient.¹³

Third, the High Court reaffirmed that in Australia, restitutionary claims and defences are rooted in equity, not unjust enrichment and the corresponding concept of 'disenrichment'. The plurality stated (at [78]):

The principle of disenrichment, like that of unjust enrichment, is inconsistent with the law of restitution as it has developed in Australia.

...the High Court reaffirmed that in Australia, restitutionary claims and defences are rooted in equity, not unjust enrichment and the corresponding concept of 'disenrichment'.

This aspect of the decision was bemoaned by Professor Graham Virgo of Cambridge University, who queried the continuing significance of unjust enrichment in Australian law. In more strident terms, Professor Virgo questioned whether the equitable basis for restitution had any content, likening Australia's use of 'the old language of conscience' to:¹⁴

nothing more than Hans Christian Andersen's Emperor, albeit one who thinks he is wearing old clothes, but is actually wearing nothing at all.

As to the continuing significance of unjust enrichment in Australia, in *Lampson (Australia) Pty Ltd v Fortescue Metals Group (No 3)* [2014] WASC 162, Edelman J considered the impact of the High Court's decision in *Hills Industries*. In a feat of judicial efficiency, no doubt taking advantage of the time difference between Canberra and Perth, Edelman J delivered that judgment on the same day that *Hills Industries* was handed down (7 May 2014). On the continuing role of unjust enrichment in Australia, his Honour explained that:

[p]rovided that unjust enrichment is not applied as a direct source of liability, in Australia the taxonomic category of unjust enrichment has served a useful function and might continue to do so. Like the category of 'torts' the category of unjust enrichment assists in understanding even though it is not a direct source of liability. The category directs attention to a common legal foundation shared by a number of instances of liability formerly concealed within the forms of action or within bills in equity.

This is consistent with recent statements of the High Court on the role of unjust enrichment.¹⁵ The role of unjust enrichment in Australia continues to be distinct from that in the United Kingdom. *Hills Industries* is merely confirmatory in that respect.

As to the content of the inquiry into whether retention of money will be inequitable or unconscionable, the plurality emphasised:¹⁶

This is not to suggest that a subjective evaluation of the justice of the case is either necessary or appropriate. The issues of conscience which fall to be resolved assume a conscience 'properly formed and instructed'¹⁷ by established equitable principles and doctrines.

To adopt and adapt Professor Virgo's analogy, Australia's law of restitution is wearing old clothing, which has been, and will continue to be, altered and patched 'on a case-by-case basis' so enabling it 'to meet changing circumstances and demands'.¹⁸

Endnotes

- [2014] HCA 14; (2014) 307 ALR 513; 88 ALJR 552.
- See the example given by French CJ at [28].
- French CJ at [23].
- Hayne, Crennan, Kiefel, Bell and Keane JJ at [69].
- at [84].
- His Honour found it unnecessary to finally decide the question: [156].
- at [155].
- [24] (French CJ); [88] (French CJ; Hayne, Crennan, Kiefel, Bell and Keane JJ)
- [24] (French CJ); [88] (French CJ; Hayne, Crennan, Kiefel, Bell and Keane JJ); [150] (Gageler J).
- at [150].
- [30] (French CJ); [83] (French CJ; Hayne, Crennan, Kiefel, Bell and Keane JJ); [150] (Gageler J).
- [31] (French CJ); [96] (French CJ; Hayne, Crennan, Kiefel, Bell and Keane JJ); [158] (Gageler J).
- [17] and [28] (French CJ); [153] - [154] (Gageler J).
- Graham Virgo, 'Conscience or Unjust Enrichment?: The Emperor's Old Clothes: *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*' on Opinions on High (19 May 2014) <<http://blogs.unimelb.edu.au/opinionsonhigh/2014/05/virgo-hills-industries/>>
- For example: *Roxborough v Rothmans of Paul Mall Australia Ltd* (2001) 208 CLR 516 at [74] (Gummow J); *Befinger v Kingsway Group* (2009) 239 CLR 269 at [88] - [89] (Gummow, Hayne, Heydon, Kiefel and Bell JJ); *Equuscorp Pty Ltd v Haxton* (2012) (2012) 246 CLR 498 at [30] (French CJ, Crennan and Kiefel JJ).
- [76] (French CJ, Crennan and Kiefel JJ).
- Citing ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [45].
- Commonwealth v Verwayen* (1990) 170 CLR 394 at 443 (Deane J), cited with approval by the plurality in *Hills Industries* at [98].

Tricky demurrers and frivolous pleas: the changing nature of the bar

By Peter Lowe

*An insignificant person until they became King's Counsel? (8 letters)**

The state of the bar and bench have been, at times, somewhat tense. At the extreme end of the spectrum one could do no better than start with Erskine who, apparently, following the acquittal of his client Horne Tooke challenged the lord chief justice to a duel because of some remarks of the latter during his client's trial.¹

Court proceedings which involved heated exchanges between counsel could, in days past, readily end in a duel. Sir Charles Wetherell had an argument with Edward Sugden, then solicitor-general, where Wetherell alleged a breach of etiquette (involving his court matter being called on when he was not present) and a furious row occurred in the Chancery Court room. A duel was only avoided by both counsel being dragged before a magistrate and being bound to keep the peace. It is noteworthy that Wetherell had previously served as solicitor-general and then as the attorney-general.²

Sometimes, court proceedings could end with a finding that both barristers were in contempt of court. In 1846, two prominent Sydney barristers ended up exchanging words in court ending with Richard Windeyer calling John Darvall a liar. Darvall then struck Windeyer forcibly with his brief and before the latter could respond in kind he was stopped by an officer of the court. Darvall received 14 days imprisonment, and Windeyer received 20 days, and both were placed on a two year good behaviour bond.³

On another occasion, an outbreak of fisticuffs occurred between two king's counsel, Vesey Knox and Roskill, based on the former making disparaging remarks which, according to Heuston, alluding to the latter's ancestry.⁴ Contemporary newspaper reports of the time suggest that the dispute related to precedence and where each counsel should be seated in court.⁵ Sir Robert Finlay, later Lord Finlay, had to step in between the two to break up the fight.

At common law a barrister, as advocate, was held not to be accountable for ignorance of the law or any mistake of fact, or for being less eloquent or less astute than he was expected to be. It would appear that no matter how disappointing the barrister was, there was no recourse in law to correct the disappointment. So it was held in the case of *Swinfen v Lord Chelmsford* with regard to compromise of law suits – if the barrister acted in good faith and with a view of the interests of the client, notwithstanding instructions from the client not to compromise, such was regarded as a mere indiscretion or error of judgment provided it was done honestly.⁶

The above case is also notable because of the audacious allegation that Sir Frederic Thesiger had colluded with the presiding judge, Mr Justice Creswell, to compromise the action. It was said at the time that the audience in the courtroom during that court action comprised chiefly barristers, perhaps because the subject matter of the proceeding involved an act of compromise by one of the then stellar performers of the bar.⁷

There was a fairly remarkable corollary to that case. When Sir Frederic Thesiger compromised the action (relating to which property fell within the testator's estate) Patricia Swinfen was outraged as she had not been consulted. She engaged the services of a then unknown barrister, Charles Kennedy, to secure the return of the estates. Being impecunious, all she could promise was the payment of the then princely sum of £20,000 to be paid as a contingency fee. Kennedy acted for her and succeeded in the hearing of the cause of action. Kennedy then sued his former client (who had since remarried and was now Mrs Broun) on her promise to pay, and in the case *Kennedy v Broun* it was held that the relationship between client and barrister was not a contract and that 'a promise to pay money to counsel for his advocacy, whether made before, or during, or after the litigation has no binding effect'.⁸

In days gone by, transcript of trial proceedings was non-existent and the evidence of what transpired at trial was based on handwritten notation of what had occurred. Media coverage played an essential role, not only in preserving the atmosphere of the trial, but also the accuracy of the oral evidence that was given. But not all trials were so covered. It was the duty of all present in court in a professional capacity to take notes, judges as well as counsel.⁹ Those notes could be used in making application for a new trial, or as evidence of the grounds of judgment in order to lay them before the court on appeal. Notes taken by counsel on the back of his brief at trial were also admitted as evidence in subsequent proceedings of what took place at the trial.¹⁰ Of course the matters which were recorded were an issue for counsel: in one notable case HS Giffard (later the earl of Halsbury) returned a brief still ribboned which, when examined, revealed that the only thing written down were the train times to London. Where objection was taken to the admissibility of the notes being relied on, then counsel could be examined. Where the same counsel were involved from a previous trial or hearing then a question arose as to the manner in which they should give evidence. On at least one occasion their evidence having been objected to when given from the bar table in an unsworn manner, the counsel were duly sworn and were examined and cross-examined standing up in their robes in their places at the bar.¹¹ On a different

note, in 1851 Lord Justice Campbell referred to an earlier occasion when a trial judge, Lord Cottenham, was called to give evidence regarding the extent to which he had been influenced by a 'nod from counsel'.¹²

Many barristers spend many of their waking hours preparing advices. There is a certain knack to brevity. F E Smith, the legendary advocate (later Earl of Birkenhead LC) gave probably was one of the briefest advices. He received a telegram calling on him to attend the Savoy Hotel in London. Upon his arrival, there awaited him a huge stack of papers. An opinion was required of him first thing in the morning. He ordered a bottle of champagne and two dozen oysters, and began to read the papers. They were of great length and complexity, and he worked on them for eleven hours, all through the night. At 8.30 next morning he wrote the following terse advice, 'There is no answer to this action for libel, and the damages must be enormous. F E Smith'. His view was warranted and the defendant settled by paying £50,000 which was at the time the largest sum paid in damages for defamation.¹³

In a similar vein Lord Erksine once provided this advice to the Duke of Queensberry regarding an action he wanted to take against a tradesman for breach of contract for the painting of his house: 'I am of the opinion that this action will not lie unless the witnesses do'.¹⁴

There is today a view of the bar which is extremely prevalent; namely that changed circumstances mean that it has far too many members who are all chasing a deplorable lack of work.¹⁵ Complaint is made that there are too many barristers joining the profession at a time when change of a legislative and procedural nature mean that the work traditionally the preserve of the bar is done by solicitors or, worse still, administrators. Developments regarding mediation and arbitration are a further coup de grâce. This idea that the bar must somehow diminish in size in order to survive is a recurring leitmotiv when looked at from a historical perspective. In 1853, one commentator was moved to write that, 'this is a time when the prospects of the bar are not such as to afford any justification for the abundant supply which seems to be pouring into its ranks, or any ground for hope that one half of those who are coming in will ever find anything to do'.¹⁶ Previously, in 1845, another commentator in response to an advertisement placed in a journal by a member of the bar, 'offering his services à tout venant, as conveyancer, or equity draftsman, or to make himself in any way useful (!) to any overlaid barrister', complained that the 'ranks of the bar are overfilled – crowded to suffocation', and that there was 'at least three times as many barristers as would suffice, with

moderate exertion, to do all the business that there is to be done'.¹⁷

While complaint is also made regarding lack of work as a continual problem for those who join the bar, for some it continues unabated for their remaining time at it. A story is told which illustrates this problem. A barrister, who we will call 'Briefless', was walking through the corridors when his clerk approached him, 'Oh, sir!', said the clerk, 'there is a man at chambers who has a brief, sir!'. 'What?, a brief! Great Heavens!' And the young barrister started running back as fast as his feet would carry him. 'Stop, sir, stop' cried out the clerk who was trying to keep apace, 'You needn't hurry, sir; I've locked him in!'¹⁸

There has been a steady decline over the years in the number of scandalous practices which used to prevail at the bar. For instance, the practice of accepting brief with fees thereon, and not attending upon such briefs. Such was the busy life for some at the bar in past years that when a member got jammed with two briefs on the same day, one brief would be flicked to a less occupied member of the bar. Long gone are the days when such a practice was extolled on the basis that '[the] public may have mediocrity with certainty, or pre-eminence with uncertainty'.¹⁹ Of the practice of accepting more briefs than can be attended to on the one day the same justification was advanced, namely the 'present habits of clients, of preferring the uncertain attendance of the most eminent men, to the certain attendance of men of inferior degree of reputation, the evil is unavoidable'.²⁰

Solicitors were singularly in the forefront agitating for change of restrictive work practices of silks. While it is difficult to pinpoint the first complaint made by a solicitor about the practice of devilling, in 1845 a solicitor, who wished to remain anonymous, complained of the increasing professional practice of QCs where juniors read all the briefs and prepared an epitome of facts and evidence – 'it strikes me it would be desirable that the junior... so engaged should be known'.²¹ It is regrettable, though perhaps inevitable, that the precedence at the bar table previously afforded to silks has all but disappeared. Fairly early on in the modern history of the New South Wales Bar the lack of respect for precedence was adverted to as a matter warranting censure when, in 1953, the Bar Council noted that junior counsel occupied the seats at the bar table to the exclusion of senior counsel and, worse still, solicitors had also been observed sitting at the bar table to the exclusion of all counsel.²²

The duties owed by counsel to the court were recognised and, it must be said, on occasion, strictly enforced. For instance the duty of a barrister to communicate to the court his knowledge that he possessed upon the law of the case (that is, not to

conceal from the court a decision which he or she believed would influence the judgment of the court against him) was not one in which the court lacked redress. In one case, a Mr Phillips of counsel, moved before Sir C Hatton, LC, to set aside a decree previously entered. He asserted that the decree was made without precedent. Unfortunately, he only made the assertion because of something the plaintiff had told him. He was committed to the prison of the Fleet for his rash motion.²³ In another case, the court imposed a sentence in relation to a barrister who had tampered with a witness in the Popish Plot which required, as part of that sentence, to have his gown pulled over his ears by the tipstaff in court.²⁴

Tricky demurrers and frivolous pleas

Justice Coleridge once remarked: 'I do marvel that gentlemen who would kick an attorney out of their chambers if he desired anything wrong in an ordinary way, will, nevertheless, consent to draw tricky demurrers and frivolous pleas. The practice degrades the counsel and special pleader, and makes them ministers of gross injustice, and parties to the frauds of other persons.'²⁵ A well drafted demurrer, on the other thing, apparently had therapeutic properties – Baron Parke was on one occasion reported to have taken a 'beautiful demurrer' to the bedside of a sick friend to cheer him up in his illness.

Sledging

Sledging, as much as it is frowned upon, when practised well, forms part of the natural armoury of an advocate.²⁶ Strangely, sledging has a long lineage at the bar table, and probably always did. That this was so was exemplified by Guillaume Durand who, in his influential book of ecclesiastical and Roman law, *Speculum Judiciale*, written in 1271 indicated that where one counsel 'have made a noise or a tittering, you may do the like'.²⁷ Though, with the potency of current microphones which records anything and everything within range at the bar table, those who practise the art should be wary. To assert that an opponent in making submissions before a court is telling an 'untruth' does not necessarily encompass the proposition that your opponent is lying or acting improperly and, as such, may not fall within the definition of 'unsatisfactory conduct', though accepted as a form of sledging.²⁸ John Starke, who apparently had a reputation for perpetual rudeness, once bellowed down the bar table to an opponent of a witness, in response to being asked why he had failed to disclose in evidence that he had been awarded two conspicuous gallantry awards, stated that he didn't think it relevant, 'Cross-examine him if you fucking well dare'.²⁹

Restrictive practices of the bar

The recent upheaval at the New South Wales Bar has ended the push, at least for now, for incorporated practice for those who wished to practise that way.³⁰ Sixty years ago a very similar thing happened. Dr J M Bennett, the eminent legal historian, wrote of that dispute in terms quite prescient about the current issue that vexed members of the New South Wales Bar:³¹

Even the idea of barristers practising in partnership was thought to undermine the principle of independence and was rejected when proposed in 1951. Seven years later a Council committee on the subject reported that there was no real demand at the bar for such partnerships, the majority of members senior and junior were opposed to them, junior men in particular feeling that in the course of time they might be left little alternative for advancement save by the lowest rung of a partnership ladder.

Both the issue of incorporated practice as well as partnership, if they are ever to be addressed, would now potentially require a national approach, due to the commencement of the National Rules of which the New South Wales Barristers' Rules form part.³² Those who call for change will no doubt hearken back to the report released in 1994 by the Trade Practices Commission which called for bar councils in all jurisdictions to remove rules which required bar members to operate as sole practitioners and to not share profits from practice with others, to ensure that all barristers were free to exercise their own commercial judgment as to the ownership and business structure of their practices.³³ As a sign that change is in the wind, a recent report released in Ireland recommended that the sole trader rule be relaxed so as to permit barristers who wished to do so to practise as a partnership.³⁴

The bar is constantly changing and has been throughout its long history. A number of restrictive trade practices have come and are now long gone. The following are just a few of those.

Historical reform of bar practice

Women and admission to the bar

It was not until 1905 that women were first admitted to the bar. Before that date they were precluded from being admitted as barristers, and in that year Flos Greig was admitted to legal practice in Victoria. This was only able to take place upon passing of legislation by the Victorian Parliament specifically allowing women to practise.³⁵ Her admission ceremony was presided over by the Chief Justice Sir John Madden. She made her first professional appearance in an application made that same day on behalf of the Australian Women's Association. It has to be

said that the chief justice held some views about admission of female barristers which could only be called antiquated today. When interviewed about Ms Craig's admission he stated that women 'were certainly handicapped by nature and sex. Women were naturally more sympathetic than judicial, more emotional than logical.' That being said, he also said that he could not see why a woman would be denied a right to go to the bench as that was a 'logical outcome of their admission to the bar'.³⁶

The position in New South Wales was that women had to wait until 1921 before Ms Ada Evans was admitted by the full court³⁷, and it was not till June 1924 that Mrs Carlisle Morrison was admitted as the first female practising barrister at the New South Wales Bar.³⁸

The first woman to practise as a barrister in England was Helena Normanton in 1922. She appeared in the Divorce and Chancery courts, and she was the first female to practise as counsel at the Old Bailey. The last was apparently due to a chance event. She was sitting in court, dressed with a wig and gown, during the hearing of a case in which three men were charged with fraud. One of them appealed for the services of a lawyer, and being told to select counsel among the members of the bar present, hit upon Ms Normanton, without apparently noticing she was a woman, due to the rule laid down by the Benchers that a woman barrister's wig must completely cover her hair.³⁹ Ms Normanton had the distinction of being one of the first women to be appointed a silk, when she became king's counsel in 1949.⁴⁰

The first female silk to be appointed in Australia was Dame Roma Mitchell in 1962. Joan Rosanove was appointed queen's counsel in 1964, some 46 years after she had been admitted to the Victorian Bar. She is noted for having the first 'speaking part' before the High Court when, in 1938, she appeared as junior counsel in *Briginshaw v Briginshaw* (1938) 60 CLR 336, and was recorded as having addressed the High Court, albeit briefly.⁴¹

Motion days.

There was a historic practice where counsel had the right to move the court on motion days which was based on their order of seniority. This was the case save on the last motion day of term, when juniors were rewarded with priority.⁴² This was not a form of precedence with regard to all motions, just unopposed motions.⁴³ That practice was apparently terminated by the provisions of the *Judicature Act 1873* which came into force on November 1, 1875 when the division of legal year into 'terms' was abolished and replaced with 'sittings'.⁴⁴

Keeping terms

There was a time when barristers were required to attend dinner on numerous occasions before they could be 'called to the bar'. Having sat a preliminary examination conducted by the selected Inns of Court, a student was required to 'keep terms' by dining three times if a member of a university, or six times if not, during each of the yearly four legal 'terms'.⁴⁵ This requirement was apparently imposed to secure his (the profession being exclusively male at the time) attendance at the moots, exercises, and lectures, which were held after dinner, the door having been locked after grace. Keeping of twelve terms was usually required.⁴⁶

Serjeants-at-law.

Serjeants (identified with the post nominal SL) were an ancient order of barristers who existed from 1278 until 1866 when the last holder of the office of king's serjeant lapsed with the death of James Manning.⁴⁷ At common law no-one could be appointed a judge of the superior courts who had not been made a serjeant (that is, attained the degree of the coif) though judicial appointments were made who were not of that order, but prior to taking up judicial office, the person would 'take the coif' and be made a serjeant.⁴⁸ The most valuable privileges enjoyed by the serjeants was an exclusive right of audience before the Court of Common Pleas and monopoly of the then highly profitable art of pleading. An attempt was made in 1755 to curtail that privilege relating to exclusive right of audience, but the legislation was defeated. It wasn't until 1846 that legislation was passed which extended to all barristers the privileges enjoyed exclusively by serjeants in the Court of Common Pleas.⁴⁹ The final undoing of the serjeants was the passing of legislation in 1873 which provided that no person appointed a judge was henceforth required to take, or have taken, the degree of serjeant-at-law.⁵⁰

Swearing of oaths as part of admission to the bar

For many centuries until comparatively recent times it was necessary for barristers to swear an oath of allegiance to the Crown upon being admitted to the bar. Serjeants-at-Law were required to swear an oath to 'serve the king's people' to truly counsel them 'after your cunning'.⁵¹ The purpose of the oath was to bind the serjeant to plead for all within the kingdom, however humble their condition. King's counsel swore an oath upon being appointed to 'serve the king as one of his counsel learned in the law, and truly counsel the king'. The letters patent are in the same terms. This was the essential difference between that office and the latter day office of king's counsel – where if

someone wanted to engage their services to appear against the interest of the king (usually in criminal proceedings), counsel had first to obtain a licence for which a fee had to be paid. Hence the connection of that latter office with being a servant of the Crown. When permission was sought it was rarely refused.⁵² King's counsel were appointed by letters patent under the Great Seal. Until 1868 barristers were required in England to take the oath of allegiance to the Crown in the Court of King's Bench. King's counsel also took an oath before the lord chancellor.⁵³ After 1868 when the Promissory Oaths Act came into effect, no oath or declaration was required to be taken in court by a person upon being called to the bar.⁵⁴

Oath in denunciation of the pope

Up until 1791 Roman Catholics were not permitted to be barristers because they were required to take an oath in denunciation of the pope. When a barrister advanced to be a silk, he had again to take a further oath to forswear transubstantiation, and also to produce a certificate that he had received the sacrament according to the rites of the Church of England within three months of taking the oath. The recognised venue for this performance was St Martin-in-the-Fields, where churchwardens had a settled fee of a guinea for the issue of their certificate of the rites being administered.⁵⁵

Peculiar rules of etiquette

Barristers from mid-nineteenth century England were required to comply with a number of peculiar rules of etiquette considered *infra dig* – all relating to restricting access to solicitors and attorneys, particularly when they were on circuit. For instance, a barrister was compelled to travel by post chaise and not by coach.⁵⁶ He was not to enter the circuit town until the opening of the assizes there.⁵⁷ He was to take lodgings in a circuit town, and not stay at a hotel.⁵⁸ A barrister was forbidden to dine or walk during the assizes with an attorney, or to dance at an assize ball with an attorney's daughter.⁵⁹ If he did any of these things he would be ostracised by other barristers for breach of etiquette on circuit for the practice of huggery which involved any direct or indirect courting of business, the overt act of which was any action involving over-civility to attorneys, or over-anxiety to meet them. This explains the basis for Lord Campbell's oft-quoted remark that 'there were four, and only four, ways in which a young man could get on at the bar. First, by huggery. Secondly, by writing a law book. Thirdly, by quarter sessions. Fourthly, by a miracle'.⁶⁰

Significant reform of New South Wales Bar practice in the past 50 years

The 'two-thirds' rule

There was a rule of professional practice that where two counsel were briefed junior counsel was not to charge less than two-thirds (sometimes it was expressed as being three fifths) of senior counsel's fees. Where junior counsel charged less than that amount you were in breach of the Barristers' Rules. The rule was well known by the General Council of the Bar of England and Wales by 1900. The rule was rescinded by the New South Wales Bar Council in 1966, ostensibly because the Bar Council considered it contrary to the public interest.⁶¹ The tale has been told many times beforehand, but is still worth telling – particularly when the two-thirds rule is a distant memory save for a select few.⁶² Robert Stitt QC from the Sydney Bar was cross-examining a quick witted witness:

Stitt QC: I would like to put a proposition to you.

Woman Witness: You would? My luck has changed at last.

His Honour: I think you had better wait until you hear what the proposition is!

At the next adjournment the exchange continued when Stitt and the witness met in the lift:

Woman Witness: Still interested in that proposition?

Stitt QC: Madam, I hope you realise that, under our Bar Rules, whatever I get, my junior must get two-thirds.

Up until 1791 Roman Catholics were not permitted to be barristers because they were required to take an oath in denunciation of the pope. When a barrister advanced to be a silk, he had again to take a further oath to forswear transubstantiation...

The 'two counsel' rule

Closely aligned to the two thirds rule was the two counsel rule. There is very little empirical evidence to support the existence of a two counsel rule until about the mid-nineteenth century, though in 1828 on the Norfolk Circuit it was noted as being an immemorial custom.⁶³ Contemporaneous with the development of the rule of etiquette was the roar of complaints from solicitors and attorneys regarding the dreadful cost of

the rule. There was a degree of expediency associated with the rule. First, it was widely believed that juniors were not being properly compensated for the work that they did prior to the matter being tried, and that being a junior to the leader was one way of making recompense. But at the same time that the rule was taking shape the courts were becoming quite mercenary in not granting a new trial where leaders did not appear for the hearing (otherwise engaged in another case, or incorrectly believing a matter wouldn't be reached within a set timeframe), in which case the presiding judge directed the junior to carry on the senior's task. The court held that every cause on the list of the day was to be considered by the parties as the first cause, and they were to prepare accordingly.⁶⁴

It would appear that the 'two counsel' rule became entrenched in New South Wales by 1910 when the New South Wales Bar Council issued a ruling in respect of king's counsel which provided that they should not appear for a plaintiff or appellant without a junior, though it provided that the silk could do so, provided he appeared for a defendant or respondent – but only when the conduct of the case did not require the 'reading of pleadings, judge's notes or other documents'.⁶⁵ In 1965 the Bar Council varied its rules to render it inappropriate for senior counsel, other than permanent Crown prosecutors and public defenders, to appear without a junior.⁶⁶ A year later the Bar Council considered the necessity of the 'two counsel' rule – and did not alter its previous ruling holding that, '[if] the rule were to be revoked, the division of the bar into senior and junior practitioners would disappear and a form of specialisation which has proved its value to the public would be destroyed'.⁶⁷

The first tentative step towards reform took place in 1984 when a new rule was passed which permitted a queen's counsel to accept instructions as an advocate without a junior, though the silk was still entitled to assume a junior would also be briefed unless he was initially instructed otherwise.⁶⁸ The 'two counsel' rule was finally abandoned when the *New South Wales Barristers' Rules* were reshaped in 1993 when the unacceptable remnants of the rule were passed.⁶⁹ In England and Wales, the rule was only abolished in 1977.⁷⁰

The cab-rank rule

The cab-rank rule has also seen substantial change. Currently, the cab-rank rule deems that the barrister is not only permitted, but in fact, required, to act on behalf of any client who calls upon his or her services, subject to limited exceptions.⁷¹ The rule regulates the conduct of barristers as advocates.⁷² The cab-rank rule does not apply to furnishing legal advice or any other such chamber work, so any barrister is not required to provide

advice regarding a matter that they are not comfortable in.⁷³

In 1993, at the same time as reform of the 'two counsel' rule was taking place, significant changes were made to the cab-rank rule which were necessitated by the increased scope of work able to be undertaken by barristers, whether silk or junior. The most significant change was the omission of a rule which permitted a barrister to refuse to accept a brief on the basis that they held a 'conscientious belief' based on reasonable grounds that precluded them from fairly presenting the client's case.⁷⁴ It was replaced by a rule which provided that; regardless of the basis of objection, and subject to no other ground of exemption existing, if the instructing solicitor and client wished for the barrister to appear, the barrister was obliged to do so and then use his or her best efforts consistent with a barrister's duties.

In 1997 the cab-rank rule was significantly expanded by the introduction of highly prescriptive rules to define what briefs a barrister must not accept⁷⁵ and briefs that a barrister could refuse to accept.⁷⁶

The conference rule

According to this rule solicitors were, generally speaking and with some limited exceptions, required to attend conferences at the barrister's chambers. The rule, as expressed above, didn't find expression in the Barristers' Rules in 1947, though there was reference to a prohibition on barristers interviewing persons at gaol in the absence of an instructing solicitor.⁷⁷ By 1980 a rule was promulgated which, in its general effect, forced solicitors to attend on counsel in chambers.⁷⁸ By 1988, a number of rules were passed which widened the ambit of attendance requirement and provided for discretionary release from the harshness of the operation of the rule.⁷⁹ The conference rule had a scope of operation until 1994 when it was repealed.⁸⁰

Barrister's interviewing witnesses

The practice in NSW, as provided for in the rules in 1947, was that it was not a breach of etiquette for the barrister to interview a witness.⁸¹ This rule was required because of the existence of a significant divergence in practice between barristers from NSW and England as to the propriety of interviewing witnesses either alone or together with an instructing attorney being present.⁸² Such witnesses were required to be interviewed in chambers, at home, or in the precincts of the court unless exceptional circumstances existed.⁸³

The *New South Wales Barristers' Rules* in 1980 provided for a barrister to interview a witness but not in company with other witnesses and that he or she was prohibited from telling a

witness what particular answer should be given to a question.⁸⁴ The Barristers' Rules were expanded in that same year to specifically provide a prohibition on any act of a barrister which would prevent or discourage a witness from being interviewed by an opposing counsel.⁸⁵

Coaching of witnesses

In 1971 the Bar Council expressed the view that it was a serious breach of ethics for counsel to 'coach' a witness (including a client) in order to advise how to deal with a line of cross-examination.⁸⁶ The Bar rule relating to interviewing witnesses was redrafted in 1997 so that the new rule, as restated, prohibited any suggestion regarding the content of evidence to be given and prohibited any coaching or encouragement of a witness to give evidence different from what the witness believed to be true.⁸⁷ A barrister was however permitted in conference to question and test the witness's evidence by drawing the witness's attention to inconsistencies and other difficulties with the evidence.⁸⁸

Prohibition on advertising

Barristers in NSW were, until comparatively recent times, severely restricted in the form of advertising or soliciting for business that they could do. The situation was initially one that no advertising was permitted as it constituted a breach of etiquette.⁸⁹ Direct advertisement was prohibited, but so were the various devices by which counsel could bring his name to the notice of the public. According to Dr Bennett, the New South Wales Bar Council from its inception concerned with the question of advertising, but those concerns had to be modified by the expansion of radio and the emergence of television, in that comment was sought from barristers regarding the subject matter of particular court cases or to provide an opinion. The rules provided the arcane restriction that it constituted a breach of etiquette for a barrister to use his name as part of a broadcast dealing with a legal matter, but it wasn't a breach for the same barrister on a non-legal matter and for his name to be advertised.⁹⁰ Following on from the UK Bar Council's removal in 1990 of the rule which restricted advertising⁹¹, amendments were made to the *Legal Profession Act 1987* which discarded the rule against advertising in the Barristers' Rules in 1994.⁹²

By and far the most radical change to befall the profession of barrister at the New South Wales Bar was the passing of the *Legal Profession Reform Act 1993* which commenced on 1 July 1994. Some of these changes wrought by that Act have already been discussed above. The passage of that Act represented the first statutory recognition of the New South Wales Bar Council's

right to make rules with respect to practise as a barrister and the rules are binding whether or not a barrister is a member of the Bar Association.⁹³ It also brought, for the first time, legal practitioners in New South Wales within the chapeau of the competition provisions of the *Competition and Consumer Act 2010* (Cth), previously the *Trade Practices Act 1974*.

To the above can be added another significant prohibition on the bar, namely the blocking of interstate practitioners from practising in a different state from which they held a practising certificate. This practice was finally declared unconstitutional by the High Court in 1989.⁹⁴

Sometimes changes are embraced more at the bar than by the bench. In 1822 Humphrey Ravenscroft developed a patent for the tie-wig, which revolutionised the wearing of wigs which alleviated the need for daily maintenance hitherto which treatment of the wig with a thick, scented ointment (pomatum) and powder had been required. It wasn't an immediate success as some judges, such as Sir James Park, a judge of Common Pleas, resisted the change as an innovation precluded by the common law, so much so that he actually refused to recognise his own son when he appeared before him wearing one of the 'newfangled wigs'.⁹⁵

It is perhaps right and fitting that in this article the final word should be that of a judge. During his swearing out ceremony as a senior puisne, judge stable in the Supreme Court of Queensland recalled an occasion when, as an associate during a full court appeal hearing, a barrister, who's case was less than impressive had a pigeon who was resting on a wooden beam above him deliver its own opinion over his brief, wig and gown. Upon that instant the presiding appeal judge stated 'I concur'. Thereby ended any prospect of success of the appeal.⁹⁶

Endnotes

* *The Times* Crossword 5,972 (May 6, 1949), A: Silkworm.

1. J Barrell, *Imagining the King's Death*, (OUP 2000) p 387. 'My Lord, I am willing to give your lordship such an answer as an aggrieved man of honour like myself is willing to give the man who has repeatedly insulted him, and I am ready and willing to meet your lordship, at any time and place that you may choose to appoint'. Eyre refused the challenge. Referred by R. Walker, 'Security, Freedom of Speech and Criminal Justice in the age of Pitt, Burke and Fox' (speech delivered at the Bentham Club on 5 March 2008, at footnote 31).
2. *The Times*, 12, 15 December, 1829.
3. K Mason, *Lawyers Then and Now*, (Federation Press, 2012) p 43. Mason wryly adds as a footnote to the incident that Darvall was later made a silk and served as attorney general for NSW.
4. R F V Heuston, *Lives of the Lord Chancellors 1885–1940* (OUP, 1987) p333.
5. *The Evening Telegraph* (27 February, 1908) p 2.
6. *Swinfen v Lord Chelmsford* (1860) 5 H. & N. 890; 29 LJ Ex 382; 2 L.T. 406; 6 Jur. N.S. 1035; 157 ER 1436. That case related to the actions of the testator's daughter-in-law, Patricia Swinfen's former barrister Sir Frederic Thesiger (subsequently Lord Chelmsford).

7. *The Monthly Law Reporter*, v 22, 409 at 411.
8. *Kennedy v Brown* (1863) 33 LJ Ch 71
9. *Malins v Price* (1845) 1 Ph 590; 5 L.T.O.S. 385; 9 Jur. 955; 41 E.R. 757, L.C.; *De La Warr (Earl) v Miles* (1881) 19 Ch. D. 80; 45 L.T. 424; Ex p. Skerratt (1884) 28 Sol. Jo. 376.
10. *Cattell v Corral* (1839) 3 Y. & C. Ex. 413; 160 E.R. 763.
11. *Wilding v Sanderson* [1897] 76 L.T. 346.
12. *Florence v Lawson* (1851) 17 Law Times 260.
13. E Kahn, 'The Shortest Opinion' (1979) 96 S. African L.J. 664 at 665.
14. G A Morton and D. Macleod Mallock, *Law and Laughter* (1913), p 29.
15. In contrast, silks attract a measure of work which is directly attributable to 'attorney scarcity', *Mafanya v Sebleka* [2011] LSHC 126 at [21] per Peete J.
16. *The Jurist*, June 11, 1853, p 206.
17. *The Jurist*, March 29, 1845, p 81. The commentator, who was referring to an advertisement placed the previous week's edition – thought it a joke, a jest placed in the journal as a sad reflection on the state of the bar, but unsure of whether it was really a joke, begged the unknown barrister to 'retract, ere it be too late' (p 82). It was a matter of comment at that time that the bar was 'notoriously' divided into two classes, 'the real' and the 'nominal' barristers: *The Legal Observer*, v. 14, 1837, pp 1-2.
18. T E Crispe, *Reminiscences of a KC* (Boston, 1910), p 201.
19. *The Jurist*, February 13, 1847, p 38.
20. *The Jurist*, May 26, 1849, p 193.
21. *The Legal Observer*, v. 29, 1845, p 409.
22. *NSW Bar Association Annual Report* (1953), pp.5-6; and mentioned again (1958) p.7.
23. *The Jurist*, July 25, 1846, p.285. It would appear that the court accepted his plea that he didn't intend to mislead the court but nonetheless punished him for his ignorance.
24. *Redding's case* (1680) 83 E.R. 196.
25. *Rowbottom v Bull* (1846) 7 Law Times 117 at 118.
26. R Burbidge QC, 'Some Thoughts on Courtesy', *Bar News* (Spring 1999, p.65) referred to sledging as involving 'interjection, snorts or facial and bodily movements'. Bickering between counsel may itself found the basis for an unfair trial, as was recognised in *R v Keech* (Unrep, Vic CCA, 5 October 1989).
27. Of the significance of this work on court etiquette of common law courts, see T F Gaffney, 'Borrowed manners: Court etiquette and the Modern Lawyer' (2012) 86 ALJ 842 at 845-6.
28. *The Victorian Bar Inc v Sandbach* [2003] VLPT 11 at [109]-[110].
29. Oral History of SEK Hulme AM QC - http://oralhistory.vicbar.com.au/hulme_trans_ed10.asp
30. The NSW Bar Association held a general meeting in September 2013 to vote on a motion proposing to permit the incorporation of barristers' practices and that motion was overwhelmingly defeated by ballot (745 no; 375 yes). The motion had sought an indication of support for changes that would allow barristers to choose to practise through single member, sole director companies. The ballot was lost, perhaps, because there was no taste as would have been required for a rewriting of the sole practice rules. In England and Wales, barristers have been permitted to incorporate and the first incorporated practice commenced in 2013.
31. J M Bennett (ed.), *A History of the New South Wales Bar* (Law Book Co., 1969), p.135, see also *NSW Bar Association Annual Report* (1958), p 6.
32. New South Wales Barristers' Rules, implementing those National Rules, took effect on 14 January, 2014, r 16(a) and (d). In England, it was held that an agreement between barristers to practise in partnership was improper and contrary to the rules of etiquette: *Home v Douglas* (1912), *The Times*, 15 November. The New South Wales Law Reform Commission recommended a relaxation of the bar rule and suggested that partnerships of no more than three barristers be permitted: *First Report on the Legal Profession: General Regulation and Structure*, NSWLRC, R 31 (April 1982), ¶7.23-7.26.
33. Trade Practices Commission, *Study of the Professions – Legal*, Final report, March 1994, p 107.
34. The Competition Authority, *Competition in Professional Services: Solicitors and Barristers* (Dublin, 2006).
35. *Women's Disabilities Removal Act 1903* (Vic), nicknamed the 'Flos Greig Enabling Act'.
36. *St John Daily Sun*, November 20, 1905.
37. She had tried to be admitted earlier but failed and she left for the United Kingdom. Her admission was only able to take place upon the passing of the *Women's Legal Status Act 1918* (NSW) which permitted women to be appointed a judge or magistrate, or to practise as a barrister, among other things. The Act did not entitle women to act as jurors though, and it was 31 years later that they would be so entitled by passage of the *Jury (Amendment) Act 1947* (NSW).
38. The nod she gave upon her admission was the subject of comment in the press and, perhaps, was a portent of things to come with the new NSW Supreme Court social media policy: *The Daily Guardian*, 3 June 1924, p 4, 'Nervous Nod Makes Mrs Morrison a Barrister. CJ in a Twitter'. See G Lindsay (ed.), *No Mere Mouthpiece: Servants of All, Yet of None* (LexisNexis Butterworths, 2002), pp.121-125; Bennett (op. cit.), p.127.
39. *Northern Advocate*, 18 April 1925. She was also the first female to secure a British passport in her maiden name.
40. The other female who was made a king's counsel was Rose Heibron who was the second woman to be appointed a High Court judge, after Elizabeth Lane. Significantly Rose Heibron was appointed at 34 years of age, and was the youngest KC since Thomas Erskine in 1783 when he was aged 33.
41. See Blackshield, Coper and Williams, *The Oxford Companion to the High Court of Australia*, (2001) at 722.
42. R E M, 'Juniors and the last motion day of term', 89 LQR 347.
43. *The Jurist*, February 7, 1852, p 29.
44. *Supreme Court of Judicature (Commencement) Act 1874*, s 2.
45. Hence the reference in legal journals of the day that, 'A man may become a barrister merely by eating a given number of dinners', *Solicitors' Journal*, 17 October, 1868, p.1012.
46. A Wood Renton, *Encyclopaedia of the Laws of England* (1897), v 2, p.7.
47. J Sainty, *A List of English Law Officers, King's Counsel and Holders of Patents of Precedence* (Selden Society, 1987), p.3.
48. G A Morton and D. Macleod Malloch, *Law and Laughter*, (T N Foulis, 1913), p.67. When serjeants appeared before chief justices from Lord Guilford onwards the latter wore the coif and addressed serjeants as 'brother': J H Baker, *The Order of Serjeants at Law* (Selden Society, 1984), p.51.
49. *Practitioners in Common Pleas Act 1846*; G. Sharswood, *An Essay on Professional Ethics* (2nd edn. 1860) pp.155-158.
50. *Judicature Act 1873*, s 8.
51. In its original sense the word 'cunning' referred to in the oath meant possessing erudition or skill and had no implication of deceit.
52. The practice of obtaining a licence was abandoned in NSW in 1930 following a meeting of king's counsel where they resolved that such special licences were no longer required. The governor-in-council agreed to that recommendation, Bennett (op. cit.), pp 239-40.
53. J Sainty, *A List of English Law Officers, King's Counsel and Holders of Patents of Precedence* (Selden Society, 1987), p.84.
54. J R V Marchant, *Barrister-at-Law*, (London, 1905), p.12
55. *Johnson's England, An Account of the Life and Manners of his Age* (Clarendon Press, 1933), ed. A S Turberville, vol. 2, p.289. The oath was introduced by the *Test Act 1673* which obligated all persons filling any office, civil or military, to take oaths of supremacy and allegiance, to subscribe to a declaration against transubstantiation, and required that the sacrament be taken in an Anglican church. It wasn't until the passage of the *Roman Catholic Relief Act 1791* (31 Geo. 3 c.32, s 22) that the oath in denunciation was abandoned, although the oath of allegiance was still required to be sworn. After that date Roman Catholics were permitted to practise as counsellors and barristers, attorneys, solicitors and notaries – whereas previously they had been restricted to being conveyancers (op. cit. at p.287).
56. *Solicitors' Journal*, 29 August, 1857, p.767.
57. D Dunman, *The English and Colonial Bars in the Nineteenth Century* (1983), p.46.

58. Ibid.
59. *Solicitors' Journal*, 8 December, 1860, p.91.
60. Lord Campbell, *Lives of Lord Lyndhurst and Lord Brougham* (London, 1869), Chapter 2. Sometimes, the third way is misquoted as: 'by marrying a respectable solicitor's daughter'. Serjeants were prohibited from hugging solicitors for that same reason: J H Baker, *The Order of Serjeants at Law* (Selden Society, 1984), p. 377.
61. *NSW Bar Association Annual Report* (1966), p.13. See also *First Report on the Legal Profession: General Regulation and Structure*, NSWLRC, R 31 (April 1982), ¶ 9.5. The two-thirds rule as an ethical rule was also abolished in England in 1966: W W Boulton, *Conduct and Etiquette of the Bar* (6th edn, 1975), p.53.
62. The anecdote was quoted by the then Hon Justice M H McHugh AC speaking at a June 1995 NSW Barristers Association dinner: *Bar News* 1995, p.17.
63. R Cock, 'The Old Two Counsel Rule' (1978) 94 LQR 505.
64. *Cottam v Banks* (1847) 8 *Law Times* 347, also *Earl v Dowling* (1852) 10 *Law Times* 115.
65. New South Wales Bar Association: Rules and Rulings (1947 Reprint), L F Osborne (former registrar of the NSW Bar Association) notation of date in his personal copy held by NSW Bar Library.
66. *NSW Bar Association Annual Report* (1965) p.30.
67. *NSW Bar Association Annual Report* (1966), p.13. See also Bennett, op. cit., pp.241-242.
68. New South Wales Bar Association: Rules and Rulings (Reprint 1990), r 60, commenced July 12, 1984. See The redrafted 'two counsel' rule had been recommended as part of a report prepared by the New South Wales Law Reform Commission in 1982: *First Report on the Legal Profession: General Regulation and Structure*, NSWLRC, R 31 (April 1982), ¶ 9.28.
69. Bar Council amendment to Barristers' Rules March 1993, see also Circular 13/93 of the NSW Bar Association.
70. The 'two counsel' rule was abolished at the English bar in that year, following a recommendation from the Monopolies and Mergers Commission: see *First Report on the Legal Profession: General Regulation and Structure*, NSWLRC, R 31 (April 1982), ¶ 9.14.
71. New South Wales Barristers' Rules, implementing those National Rules, rr 21 to 24B, commencement 6 January 2014.
72. Hon. G. Samuel, 'No More Cabs on the Rank? Some Reflections About the Future of Legal Practice' (1998-9) 3 *Newcastle L Rev* 1, p 2. In that article, a serious question is raised as to whether current and future practice at the bar requires the retention of the cab-rank rule.
73. *NSW Bar Association Annual Report* (1983), p.11. See also NSW Bar Association Circular 13/93 of the NSW Bar Association.
74. Rule 2(o) omitted, see Bar Council amendment to Barristers' Rules March 1993, and see also Circular 13/93 of the NSW Bar Association.
75. *Gazette* No. 66 of 20 June 1997, pp 4559-61 (rr 87-88) and *Gazette* No.67 of 12 April 2001, p.1880. See now New South Wales Barristers' Rules (2014), rr 24, 95 to 99.
76. *Gazette* No. 66 of 20 June 1997, pp 4561-62 (r 91). See now New South Wales Barristers' Rules (2014), rr 99-103.
77. New South Wales Bar Association: Rules and Rulings (1947 Reprint), p.21. See also *NSW Bar Association Annual Report* (1974), p.13.
78. *New South Wales Barristers' Rules* (1980 Reprint), r 34.
79. *New South Wales Barristers' Rules* (1980 Reprint), see rr 33, 33A and 33B (commenced on 6 September 1988).
80. *Legal Profession Act 1987*, s 38N, was introduced as part of amendments to that Act which came into effect on 1 July 1994, and provided that no rule or practice prevented a barrister attending on a solicitor, or vice versa. See also, Trade Practices Commission, *Study of the Professions – Legal*, Final report, March 1994, p. 107– where such a change was the subject of a formal recommendation.
81. New South Wales Bar Association: Rules and Rulings (1947 Reprint), p.23.
82. R C Teece, *The Law and Conduct of the Legal Profession in New South Wales* (Law Book, 1963), pp.76-77. The 'recognised practice' in England was for barristers not to interview witnesses either before or during a trial: W W Boulton, *Conduct and Etiquette of the Bar* (1st edn, 1953), p.12. That practice still prevails today in England in contested criminal cases for all witnesses save in relation to the client, character and expert witnesses (but only in relation to defence barristers), but the rule was relaxed in civil matters: Code of Conduct of the Bar of England & Wales (8th ed.), ¶ 6.2.2, 6.3.1.
83. New South Wales Bar Association: Rules and Rulings (1947 Reprint), p.23.
84. *New South Wales Barristers' Rules* (February 1980 Reprint), r 32.
85. New South Wales Barristers' Rules (February 1980 Reprint), r 37.3 (commenced 30 October 1980).
86. *NSW Bar Association Annual Report* (1971), p 13.
87. *Gazette* No. 66 of 20 June 1997, pp.4555-56, rr 43-44 (commenced 20 July 1997).
88. Ibid. See now *New South Wales Barristers' Rules*, implementing the National Rules, which took effect on 6 January, 2014, rr 73 and 74.
89. New South Wales Bar Association: Rules and Rulings (1947 Reprint), p 24.
90. Bennett (op. cit.), p 170-171. The prohibition on advertising was reaffirmed: *NSW Bar Association Annual Report* (1972), pp 10-11.
91. L L Hill, 'Publicity Rules of the legal Professions within the United Kingdom' (2003) 20 *Arizona Journal of International and Comparative Law* 323 at 338.
92. *Legal Profession Act 1987*, ss 38J and 38K. Pursuant to the Barristers' Rules that came into effect in 1994, it was specifically declared that they were not to be read by reference to any former rules made by the Bar Association prior to that date. The changed Barristers' Rules were the subject of an article in the *Bar News* (Summer 1994), pp 15-16. For the current provision governing advertising, see *Legal Profession Act 2004* (NSW), s 84.
93. Barristers' Practising Certificates, NSWLRC, R 72 (1994), ¶1.32, *Legal Profession Act 1987*, ss 57A and 57D.
94. *Street v Queensland Bar Association* (1989) 168 CLR 461.
95. J Croake, *Curiosities of Law and Lawyers* (1899), p 593. Previously, human hair was used but the patent involved the use of horsehair in the proportion of five white strands to one black.
96. 'Valediction to the Hon Mr Justice Stabile S.P.J.' (1979) 5 Qd L 127 at 132.

The prosecution of Amanda Knox: it's not over yet!

By Caroline Dobraszczyk

The trial received extraordinary news coverage around the world. It was for the brutal murder of a pretty, young UK girl called Meredith Kercher. But the focus was almost exclusively on another young and very attractive girl from the USA, called Amanda Knox – one of the accused in this brutal and quite horrific case. Almost from the start of the case, when the body of Meredith Kercher was found in her bedroom with her throat slashed in the villa in Perugia that the two girls shared with two other girls, Amanda Knox was photographed, written about and filmed constantly: during the investigation; her arrest; the trial; her release; and then during the latest decision of another trial. There was constant use of her nickname ‘foxy knoxy.’¹

The case has raised a number of very interesting issues, particularly from a feminist perspective, not all of which can be explored fully in this article. Issues such as: sensational media reporting; the focus on Knox’s looks; the detailed focus on the alleged sexual motives and sexual ‘goings on’ of all the accused; the use of drugs and the party lifestyle (particularly that of Knox and her co-accused – Italian boyfriend, Raffaele Sollecito); the focus on what Knox was wearing; whether women usually commit such brutal crimes; her parents’ wealth; hiring a PR firm to ‘manage’ the media; and her ‘status’ as a foreigner abroad. There was no doubt that she was a foreigner from the ‘land of the free’ in a small, romantic Italy where they really do things very differently, especially when it comes to law and order.

Another interesting issue, particularly in a high profile case, is whether to actually analyse the evidence for oneself and come to some decision as to what the result should be. However, my focus in this article will be the ‘unusual’ legal process – ‘unusual’ for us, that is – that has gone on and continues to go on. The Italian legal system is very different to our own, although there are some similarities to our criminal justice legal system. The next step in this ‘saga’ is also very interesting, that is: whether Amanda Knox will ever be extradited from the US back to Italy, to face a lengthy term of imprisonment. First however, some background to the case.

Background

In early September 2007, Amanda Knox arrived in Perugia, Italy, a city about half way between Florence and Rome. She was 20 years old. She went there to study Italian, which she loved, at the University for Foreigners. This is a small school that focusses on language. Knox was already a student at the University of Washington, studying Italian, and her plan was to master the Italian language and immerse herself in the culture for nine months in Perugia before doing a summer



creative writing course taught in Italian in Rome, hosted by the University of Washington. Any credits she obtained from the University in Perugia for studying Italian would be transferred to the University of Washington.² She found a place to stay, being the top floor of no. 7, Via della Pergola, which was a villa occupied by two Italian girls. They were both in their late twenties and working in law firms. The basement was rented by a group of young male students.³ Knox then went travelling for a few weeks and was advised that there would be another girl moving in. Her name was Meredith Kercher, a British exchange student. Knox writes that ‘They [her other two flatmates, Filomena and Laura] said she was quiet and nice – from outside London. They urged me to come back soon so we could ‘get the party started’.⁴ She writes that ‘Around our house, marijuana was as common as pasta.’⁵ Knox then met Kercher on 20 September 2007, which was the day Knox moved into the villa. She writes that Meredith, who was half Indian was ‘...exotically beautiful, a Brit majoring in European studies.’⁶ Amanda also got a job working in a bar nearby which was owned by a Congolese man, Diya Lumumba, called ‘Patrick’.

Amanda Knox met Raffaele Sollecito on 25 October 2007, ‘by chance’.⁷ On this night she and Meredith went to a string and piano quintet performance at the university. Amanda writes that she and Meredith ‘...sat together by the door of a high-ceilinged hall. During the first piece – Astor Piazzolla’s ‘Le Grand Tango’ – I’d just turned to Meredith to comment on the music when I noticed two guys standing near us. One was trim and pale with short, disheveled brown hair and frameless glasses. I was instantly charmed by his unassuming manner. He smiled. He smiled back.’⁸

The rest, as they say, is history. Amanda and Raffaele did meet that night and quickly fell into a relationship. They spent a lot of time together and significantly were together on 1 November 2007. That is All Saints’ Day, a day to honour the dead, and

is also a public holiday in Italy. That afternoon Amanda was at the villa, waiting for Raffaele. The two girls, Laura and Filomena, were away and Meredith left the villa to spend time with friends. She said 'ciao' to Amanda as she went out the door.⁹ Raffaele eventually came; they smoked a joint and they both went back to his house. Amanda writes that 'we wanted a quiet, cozy night in.'¹⁰ Patrick had sent her a text message that she did not need to work that night and she wrote back 'okay, ...see you later. Have a good evening!' (This became highly significant during the trial as providing Knox with free time, and is perhaps also, very significant for the latest decision against her). The pair also did not have to drive Raffaele's friend to a bus stop to pick up her suitcase, which they thought they would have had to do that night. They watched a movie and according to her version of events, stayed at his house all night. They had known each other for exactly one week.

The murder, the investigation and the trial process

The next day, 2 November 2007, Amanda's version of events is that she woke early and went back to the villa. She immediately thought something was strange when she found the front door open. Then she found some blood stains in the bathroom sink she and Meredith shared, and a large blood stain on the bathmat.¹¹ Soon after, police arrived as two mobile phones had been handed in to them, both of which turned out to be Meredith's. By this stage Filomena and Raffaele had arrived, and they were all worried as to the whereabouts of Meredith (Laura was in Rome on business). Amanda had knocked on Meredith's door but there was no answer and the door was locked, which Amanda found unusual.¹² Eventually Meredith's door was forced open and the grim discovery was made. Amanda writes, 'It was only over the course of the next several days that I was able to piece together what Filomena and the others in the doorway had seen: a naked, blue tinged foot poking out from beneath Meredith's comforter, blood spattered over the walls and streaked across the floor.'¹³

She also writes, 'I didn't find out until the months leading up to the trial – and during the trial itself – how sadistic her killer had been. When the police lifted up the corner of Meredith's beige duvet they found her lying on the floor, stripped naked from the waist down. Her arms and neck were bruised. She had struggled to remain alive. Her bra had been sliced off and left next to her body. Her cotton T-shirt, yanked up to expose her breasts, was saturated with blood. The worst report was that Meredith, stabbed multiple times in the neck, had choked to death on her own blood and was found lying in a pool of it, her head turned toward the window, eyes open.'¹⁴

The police investigation that followed quickly determined that the break in was staged. That is, the window in one of the rooms was smashed and a large rock lay in the centre of the room. Nothing was taken, no jewellery, no computers. The scene was consistent with the rock having been thrown from inside, using the shutters in the room as a buffer. There was no glass on the outside.¹⁵ The time of death was ascertained to be approximately 11pm.

Amanda and Raffaele were interviewed extensively. (The other two flatmates and their boyfriends had alibis). Amanda described the process as horrendous. Police spoke to her at length, and at one stage, she says she was hit at the back of her head, to get her attention and to stop lying.¹⁶ Some of the questioning was only in Italian without an interpreter.¹⁷

She writes, 'The authorities I trusted thought I was a liar. But I wasn't lying... I was twenty, and I barely spoke their language... They [police] try to scare people, to coerce them, to make them frantic. That's what they do. I was in their interrogation room. I was surrounded by police officers. I was alone. No one read me my rights. I had no idea I could remain silent. I was sure you had to prove your innocence by talking. If you didn't, it must mean you were hiding something.'¹⁸

Eventually, after many hours of interviews, she named Patrick Lumumba, the owner of the bar where she worked, as the killer, and said that she had been in the house when Meredith was killed. He eventually got alibi evidence to prove he was not at the villa and Amanda retracted this version of events, almost as soon as she said it, explaining that she was so exhausted by the interview process that she gave in. At one stage Raffaele, also during his interview process, said that Amanda had left his house on the night of the murder and asked him to lie for her.¹⁹ It seems that he retracted this version at a later time. Not long after she named Patrick, Amanda was taken into custody.

But it was the DNA evidence that became crucial in the case and, at least initially, this implicated both Amanda and Raffaele as well as a third person, Rudy Guede. Police found a knife at Raffaele's apartment which had Meredith's DNA on it, as well as Amanda's, and evidence that bleach had been used there. There was also the likelihood that the villa had been cleaned thoroughly.²⁰ Investigators found Raffaele's DNA on a bra strap belonging to Meredith (the bra having been found under furniture six weeks after the initial search). Three sets of footprints were found: Guede's and others consistent with Amanda's and Raffaele's. A 'homeless hippie type' said he saw both Amanda and Raffaele in the town square which was near the villa, on two occasions on the night of 1 November, i.e., at

nine o'clock, and then close to midnight.

There was much DNA evidence in Meredith's bedroom which was traced to Guede. Guede changed his story many times as to what happened that night, implicating and absolving Amanda on numerous occasions.²¹ Amanda states that she only saw Rudy on two occasions. First, when she met him when he played basketball with the boys who lived downstairs, in about mid October 2007. Meredith was with her at this time and they all walked to the villa together. She then saw him once after that, at the bar where she worked. She had taken his drink order.²² He was an unemployed 20 year old from the Ivory Coast who had been previously caught breaking into offices and homes.²³

Amanda went through an 'Interrogation Day', which was a process whereby Amanda answered questions put to her by the prosecutor. By this stage she had been found to be 'formally under investigation for the murder of Meredith Kercher'. This was part of the court process.²⁴ Her family had retained two lawyers, Carlo Dalla Vedova and Luciano Ghirga. She met with them weekly.

In late June 2008 Amanda was formally advised that she had been charged with murder. The relevant charge document stated that she, Raffaele and Rudy had, in collaboration, murdered Meredith by strangulation and a 'profound lesion by a pointed cutting weapon', that Rudy had, in collaboration with the others, committed rape, that she and Raffaele had illegally carried a knife and that Amanda had falsely accused Lumumba of the murder.²⁵ There were in fact five crimes: murder; illegally carrying a knife; rape; theft; simulating a robbery; and a sixth charge just for Amanda, of slander, regarding her allegations against Patrick.²⁶

The pre-trial hearing was scheduled between 18 September and 28 October 2008. Guede's lawyers asked for an abbreviated trial, which means that the judge's decision is based solely on the evidence. No witnesses are called. If found guilty, the sentence is reduced by a third. He was found guilty and given 30 years (although his sentence was reduced to 16 years on appeal). The hearing was before one judge. Only two witnesses gave evidence in relation to Amanda's and Raffaele's hearing: the prosecution DNA expert and a man who claims to have seen Amanda, Raffaele and Guede together on Halloween, the day before the murder. (According to Amanda, this evidence was totally implausible).²⁷ Both Raffaele and she were ordered to stand trial.

The trial was conducted between January and March 2009. She describes it as a 'spectacle'.²⁸ The trial was in fact a combination

of the criminal charges and some civil claims, i.e., on behalf of the Kerchers, a claim for five million euros to compensate for the loss of their daughter. Patrick was suing Amanda for slander for an amount to be determined and the owner of the villa was suing her for 10,000 euros for damages and lost rent!²⁹

The trial was really based on the DNA evidence, the expert witnesses, some other witnesses of varying credibility, the flatmates and motive. The prosecution closing arguments dealt with the fact that Filomena's window was too high to be a credible entry point into the villa; that Amanda wanted to hurt Meredith because she was critical of Amanda's 'sexual easiness' and was much more reserved; that the three of them attacked Meredith and forced her to have sex; that in the process, Raffaele had cut off Meredith's bra strap and had used his knife to threaten and wound Meredith; that Amanda used a knife, pointing it upward toward Meredith's neck and wounded her on the right side of the neck and tried to strangle her; Amanda then made the deepest wound on the left side; that during the interrogation the woman who had called Amanda a liar and told her to stop lying, was described as very sweet, and the prosecutor knew this because he was there; and in relation to the accusation of Patrick, by Amanda, that police were doing their job: they were trying to make her talk and these were normal and necessary investigative techniques. Finally the prosecution showed a 3D computer generated animation with the accused looking like avatars. This was objected to by the defence team but it was shown. It demonstrated the blood splatters in Meredith's room.³⁰

On 4 December 2009 Amanda and Raffaele were found guilty of all the charges. She was sentenced to 26 years and Raffaele to 25 years.

The 407 page report from the judge emphasised that Amanda and Raffaele found themselves with nothing to do that night; they met Rudy by chance and they went to the villa where Meredith was alone; at the villa Amanda and Raffaele were fooling around and Guede started raping Meredith; Amanda and Raffaele then joined in; 'the criminal acts were carried out on the force of pure chance. A motive therefore of an erotic, sexually violent nature ... found active collaboration from Amanda Knox and Raffaele Sollecito'.³¹ The court had disregarded the evidence of the eye witnesses and they found no animosity between Meredith and Amanda. The court found that '...extreme evil was put into practice. It can be hypothesised that this choice of evil began with the consumption of drugs which had happened also that evening, as Amanda testified'.³² The court went on to say that given Raffaele's interest in knives it is probable that he convinced Amanda to carry a knife with her.³³

The defence then prepared for an appeal. Amanda writes that 'In Italy's lower and intermediate levels, the judges and jurors decide the verdict. And instead of focusing on legal errors, as we do in the United States, the Italian appellate court will reopen the case, look at new evidence, and hear additional testimony – if they think it's deserved.'³⁴ Amanda's team asked for the court to appoint independent experts to review the DNA evidence and a judge ordered that this was to occur and that the case was complex enough to warrant a review.³⁵

The new expert report when it finally came was positive for the defendants. Basically the independent expert had identified more than fifty mistakes the forensics team had made.³⁶ Closing arguments in the appeal began on 23 September 2011 (before a judge and jury), and on 3 October 2011 both defendants were found not guilty of all of the charges – except that Amanda was found guilty of the slander charge, and received a sentence of three years, but as she had already served this time she was free to go.³⁷

And home she went. The courtroom erupted when the decision was handed down. She writes 'The crowd cheered. Some booed.'³⁸ She was quickly taken from the courtroom, driven to Rome where she stayed overnight in a safe house with her mother and some family members and the next day, flew to Seattle. Outside the court there was a wall of people and cameras, faces practically pressing against the glass, and a high-speed chase to Rome.³⁹ There were journalists on board her flight back to Seattle.⁴⁰ When she finally touched down in Seattle, she gave a news conference. She thanked all her supporters and said that her family is the most important thing to her right now.⁴¹

It's not over yet

But the prosecution now were not content with this result. They appealed this decision to the Italian Court of Cassation. On 26 March 2013 the court ordered a new review of the case largely due to the finding that the Appeal court had not considered all the evidence and had ignored discrepancies in both the defendants' evidence.⁴² The retrial began on 30 September 2013. Amanda maintained her innocence in a written statement to the court which was sent to her lawyer in a lengthy email and presented to the court. Raffaele gave a statement to the court in November, maintaining his innocence.⁴³

On 31 January 2014 the court reinstated the guilty verdicts against both defendants. Not only that, her sentence was increased to 28 years and six months while Raffaele received the same sentence of 25 years. The court also ordered that damages

should be paid by the defendants to the Kercher family.

The verdicts were handed down by the president of the Florence Appeals Court, Alessandro Nencini. This appeal decision was made by two judges and six lay members of the jury. Judge Nencini said in an interview that 'a chance decision on the part of Knox to change her plans on the night of 1 November 2007 initiated a series of events that culminated in the brutal killing of Ms Kercher...Crucially...the court had arrived at a motivation for the crime.'⁴⁴ The court has 90 days in which to release its reasoning for upholding the guilty convictions. Judge Nencini said 'At the moment all I can say is that at 20.15 that night, they had different plans; then these were ditched and the occasion [to commit the crime] was created...If Amanda had gone to work she probably wouldn't be here now. There were coincidences and on this we have developed our reasoning. We realise this will be the most controversial part.'⁴⁵

Raffaele has had his passport confiscated. On the day of the latest verdict he was found by police, with his girlfriend, in a hotel in Venzone, which is about 40 km from the Austrian border, close to Slovenia and 322 km from Florence.⁴⁶

The situation now is that the defendants can lodge an appeal against the latest decision, to the highest court in the country, the Court of Cassation. In a statement issued after this verdict, Knox has said that she was 'frightened and saddened by this unjust verdict'.⁴⁷ She added 'Having been found innocent before, I expected better from the Italian justice system...There had always been a marked lack of evidence. My family and I have suffered greatly from this wrongful prosecution. This has gotten out of hand...[There was an] overzealous and intransigent prosecution, prejudiced and narrow-minded investigation, unwillingness to admit mistakes, reliance on unreliable testimony and evidence, character assassination, inconsistent and unfounded accusatory theory, and counterproductive and coercive interrogation techniques that produce false confessions and inaccurate statements.'⁴⁸

Public reaction has of course been numerous, loud, strong and varied. A writer from New York magazine states that the Italian law is 'totally insane', allowing for double jeopardy which is 'constitutionally prohibited in US law'. He writes that Knox is 'the poster child for not studying abroad'.⁴⁹ However, the contrary view is clearly that the American media '...makes a mockery of the Italian magistrates who professionally managed this appeal, and who regularly risk their lives prosecuting the mafia in that very same courtroom. Has American arrogance ever been so bold? Have the western media ever been so complicit in such an orchestrated public relations sham?'⁵⁰

The Italian Code of Criminal Procedure⁵¹

The first thing to note is that the role of the prosecutor, i.e., the *Pubblico Ministero* (the public prosecutor) is to investigate the crime during the preliminary investigations. Technically he/she is a member of the judiciary: a magistrate, and should investigate the crime in a fair way, i.e., to try and find the truth, not only to look for evidence that can lead to a conviction. A judge seldom intervenes during the preliminary investigations. The prosecutor can ask a judge for orders to limit the movements of a defendant, known as 'precautionary measures'. This cannot be ordered unless there is proof that the defendant has committed a crime.

Self incriminating statements made by someone during the investigation process are inadmissible. The police or the prosecutor summon the defendant during the preliminary investigations and inform him/her of the alleged criminal behavior and the evidence gathered against him/her, if it is not detrimental to the investigation. The defendant (*indagato*) may defend him/herself or he/she may refuse to answer any questions. The person when interrogated must not be influenced by the use of any psychological or physical means and they must be willing to provide the information (*animus confitendi*). Before the interrogation begins the *indagato* must be informed that the statements can be used against him/her in court.

When the prosecutor decides that there is enough evidence to make out the case, a notice is served on the suspect advising of the charge and that all the evidence can be examined by the suspect and his/her attorney. The suspect can then, within 20 days, file a defensive brief, appear before the prosecutor to make spontaneous statements or ask the prosecutor to question him/her. Further the suspect can ask the prosecutor to carry out specific acts of inquiry.

When the preliminary investigations are over, if the *Pubblico Ministero* thinks that the evidence could not justify a conviction, he must not proceed with any charges. If however he decides that he can make a case, he summons the defendant to appear before the judge of the preliminary hearing. All the evidence is presented by the *Pubblico Ministero*. The defendant can try and prove his innocence. The judge has to decide whether the evidence justifies a guilty verdict or not. This process is similar to our committal process.

The trial may then follow. A defendant can be called to give evidence but he may refuse to answer any or all questions. Also he/she can choose to make spontaneous statements to the judge. For a defendant to be found guilty the judge must

be internally convinced, i.e., *intimo convincimento*. Because of this test there are no rules that predetermine the weight to be attributed to any piece of evidence. Witnesses are cross-examined and the judge may choose not to admit testimony that is patently superfluous, or questions that are irrelevant or irregular. Both parties must file a brief before the beginning of the trial detailing all evidence they want to present.

Most courts have professional judges and no juries. The exception is in the *Corte d'Assise* which is made up of eight judges; two are professional and six are lay judges, i.e., citizens who are not technically jurors as in our trial system. The *Corte d'Assise* deals with major felonies such as murder and terrorism.

In relation to appeals, both the prosecutor and the defendant can appeal a judgment before the *Corte d'Appello* that will retry the defendant. The judgment of the Appeals Court can also be appealed to the Court of Cessation however this court cannot rule on the merits. Both the Court of Appeals and the Court of Cessation can uphold, modify or quash the sentence. It is possible that the Court of Cessation may determine that further fact finding is required to reach a final judgment so it remands the case to another criminal division of the Appellate Court. The defendant can then be tried again but the judge must conform to the points of law applied by the Court of Cessation.

There is no doubt therefore that the system is quite different to our own but nevertheless, it provides for a thorough and detailed examination of all the issues.

Extradition?

An obvious question is whether, assuming the Court of Cessation or a further Appeals Court upholds the sentence against Amanda, and there is finally, a final decision, will Italy then request the USA to extradite her so that she serves her sentence in an Italian gaol?

Harvard law professor Alan Dershowitz has stated that 'As popular as she is here and as pretty as she is here – because that's what this is all about, if she was not an attractive woman we wouldn't have the group love it – she will be extradited if it's upheld. The Italian legal system, though I don't love it, is a legitimate legal system and we have a treaty with Italy so I don't see how we would resist. We're trying to get (fugitive NSA leaker Edward) Snowden back – how does it look if we want Snowden back and we won't return someone for murder?', he asked.⁵²

CNN's legal analyst, Sonny Hostin, says in an article online that US law dictates that a person cannot be tried twice on the

same charge. Because of this tension between the Italian and US law it is unlikely that US law will extradite her. When the fight begins, those are the grounds the US attorneys will be arguing.⁵³

Another law professor, Stephen Vladeck from American University in Washington said that ‘there’s nothing in the treaty that requires Italy to uphold the US legal system.’⁵⁴

It seems that the procedure in relation to extradition is as follows:

First there is a treaty between Italy and the USA signed in 1984.

The Italian embassy in Washington would send a request to the US state department, which would review it.

If in proper order, the request is sent to the US Attorney’s office.

A warrant can be issued and the fugitive arrested.

A court hearing would then be held to determine whether she is extraditable. USA law provides for specific rules and laws in relation to extradition proceedings. Lawyers appear on behalf of the extradition country, i.e., Italy, and Knox with her lawyers, would of course be entitled to oppose the order of extradition, which is sought in the hearing.

If the court finds that she is extraditable according to US laws, the court enters an order of extraditability and certifies the record to the secretary of state, who decides whether to surrender the fugitive to the requesting government. In some cases the fugitive may waive the hearing process.

If not, the fugitive is transferred to the agents appointed by the requesting country to take her. Although the order of extradition is not appealable by either the fugitive or the government, the fugitive may petition for a writ of habeas corpus as soon as the order is issued. The district court’s decision on the writ is subject to appeal and the extradition may be stayed if the court so orders.⁵⁵

Conclusion

There is no doubt that this case has been fascinating at every stage. Many people, lawyers and non lawyers, have an opinion in relation to every point. What must not be forgotten is that a young girl was brutally murdered and justice must be done – as best as possible.

Endnotes

1. A nickname Amanda Knox acquired from her soccer teammates because of the way she moved the soccer ball down the field: from ‘Amanda Knox’ – Waiting to

be heard - A Memoir’, Harper Collins Publishers, 2013, at page 31.

2. Ibid., p.7 and p.9.
3. Ibid., p.21.
4. Ibid., p.22.
5. Ibid., p.37.
6. Ibid., p.25.
7. Ibid., p.51.
8. Ibid.
9. Ibid., p.61.
10. Ibid.
11. Ibid., pp.65-66.
12. Ibid., pp.67-71.
13. Ibid., p.72.
14. Ibid., p.73.
15. Rundle, Guy, ‘Amanda Knox’s story, full of violence and lies’, Crikey!, viewed 11 February 2014, p.3.
16. Ibid 1 at page 103. (not sure if this refers back to the memoir)
17. at page 113.
18. at page 104.
19. at pages 113-114.
20. Ibid 15 at page 4.
21. at page 4.
22. ibid 1 at page 220.
23. at page 220.
24. at page 164.
25. at pages 259-261.
26. at page 291.
27. at page 278.
28. at page 289.
29. at page 291.
30. at pages 351-355.
31. at page 395.
32. at page 396.
33. at page 396.
34. at page 397.
35. at page 411.
36. at page 428.
37. at page 444.
38. at page 444.
39. at page 447-448.
40. at pages 454-456.
41. at page 457.
42. Zanker, Anthony, ‘Amanda Knox murder conviction spurs debate on Italian justice’, BBC online - Echo Chambers, viewed 31 January 2014.
43. Wilkinson, Peter, ‘Amanda Knox retrial verdict, Six things to know’, CNN, viewed 31 January 2014.
44. Day, Michael, ‘Evidence of a motive’ for the crime behind Amanda Knox verdict’, The Independent online, 2 February 2014, p.1.
45. Ibid., p.2.
46. BBC News Europe- ‘Kercher murder: Sollecito found near Austrian border’- online article -31 January 2014.
47. BBC News Europe- ‘Amanda Knox and Raffaele Sollecito guilty of Kercher Italy murder’- online article -31 January 2014, page 1.
48. pages 1-2.
49. ibid 42 at page 1.
50. at page 1.
51. my information in relation to this topic is obtained from Wikipedia.
52. ibid 43 at pages 2-3.
53. at page 2.
54. ibid 47 at page 2.
55. USAM 9-15.700 Foreign Extradition Requests and ibid 46 at page 2.

How one plaintiff lawyer made a difference

By Brad Hughes SC

Roman Silberfield is a very successful Los Angeles attorney and on the board of a national litigation firm in America. His recent wins include a suit against the Disney Corporation involving intellectual property, and a jury verdict in his client's favour of in excess of \$300 million plus interest of \$60 million.

'So what?' you might think. Well, here's what:

In August 2012 Gary Mara, a very, very good bloke, pub manager and former Balmain footballer went on his first overseas holiday for his 50th birthday, a gift from his wife, Julianne, and eight year old daughter, Olivia. It was the trip of a lifetime that ended tragically when he was hit by a car while crossing the road with his wife and daughter in Los Angeles. In fact, he stepped back into the path of the car to throw Olivia clear of a speeding vehicle driven by an intoxicated 28 year old woman.

Incidentally, this was the second drink driving offence for the driver and she was initially charged with murder, only later to plea bargain her way into a four-year gaol sentence for vehicular manslaughter.

Unlike NSW where drivers are insured for the personal injury they inflict while speeding and under the influence of intoxicating liquor, in the United states of America a vehicle can be insured with a cap of \$15,000 for any death or personal injury caused with a maximum payout of \$30,000 for any one accident. This is considered adequate cover and drivers are then let loose on the unsuspecting public.

Olivia and her mother Julianne were both deeply traumatised by witnessing Gary being run over and Olivia herself had bumps and bruises from her contact with the road surface as



she was propelled out of harm's way. Gary was killed when the car struck him. The meagre amount of money available by way of insurance just didn't seem fair. Thirty thousand dollars for the loss of a father, a husband, and the sole source of family income is no more than a pittance.

This is where Roman, a friend of well-known Australian plaintiff lawyer, Peter Cashman, stepped up to the plate. At my request, he contacted the assistant district attorney on behalf of the family and became directly involved in negotiating some compensation from the guilty driver. He attended court with Julianne and supported her as she read her victim impact statement. His efforts resulted in an additional US \$100,000 to Julianne and Olivia and a degree of closure for the grieving family. Not a king's ransom, but a base from which to rebuild their shattered lives.

Oh, and the best bit: he refused any payment for the service he provided. 'I will not charge one red cent after all that family has been through,' is the way he dealt with my enquiry as to his fee.

I like to think of his selfless involvement every time I hear another rapacious lawyer story. You might too.

Interview with Attorney General Brad Hazzard

On 18 June 2014 Arthur Moses SC and Kylie Day interviewed the recently appointed attorney general of New South Wales, at Parliament House.

In April 2014, the Honourable Brad Hazzard MP was appointed attorney general and minister for justice in the NSW Liberal and National Government. His portfolio includes the newly structured Department of Justice, Corrective Services NSW, Legal Aid Commission, Office of the Director of Public Prosecutions, Information and Privacy Commission, Judicial Commission, Solicitor General and Crown Advocate.

Brad was educated at Manly Boys High School, Roan School, London and Macquarie University, where he was awarded a Bachelor of Arts (Science) and a Diploma of Education. He began his professional life as a graduate science teacher at North Sydney Boys High School (1974 – 1975). He studied law at the University of NSW and was admitted as solicitor in 1977. He was a partner in a Manly law firm from 1981 to 1996. In 1984 he was awarded a Master of Laws from the University of Sydney. He practised as a solicitor and arbitrator and entered parliament in 1991 as the state member for Wakehurst, on Sydney's Northern Beaches. In the Fahey Liberal and National Government, he was chairman of the Staysafe Committee, leading campaigns for improved road safety. In opposition (1995-2011), he served continuously on the front bench in more than a dozen portfolios, including as shadow minister for corrective services and community services.

Before his appointment as attorney general in April 2014, Brad served as minister for planning and infrastructure, minister assisting the premier on infrastructure NSW and leader of the house from 2011 to 2014.

Bar News: Tell us a little about your background in the law. We understand that you were a solicitor and partner for 20 years or so.

Attorney General: I have held a practising certificate since 1977. My practice as a solicitor was very varied, but my passion was advocacy. I did a broad cross-section of work, everything from commercial practice, family law, criminal law, conveyancing, arbitration - the usual range of work that you would find in a solicitor's practice.

Bar News: Were you tempted to go to the bar?

Attorney General: Yes, I was. Politics came along before I actually made the decision. I had in mind that at some stage I would like to go to the bar because I enjoyed the advocacy so much.

Bar News: What didn't you enjoy about legal practice?

Attorney General: That's a harder question. There wasn't much about legal practice that I didn't enjoy. The only aspect that might have been a negative was the red tape of bureaucracy that goes into running a law practice, but the essence of legal practice I loved. I enjoy being the attorney general as I am able to work with barristers, solicitors and the judiciary. I have had a smile on my face since my appointment.

Bar News: How important do you regard the ability of an attorney general to communicate with the public on matters pertaining to law and order issues?

Attorney General: The capacity to communicate with the public to maintain confidence in the legal system is critical. It does not just apply to the attorney general. It applies to the members of the judiciary and, indeed, the broader legal



community. We all need to be in this. Sometimes the very foundations of the legal system come under attack from some quarters, and we need to have people who can advocate on behalf of the law and its necessity to our democratic system of government.

Bar News: You have been quoted as saying that there needs to be better communication from the judiciary on why sentences are imposed. How do you think that could be best achieved?

Attorney General: I think we, as lawyers, are trained to use the language of the law, which is often exclusionary of the public. Chief Justice Bathurst is doing an excellent job - through a series of forums, he has been reaching out to the community and media and trying to improve the general understanding of sentencing. I attended one forum (held for members of parliament and the media) and found it very useful. But there is always more to be done. I do not want to be so presumptuous as to suggest that there is a particular way to do it, but I will work with senior members of the judiciary to ascertain if there's any assistance I can offer in their current endeavours.

I see part of my role as being to challenge the orthodoxies of the past with a view to providing more confidence in the community's mind about our legal system.

Bar News: You have just returned from introducing the *Courts Legislation Amendment (Broadcasting Judgments) Bill 2014* into Parliament this morning. Is that a further step towards engaging the community and building confidence in the legal system?

Attorney General: Most people never see the inside of a courtroom, and so they tend to form their views from the media, including social media. This Bill is another very clear statement that we need to do more to make sure that the community understands what is actually happening in the courts across this state.

Bar News: What has been the biggest challenge for you, in the short time that you have been attorney general?

Attorney General: I think the greatest challenge that I have had, and will have, is not a daily issue but the ongoing task of building confidence in our legal system and ensuring that its inherent value is appreciated, and that the judges, solicitors, and barristers who make up the system, and the various law agencies who support it, actually get recognition for what they are doing.

I see part of my role as being to challenge the orthodoxies of the past with a view to providing more confidence in the community's mind about our legal system.

Bar News: When *Bar News* interviewed the Commonwealth attorney general last year, he said that '[f]or every Government there are one or more areas of black letter law reform that stand out'. Do you agree with that statement?

I have to say that three years as the NSW minister for planning and infrastructure is like a baptism of fire.

Attorney General: I would have said that if you have a broad vision, which in my case is to rebuild confidence in the legal system, then of course there will be black letter law reform that will flow from that. But, in my personal view, black letter law reform is not the critical issue.

Bar News: Would you agree that an effective attorney general has to straddle both legal and political issues, and be a good politician as well as a good first law officer?

Attorney General: Yes. I think that to achieve what you need to achieve as a first law officer you have to be able to tread carefully across some political issues and pitfalls.

Bar News: No doubt your confidence would come from your very lengthy experience in the New South Wales Parliament, across a broad range of areas and portfolios.

Attorney General: I think it helps. I have to say that three years as the NSW minister for planning and infrastructure is like a baptism of fire. I am finding that being back in the milieu of the law is both comforting and challenging. I am really enjoying it.

Bar News: The new structure of your department has received some comment and criticism. How have you found it working in your present role? Does being the head of a department that encompasses both the former Attorney General's Department as well as policing and emergency services, impose on you a greater workload than previous attorneys general? How do you find that the structure works for you?

Attorney General: I made it very clear as soon as I accepted the job that I understood very well the role of the first Law Officer and I would not be compromised.

How has it played out since I became attorney general? Very well, actually. Technically, my role has been reorganised so I am now the Senior Minister of the cluster which includes attorney general, Police and Emergency Services and Corrective Services. However, I don't see that as being a particular plus or minus because Stuart Ayres is the minister for police. He is a very good professional colleague and friend and we have a good working relationship. That is critical because when we say that we need to build confidence in our legal system, lawyers tend to look at it from the perspective of just the court system. I am looking at it from a broader perspective and saying that we need to build confidence across a number of agencies.

Bar News: One of the controversial issues in your predecessor's time was mandatory sentencing. What is your view on mandatory sentencing?

Attorney General: Any lawyer would be concerned about removing judicial discretion. As a starting principle, that is from where I come. However, I am also comfortable that there is, on occasion, the need for a government to make a very clear statement about where that government sees a problem to lie, with a view to making a significant cultural change. That is the case with the 'one punch' laws, but overall, my view is that judicial discretion is critical.

Bar News: What do you think the best method is for consultation in relation to judicial appointments?

Attorney General: The current system that operates in New South Wales is sensible. It varies slightly as between the Supreme Court, the District Court and the Local Court. The panel that operates in the District Court seems to be working well, as does the advertising of positions in the Local Court and the panel there that makes recommendations to the attorney general. I am certainly not going to be leaping in to making any decisions that would be contrary to the wise counsel that comes from the profession and the judiciary.

Bar News: One issue that the Bar Association is looking at currently is the issue of direct briefing. Many corporations are realising that their inhouse counsel can brief barristers directly, and that this can be an effective way of reducing costs in appropriate cases. Is direct briefing of the bar something that government departments could or should use more to contain their legal costs?

Attorney General: Anything that sensibly reduces the government's legal costs should be looked at. I would want to consider it in more detail and discuss it further with the legal profession, before I made any decision about it.

Bar News: From time to time, concerns have been voiced that an increasing number of unrepresented litigants leads to increases in the time and cost of litigation generally (including for other parties and the court). Do you have any thoughts on where the answer might lie?

Attorney General: I think you need the wisdom of Solomon. Anyone who has conducted a hearing, with an unrepresented litigant would know the challenge of trying to make sure that they are fairly dealt with, but also that everybody else is fairly dealt with.

Bar News: The Productivity Commission is currently looking at potential reforms to the legal system. The NSW Bar Association

Beside my bed are The Tournament, Ice Station and Hell Island.

made a submission to the effect that a cost benefit analysis should be undertaken to see whether the reduction in legal aid funding for civil cases actually leads to more unrepresented litigants and hence increases costs (by increasing the time in court and the costs of opposing parties). What do you think about that?

Attorney General: In a perfect world, people should be legally represented (if they choose to be) when they come into the court system. If they don't have the money to engage a lawyer, then theoretically the system should find some way to do it. Practically, that would require almost a bottomless pit and that is where my political skills may be tested. The public purpose fund has, in my view, opportunities for very good cost benefit outcomes through, for example, community legal centres. They are critical to providing opportunities for access to justice across New South Wales, and if we can find a new source of funding for them then that would be very significant. That is one of my priorities. I am exploring further opportunities for funding at the moment, but I would welcome any input from the legal profession.

Bar News: The Productivity Commission is also looking at the issue of making justice accessible to people who are sometimes called the 'unfunded middle' or 'missing middle'. They are the ones who do not qualify for legal aid, but are not wealthy enough to fund litigation. The commission has floated suggestions such as properly regulated litigation funding and contingency fees in some matters, to facilitate legal representation being more affordable and accessible, coupled with regulation to avoid abuse. If the commission made recommendations along the lines of those suggestions, what would you do?

Attorney General: I would look at anything the Productivity Commission recommends, but I would certainly want to explore further, with experts on those matters, whether such initiatives are likely to be effective.

Bar News: Do you get time to read for pleasure and, if so, what have you been reading?

Attorney General: I recently read *The Book Thief*, which I really enjoyed. Now, I am getting into fiction by the Australian author, Matt Reilly. Beside my bed are *The Tournament*, *Ice Station* and *Hell Island*.

Bar News: What did you think of the opening to *The Book Thief*? [Ed, spoiler alert below]

Personally, I feel very strongly opposed to any change to section 18C. I can see no justification for anybody to do the kinds of things that it prohibits.

Attorney General: It took a little while for me to wake up to the fact that it was 'Death' speaking. I was taking a judicial and considered approach, and did not want to draw any conclusions until all the evidence was in. Some years ago I visited Germany, including places that are settings in the book. It's a great book.

Bar News: The Australian Government wants to repeal parts of the *Racial Discrimination Act 1975* (Cth), including section 18C, which currently makes it illegal to publicly offend, insult, humiliate or intimidate a person or group of people. The plan to repeal section 18C has been widely criticised. The previous premier, Barry O'Farrell, was opposed to the amendments. Does the new Premier maintain that opposition?

Attorney General: It is always a challenge when the Australian Government puts a policy position with which a state government, of whatever political persuasion, cannot agree.

Whilst I respect my federal colleagues, on this particular issue, no, the New South Wales Government does not agree. I have made that point on a number of occasions. Personally, I feel very strongly opposed to any change to section 18C. I can see no justification for anybody to do the kinds of things that it prohibits.

Bar News: The Bar Association is currently preparing a response to the Law Council of Australia's 'National Attrition and Re-engagement Study (NARS) Report', which looked at the attrition of women from the legal profession in Australia. Do you have any particular thoughts on that topic?

Attorney General: It was obvious to me at the 2014 Bench and Bar dinner that there is a significant cohort of women now coming to the bar. It is critical for the bar to investigate and address the issues surrounding the attrition and retention of its female members. I think it is a critical issue for the legal profession generally, and probably for any profession in modern times. I will be very interested in the response of the Bar Association to the NARS Report, and in its efforts on the issue more generally. I would be happy to continue the discussion and assist in any way that I can.



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An alternative voice in the law and order debate

Caroline Dobraszczyk spoke with Phil Boulten SC shortly after he stepped down as president of the New South Wales Bar Association.

Phillip Boulten SC recently retired as our president. I thought it would be very interesting for all of us to find out what it was like to be the president of the New South Wales Bar Association and to ask one of our most experienced senior counsel, some questions about law and order and barristers in general.

Bar News: Can you describe a busy day in the life of the president?

Boulten SC: I started out with the idea that I would set two or three days a week to go to court and leave the rest of the time for bar president's tasks, but you can't turn your practice half off and in the end it was about fitting bar tasks in, wherever possible. Everyday I would receive about 30 – 40 emails that had something to do with being on the Bar Council, I would respond quickly during a morning tea break when I was in court or at lunch.

I will start with the typical day. The papers arrive at home. I read them first thing – the *Telegraph* and the *Herald* and the *Australian*. Sometimes the telephone would ring and it would be the radio - would you like to comment on. This would happen two or three times a month perhaps and sometimes I would agree and sometimes I wouldn't agree.

Then into the office, quick breakfast and out to court and dealing with issues on the way through.

There is a committee meeting perhaps nearly every week including Bar Council, functions, helping to come up with the results for policy. The Bar Council has an extraordinary range of issues to deal with. A lot of it is about discipline issues. A lot of time is spent dealing with discipline and regulation. I enjoyed it. It was a great opportunity to be able to be the bar president and I was really pleased to be able to do what I did.

Bar News: Of course you had many particular criminal law related issues during your time if I can put it that way...

Boulten SC: It was good to have a criminal lawyer as the president especially when there are important issues. The changes to right to silence and the mandatory sentencing issues needed someone with experience and expertise to deal with it. It also helps that I was able to talk with the attorney general, he knowing that I knew what I was talking about and I knowing that he knew what he was talking about. We had a very good line of communication and we had been able to reach agreement up to a point. He understood that the bar could not agree with what the government was proposing and he understood that we had a job to do. There was no personal rancour. It was as it



should be, highly professional. There was no grievance or any kind of personal attack because you weren't seeing my way of looking at things. I think governments generally understand that the legal profession play a necessary role as a contradictor in debates about law and order and justice. Often political parties are fighting for an extreme position and the only alternative voice is the legal profession. So most governments understand that that is the way it has to be (probably because they know where they are coming from which is a different agenda). I also think they rely on the legal profession to save policies from becoming too extreme so that they can actually say we've had to have another look at this.

I think we saved the state from some very bad policies.

Bar News: What are you most pleased or satisfied about during your time as president?

Boulten SC: The position of mandatory sentencing is the most important thing over the past 18 months. At least so far, it seems to have been effective. Time will tell whether this state of impasse that exists between the parties and the houses of parliament on mandatory sentencing continues.

I think we saved the state from some very bad policies.

Bar News: Did you take on less work on behalf of clients as a result of being the president, consciously or unconsciously?

Boulten SC: To start with I decided I would not do any jury trials, but by the end of last year I had longstanding clients whose cases were coming up for hearing and I could not just bow out. So this year I have been doing jury trials and yeah, having to fit everything in accordingly.

Bar News: What can the New South Wales Bar Association do better for its members and the community?

Boulten SC: We have to think about where the legal profession is going to be in 15 or 20 years. Barristers have practised as court advocates. Being an advocate is still, I think, an essential part of being a barrister, but extraordinary amounts of barrister hours are not spent in court. We have to come up with a way to understand and recognise that practice at the bar will involve increasingly non-litigious advice and representation and work out a way to market barristers' skills in the legal services industry, to compete with solicitors. And that is a big change.

We have a lot going for us, basically nearly all barristers are really, really clever. They are very good litigators but also extremely good value. The fees that an excellent barrister charges almost always compare favourably to the fees that solicitors charge for doing exactly the same thing. We have to find ways to explain to people that you don't need three lawyers to do work when one or two including a barrister will do it just as well.

Bar News: And the community – what can the New South Wales Bar Association do better for the community?

Boulten SC: I think we don't put enough effort into explaining how the legal system works. Clearly people misunderstand it or have misconceptions about it. We are not helped by the popular press, which is hell bent on a distortion of the legal system. We really do need to find ways to explain simple things – like, what is involved in fixing a person's sentence; why is it that it takes time for a court case to be resolved? How is it that people can feel like they have a just cause but lose a court case?

I think engaging with community groups, seminars or being involved in legal education, becoming more connected to young people, explaining their rights. I say all of these things we can do better, but the bar is actually not a huge organisation. It is actually us – the barristers – and it is really hard to find the time to do what we normally do and then decide we need to educate the community.

At least there is a lot more than there used to be. I like the fact that the barristers go to schools and act as the judges for example to help them. There are now legal studies in high school – there wasn't when I was in high school, and solicitors with barristers

are also going out and judging competitions and helping with that type of stuff. And I like what women barristers do for female law students, encouraging them in particular at the bar.

Bar News: Times are tough for many NSW barristers - not enough work – what should they do?

Boulten SC: Barristers should deliver their services with excellence. They should take nothing for granted, work hard and that will be the best way to attract work. But assuming that's a given, I think barristers also need to be prepared to move into areas of practice that they have not formerly had experience in. Be prepared to take up cases that are not an easy fit. Stretch your comfort zone. Be prepared to learn about six or seven cases that you have never heard of so that you can be somebody who can say something in another jurisdiction. Barristers need to be flexible.

Bar News: What are the main challenges now and in the future for barristers in NSW or in Australia and does it depend on what area you practise in?

Boulten SC: There is a decreasing amount of legal aid money, especially in criminal law and family law, this is a problem for those who represent the most disadvantaged people. In England this has caused real problems. Barristers have to work out ways of coping with more scarce public funding. Barristers doing the 'top end of town' work are also affected particularly as the economy tightens. Corporations are deciding to spend less on litigation and without complex court cases. There is a real squeeze on fees.

Bar News: And lastly, why do you love the law?

Boulten SC: I get thrown in to deal with so many people's problems, people I would never get to meet. There have been all types and they are all interesting. Robber barons, premiers, scientists, accountants, spies, horse trainers, doctors, priests - with every problem imaginable. Who else gets to meet such a mix of people? I can say that I have not had one day where I have thought I hate going to work. There have been days of course where I have thought how will I get through a particular issue, I have been worried about particular issues and what would the judge do, but I always think, I'm glad I'm going to work!

Bar News: Thank you to Phillip Boulten SC

Retaining women at the bar

Catherine Gleeson reports on the Law Council's National Attrition and Re-Engagement study and the Bar Association's response

On 14 March 2014 the Law Council of Australia released the results of its extensive survey into the progression, attrition and re-engagement rates of female lawyers (NARS Report). The findings recorded in the report noted continuing issues concerning the experience of women within the profession generally, which affected the rates of retention of women in the profession. The NARS report also identified issues particular to women at the bar.

None of the issues identified are new. They include discrimination, bullying, harassment, want of leadership, briefing inequities, and financial and work pressures associated with family responsibilities.

The Bar Association has, with the assistance of the Equal Opportunity Committee and Women Barrister's Forum, established a working party to review and progress initiatives to address these issues. Recent developments of note include the recent launch of best practice guidelines governing parental leave, discrimination and harassment, bullying, and grievance handling; and the launch of the NSW Bar childcare scheme. The Bar Council has endorsed investigation of further initiatives.

The NARS report

The survey was released in every Australian state and territory and addressed women and men who are currently in practice, as well as those who have left practice or who have never practised. The survey and accompanying detailed interviews examined a number of cohorts, including practitioners in large, medium and small firms; at in-house roles; and at the bar.

More than half of the more than 4000 respondents to the NARS survey were from New South Wales. The results of the survey are sobering. The NARS Report establishes that there continue to be significant obstacles to achieving gender equality within the legal profession, and particularly at the bar.

The NARS Report notes that:

- Female barristers were more likely to report experiencing almost every form of discrimination or type of harassment at work compared with their counterparts in private practice or in-house legal roles. 84% of female respondents reported experiencing discrimination due to gender during their time at the bar.
- Reported rates of bullying or intimidation were high for men and women at the bar, at 51% and 80% respectively.

- The most common reason for women not to consider a career at the bar was that they were uninterested in a career at the bar, or that they felt that they did not have the requisite skills and experience.
- Male and female barristers reported dissatisfaction with the financial pressures associated with life at the bar, as well as the pressure of the role and the environment in which barristers practice. These pressures are particularly acute when barristers are required to balance their work commitments with other responsibilities, including family commitments.

The results of the NARS Report are of concern, in particular due to the extremely high rates of bullying and discrimination reported by women at the bar. The continuing low numbers of women who may consider a career at the bar is also concerning, particularly in light of the high numbers of women entering the profession generally.

The NARS Report also notes a high level of work satisfaction reported by female barristers, particularly compared to other branches of the legal profession. This is encouraging, and consistent with the growing numbers of successful women at the NSW bar. The recent rate of appointments of female silk bears this out. However, the NARS Report makes for stark reading for those who assume, not unreasonably, that the experiences of many of the barristers who responded to the survey belong to a time now past. It serves as a reminder that there continue to be obstacles to achieving genuine equality at the bar.

The NARS Report contains a number of recommendations to address the above issues. Broadly, the recommendations aim to achieve a number of aims:

- Promoting flexible work practices for practitioners and a culture that supports practitioners in balancing professional and family responsibilities;
- Encouraging mentoring and sponsorship relationships to ensure that female practitioners are supported in their career advancement, and endorsing female leaders within the profession as role models and examples of achieving successful gender diversity;
- Increasing transparency and accountability, by monitoring gender equity trends within the profession and using them to encourage discussion of attrition and leadership issues for female lawyers.

There are obvious limitations to some of the recommendations



in the NARS Report, due to the fact that the bar is comprised of sole practitioners. Moreover, the composition of the bar also lends itself to some benefits not shared across the whole of the profession, such as greater autonomy in work performance and flexible work practices.

Bar Association Response

The Bar Association was invited to provide comments on the finding of the NARS Report, with a view to devising a strategy amongst Law Council members to address the issues raised in the report.

The response¹ was compiled by the Bar Association's working party and detailed the work of the Bar Association in addressing gender equality since 1995, when the Gender Issues Committee (now the EOC) was set up under the presidency of Michael Slattery QC. Since then the Bar Association, with the assistance of the EOC, WBF and many of its members, has undertaken a number of measures since that time, including:

- Developing and promoting a number of policies for adoption by members, including the Equity and Diversity Policy² and the Law Council's Equitable Briefing Policy.³
- The launch of the Best Practice Guidelines on Parental Leave, Harassment, Discrimination, Victimisation and Vilification, Bullying and Grievance handling, discussed further below.
- Introduction of professional conduct rules proscribing conduct that constitutes discrimination, bullying and harassment (Rule 117 of the Barristers' Rules).

- Supporting barristers with family responsibilities by establishing a successful childcare scheme, recently relaunched with dedicated places reserved for members at Jigsaw Corporate Childcare in the CBD and emergency childcare by MacArthur Management, and by granting practising certificate fee waivers for barristers on parental leave.
- Undertaking formal mentoring programs for female junior members over the last decade, and in more recent years for all junior members.
- Conducting seminars and CPDs for members and prospective members of the bar, including CPDs organised by the WBF at lunch time, on topics ranging from workplace flexibility to bullying, discrimination and harassment, and 'coming to the bar' open days for female university students.

The Bar Association working party has been tasked with building on this work by considering and developing a number of further initiatives relevant to the recommendations in the NARS Report.

Best Practice Guidelines

A key component of the Bar Association's response to the NARS Report is the introduction of four new Best Practice Guidelines.

On 19 June 2014, Bar Council approved four new Best Practice Guidelines:

Continued on page 60

The Bar Association Childcare Scheme



The New South Wales Bar Association's childcare scheme commenced with the opening of a new Guardian Early Learning Centre in Martin Place, Sydney on Monday, 4 August 2014. Under an arrangement with Guardian, the association has reserved ten childcare spots for its members, providing them with easy access to affordable, high quality care.



Bench and Bar Dinner 2014



The 2014 Bench and Bar Dinner was held in the ballroom of the Hilton Sydney on 2 May 2014



Ms Junior, Sophie Callan; Chief Justice Allsop; Mr Senior, Arthur Moses SC; and President Phil Boulton SC



President Phil Boulton SC



Ms Junior, Sophie Callan



Mr Senior, Arthur Moses SC



Attorney-General George Brandis QC and the Hon Justice Reg Blanch AM



The Hon Greg Smith SC MP



Angela Cox, Lisa-Claire Hutchinson, Theresa Dinh



Chris Withers, Elliot Hyde, Natalie Zerial, Adam Hochroth, Anais D'Arville



Ivan Griscti, Richard Beasley SC, Ishita Sethi



David Talintyre, Louise Jackson, Aditi Rao

- Parental and other Extended Leave⁴
- Harassment, Discrimination, Victimisation and Vilification (which supersedes the existing Model Sexual Harassment and Discrimination Policy, presently adopted by a number of Chambers)⁵
- Bullying⁶
- Grievance handling⁷

The operation of the guidelines is twofold. First, the guidelines are applicable to all Bar Association services, committees, events, seminars and courses. To that end they will apply to the Bar Association's employees and to all persons engaging in the activities of the Bar Association.

Second, the Guidelines are available to be adopted by chambers and to apply to their members, licensees and employees. The Bar Association will promote their adoption by working with bar councillors, heads of chambers and the Clerks Association. The association will also take steps to monitor compliance with the Best Practice Guidelines.

In both cases, the guidelines are a necessary step to ensuring that those who deal with the bar, and its members, are provided with the requisite level of protection against discrimination, bullying and harassment, and to demonstrating to the community that the bar is responsive to issues of equality and diversity.

The Best Practice Guideline on Parental Leave addresses the needs of all barristers taking parental leave and return to work arrangements. It includes guidelines for:

- licensing of accommodation during a period of leave taken by a barrister;
- relief from rent and/or floor fees for a period during or following a period of leave;
- maintenance of contact with chambers and work opportunities during the period of leave (where requested);
- access to home-based work arrangements during and following a period of leave;
- opportunities to share rooms on a part-time basis following a return from a period of leave; and
- ensuring that barristers returning from a period of leave are offered support in re-establishing their practice.

The Best Practice Guidelines on Harassment, Discrimination, Victimisation and Vilification and on Bullying provide strong statements that such conduct is unacceptable. They deal with acceptable standards of conduct and engagement in barristers' daily professional lives.

The Best Practice Guideline for Grievance Handling is designed to provide a procedure for handling complaints of offending conduct confidentially, impartially, and promptly. The guideline sets out the appropriate procedure to be adopted by complaint contact officers in chambers and at the Bar Association.

The bar is an association of individuals. We represent, and should be representative of, the community in New South Wales. To that end, it is of significant public interest that our membership should reflect the composition of the community. It is axiomatic that as barristers we should exhibit the highest standards of conduct. There is no place within those standards for discrimination or mistreatment of our colleagues, clients or employees based on gender or any other difference. The NARS Report serves as a timely reminder to all members of the importance of ensuring fairness and equality amongst our members, and the Guidelines are a step to achieving that.

Endnotes

1. Available on the Bar Association website at www.nswbar.asn.au/for-members/bpg
2. Available on the Bar Association website at <http://www.nswbar.asn.au/docs/webdocs/diversity1.pdf>.
3. Available on the Bar Association Website at <http://www.nswbar.asn.au/docs/webdocs/eobp.pdf>.
4. Available on the Bar Association website at http://www.nswbar.asn.au/docs/webdocs/model_parental.pdf.
5. Available on the Bar Association website at http://www.nswbar.asn.au/docs/webdocs/model_harassment.pdf.
6. Available on the Bar Association website at <http://www.nswbar.asn.au/docs/webdocs/bullying.pdf>.
7. Available on the Bar Association website at <http://www.nswbar.asn.au/docs/webdocs/grievance.pdf>.

Chief justices in anecdote and fable

The Hon John P Bryson QC records some folklore of the New South Wales Bar as he remembers it from long ago. He invites others to supplement, correct, or challenge him in *Bar News*, as appropriate.

Sir Owen Dixon

I saw Sir Owen Dixon CJ in court several times. During one week in November 1958 he heard two appeals which I had the management of, although I was young, inexperienced and untrained and had no appreciation that I was seeing the High Court in a golden age. These hearings competed for my attention with preparation for annual examinations. No wonder the professors thought so little of me. The judges accompanying Dixon on the bench in *Jones v Dunkel* (1958–1959) 101 CLR 298 and *Commissioner for Railways v Scott* (1958–1959) 102 CLR 392 were stellar company. I do not suppose that the High Court has ever been stronger. *Jones v Dunkel* has followed me all my life. Of all High Court decisions, it is the one most often cited inappropriately, often with groundless assertions about the witness supposedly being ‘in the camp’ of one side or another with no evidential basis for putting him in a tent or asserting what he could have said. The High Court did not speak about the camp. *Commissioner for Railways v Scott* was a medieval relic, almost unheard of for half a century until it re-emerged in *Barclay v Penberthy* (2012) 246 CLR 258 and lives again. Dixon dissented and upheld our argument in both, which was consolation of a kind.

I greatly regret that splendid opportunities to observe Dixon came and passed when I did not know how splendid they were, as with Fullagar, Kitto, Taylor, Menzies and Windeyer JJ. Managing appeals and instructing counsel in these appeals were far beyond my understanding or ability, and I cannot perceive what my employers thought they were doing, or thought I was doing. Dixon has been splendidly served, particularly by himself in his huge contribution to the Commonwealth Law Reports for well over three decades (and earlier in the VLR), and in speeches and addresses collected as *Jesting Pilate* (Law Book Company Limited, 1965) which no real lawyer has omitted to read. Edited selections from Dixon’s judgments were published by The Law Book Company in 1973, but a brief introduction to his judicial work. He has been well served without adulation by his biographer Philip Ayres (Owen Dixon, The Miegunyah Press Melbourne, 2003.)

I have recollections of a quiet man, slight in build and quiet in speech, presiding and controlling without seeming to do so, not assertive and not needing to be. He was accorded unqualified respect by all in the courtroom, among them counsel and judges. From time to time he would make quiet interventions in argument which immediately held the attention of all and controlled the next turn of debate. Throughout the hearings

there were no indications of feelings, strong or otherwise. Intellectuality was the atmosphere. No voices were raised and no frowns crossed foreheads. At one point Dixon illustrated his thoughts in Ancient Greek and gave a further exposition when counsel seemed not to understand. The Greek reappeared at 102 CLR 400 in his remarkably digressive dissenting judgment, which is still lost on me. I know, from people who argued High Court cases in those days, that the scene was not always as calm as I saw it. Other judges, particularly Kitto J, sometimes tested counsel very severely.

I did not ever see any case before Dixon where the Constitution was discussed. There must have been another occasion when I was present for a motion list of leave applications; not so frequent then when many appeals did not require leave. John Flood Nagle then a junior, later Nagle J, asked to adjourn his application to obtain some further affidavits from the Northern Territory. Dixon quietly said that half the judges present (I think there were four) had already decided to grant leave, and offered Nagle the opportunity to persuade another, which he readily and successfully took.

Sir Garfield Barwick

In my early law school years Sir Garfield Barwick was fully engaged in practice at the head of the bar. He was phenomenally energetic and busy, doing the hardest cases involving the largest amounts of work and, quite often, the least prepossessing clients, distinguished only by their wealth. Barwick had an array of strengths: preternatural energy, profound legal knowledge, an astonishingly lengthy working day, gifts for forceful advocacy and persuasiveness. The work he did was very varied, the common threads being importance and difficulty. He did not, as many barristers and not a few silks do, emulate the manufacturers of sausages, for whom each product is very like the others. He did not ever turn up in the kind of routine business in which I was employed: personal injury claims involving repetitive fact situations, irreverently known as ‘meat and grease’ or ‘finger and toe’ cases. So I never saw him perform in court, although the air was full of stories of his latest exploit.

Then in 1958 he was suddenly gone into politics and rising rapidly, to be attorney general and later minister for external affairs. He appeared to be going far, with the caveat that R G Menzies (who had earlier suffered much from rivals) liked ministers to be talented, but if excessively talented they were headed off in some other direction. As attorney general Barwick had a large part in the Commonwealth’s entry into the law of marriage and matrimonial causes, significantly extending

Barwick possessed an ascendancy over the intellectual tools available to those who write judgments, and could imbue the reasons he offered for any outcome with apparent apostolic conviction.

and rationalising the grounds for divorce. He also had a large part in giving some reality to legislation against restrictive trade practices. In their time these were large reforms, but they were eclipsed by much more extensive reforms under Whitlam. In External Affairs he utterly reversed Australia's policy towards West New Guinea and its then owner the Netherlands, and steered Australia towards supporting elaborate measures which saw that territory transferred to Indonesia, which had as little claim to it as the Dutch had had. He was immensely proud of this highly expedient turn. In retrospect it brings to mind the Munich Conference: peace in our time at great expense to someone else.

Then, in 1964, Dixon CJ retired and Barwick became chief justice of Australia: a very suitable appointment and also an exemplar of Menzies' way with possible rivals. I would count Barwick among Australia's great chief justices, but not on account of his manners. Rather than add to his praises I will mention one or two sour notes. His courtroom manner was not the urbane brutality I mention elsewhere; the urbanity was missing. To form an idea of his appearance in court you should perhaps study his portrait in the Bar Common Room by Walter Pigeon ('WEP'), a portrait of savage honesty. Or for more insight, read Shelley's poem Ozymandias for the wrinkled lip and sneer of cold command. There was no Socratic Dialogue. His interventions in argument could be raucous, abrupt, conclusive and dismissive: not at all the High Court's style that I had seen. As recurrently happens in appeals, excessive judicial zeal in support of one view obstructs the endeavours of counsel who is trying to put that view fully to minds not yet convinced, and reinforces the adverse dispositions of judges whose thoughts are tending the other way. I heard him say, to senior counsel opposing us: 'That's the sort of submission a journalist would write.' In the context of a Constitutional law argument, this was quite an insult. Counsel replied with firm dignity: 'I can assure your Honour that no journalist did write it.' This exchange with our opponent did not do us any good. Barwick controlled the courtroom and the course of argument with dominance, and more scholarly and perhaps more judicial members of the court sat quietly and awaited the time to speak in their judgments, which did not always reflect the apparent course of argument. Barwick possessed an ascendancy over the intellectual tools available to those who write judgments, and could imbue the reasons he offered for any outcome with

apparent apostolic conviction. A particularly large black spot obscured the commissioner for taxation, who could be sure of a rough time, and of at least one dissent should he succeed.

Barwick managed the court's list himself, and seemed to follow a policy of not giving anybody a great deal of notice of when a case was to come on. Cases could be called on with a day's notice, sometimes less, and in one case in which I had been involved but no longer was, the parties in Sydney were told mid-morning that the case would be heard in Perth on the following day; and it was. I could never understand why it was difficult to arrange lists two or three weeks in advance. It seemed to me that Barwick was indifferent to other people's convenience and arrangements and did not respect them; or perhaps enjoyed annoying people. In truth much more than convenience was involved. Fair process requires reasonable notice. Barristers who suffered under his arrangements did better when they came to run courts themselves.

Not all my recollections of Barwick are adverse. In the seventies I trailed at the end of queues of counsel appearing for the State of New South Wales in Constitutional cases and some other High Court business. It was very much an Age of Centralism (and perhaps all ages are), but several times we achieved the minor success of a dissent by Barwick CJ.

On one occasion I found myself attending Barwick in his chambers with my opponent to obtain a consent order; simple enough in principle but sometimes viewed in the High Court as a challenge to judicial ingenuity. Not so in this case. The consent order was made without demur, but not until both counsel had been detained for an hour of reminiscence of Barwick's successes at the bar. He explained, not briefly, the dilemma of setting his fee at a sufficiently high sum to requite his contribution to a favourable outcome and to the repulse of other possibilities, while balancing fee justice to himself with the injury imposed on the public interest by counsel of lesser talent who regarded what he was charging as in some way an indication of what it was suitable for them to charge. There was no rational basis for their seeing any such indication in view of the disparity of talents. There was no element of humour or self-mockery in this. He was re-living the agony of his earlier dilemma. With difficulty I maintained a grave facial expression while listening to this.

Whether or not Barwick was our greatest chief justice, I feel that he was probably the most exciting.

My worst High Court day was spent as junior to Edwin Lusher QC, himself a most forceful advocate with no soft vocal tones, seeking to uphold damages for negligence to the dependents of a deceased train passenger whose own conduct had been astonishingly dangerous. Contributory negligence was not a defence and the award was grounded on some small failing by railway staff. From an early moment Barwick revealed a strong sense of outrage that there had been such an award, and engaged Lusher as if his advocacy of such a case was markedly delinquent. Both were forceful in manner and both moved quickly to the shouting stage, simultaneously and not responsively. There was no control. The presiding judge was in a rage, not a speechless rage, and leading counsel the same. I thought to myself that in two minutes Lusher would be expelled from the courtroom and the case would be mine, and began composing my thoughts on what I could say. Slowly it dawned on me that the other four judges lacked all expression. They sat like their grandsires cut in alabaster and did not support Barwick at all. If Barwick attempted to discipline or expel Lusher then the other four would have overruled him. Lusher had worked this out long before I had – and Barwick had too. The crisis did not come. The shouting match was the storm before the calm; the argument proceeded to conclusion on a more rational basis and judgment was reserved. When judgment came the majority was four to one in our favour.

Whether or not Barwick was our greatest chief justice, I feel that he was probably the most exciting.

Sir Frederick Jordan

I missed Sir Frederick Jordan CJ, who died on 4 November 1949 while I was in high school. He was the subject of many anecdotes, mostly harsh, about his cold manner, overwhelming personality and general lack of human sympathy. It wasn't the whole story about him, as can be seen from the address given on 1 February 2007 by the Hon J P Slattery AO QC, published on the Supreme Court's website. Slattery knew Jordan closely as his associate and friend and is a far better source than I. Anecdotes about Jordan were to the effect that he was cold and terse in the company of lawyers. 'Frigidaire Freddie' could be relied on to dampen any occasion with a few well frozen words, but had another life and personality altogether in the company of poets, artists and litterateurs who haunted Rowe Street, now a pitiable back lane but once very animated. I did not ever see Jordan but

heard anecdotes about him, many of them rather cruel: that his practice had been very narrow and that when he became chief justice people who practised at common law did not know who he was. He proved to have a profound knowledge of the law, and crafted many judgments of great force and authority across the breadth of the work of the full court. The *State Reports* of his time in the 1930s and '40s are luminous.

One story was to the effect that he had wide literary tastes and sometimes diverted himself by reading ancient Greek authors. When Milner Stephen J died in his chambers early one evening in 1939 after summing up to a jury and sending them out to consider their verdict, Stephen's associate rushed around to the chief justice's chambers, knocked on the door and stumbled in, saying 'Chief justice, chief justice, Mr Justice Stephen just fell down dead and the jury want to bring back their verdict!' Jordan laid down his Greek text, reached to the shelf behind him for his copy of Roscoe's *Nisi Prius*, leafed through a few pages, pointed his finger to a passage and said to the associate 'You may take a verdict'. He closed Roscoe and restored it to the shelf, and resumed reading his Greek text. This was taken to indicate a lack of warm feeling for Milner Stephen J.

Sir Maurice Byers

Byers was an associate at the court at a time when Sir Frederick Jordan was chief justice. Jordan was a meticulous compiler of case law and authorities, and punctuated his judgments with strings of case references, all in point and driving home his conclusion with their accumulated weight. These case references were taken from a leather-bound book, which he had handwritten over some decades. As valuable as *Prospero's Book*, he kept it close to hand and shared it with no-one. His law school notes in this style must have been based on this collection. Bar folklore was that when Jordan died his widow gave the book to his then associate, who was great at rugby but did not know the book's value, so that it was lost to learning, drowned deeper than ever did plummet sound.

Sir Kenneth Street

When I first saw the Supreme Court in 1955 Sir Kenneth Street was its chief justice. He held that office from 1950 until 27 January 1960. Earlier he had been a puisne judge of the court and became chief justice after Jordan CJ died. Earlier still, he had been a judge of the Court of Industrial Arbitration from 1927, so he held judicial office for 32 years. He was appointed to the Supreme Court in 1931, and his father Sir Philip Street was then chief justice, as he had been since 1925. That father and son should be members of the same court at the same time is probably historically rare.

There were many problems for the court while Street was its chief justice. The court expanded rapidly: by twelve judges in 1950 and twenty-two in 1960 when he retired.

There were many problems for the court while Street was its chief justice. The court expanded rapidly: by twelve judges in 1950 and twenty-two in 1960 when he retired. The buildings and court rooms were antique and altogether inadequate. They were nineteenth century structures, some in the former convict barracks and the guard-house to the barracks, a building converted to court rooms and chambers after being designed as the registrar general's office, not designed to the purpose. Some were temporary wooden structures erected before and during the First World War. Gradually more court rooms were built, piecemeal and inconveniently spread around: two in Wentworth Chambers in 1958; six in Hospital Road about 1962; about three at 225 Macquarie Street perhaps about 1965; five or six far away down Phillip Street, now the Industrial Court but then for Matrimonial Causes in about 1970 or so. Planning begun in the 1920s for the court to have a new building of its own produced nothing until 1978 when the court gained its present building in an architectural style not inappropriately called New Brutalism. In 1955 the delay between completion of pleadings and trial by jury at common law was 48 months, by which time the plaintiff had recovered if he was going to recover, or died if he was going to die. Perhaps there was some efficiency in that. Interest was not an element in the assessment of personal injury damages. Common law business was a shambles. The great delays in trials perhaps explain the expansion of the court, but the delays cleared very slowly, over several decades.

I saw Sir Kenneth Street on the bench quite a few times in appeals. He presided in the full court when I was first admitted to the bar in December 1959. Judicial style and manner have altered in the intervening half-century. In the present age judges seem prepared to admit that they are human, whereas earlier most aimed to project calm gravity unalloyed by human feeling, while for those who revealed any emotion, the emotion revealed almost always was fury; occasionally disdain. Sir Kenneth was the picture of dignity and gravity. There were no moments of levity. He appeared rather tall and always spoke and comported himself with appropriate judicial gravity, as became chief justices in the ideals of those times: reserve, dignity and lofty distance, not conveying a sense of engagement with counsel in shared examination of the problems of the case.

The bar or those less reverent gave Street the soubriquet 'Abdul a Bul Bul,' claiming that he looked or behaved like an Eastern Potentate. To me this seemed rather far-drawn. He presided in

the full court and in criminal appeals and I did not know him to do any other judicial work. The full court almost always sat in the Old Banco Court in St James Road, which was much too small and cramped for the numbers of people who had to be there, and for the amount of business and its high importance.

Sir Kenneth Street's wife Lady Jessie Street was at least as famous as he, and had a very active public career in her own right. If this small detail about Sir Kenneth Street suggests that he had a radical streak, there was no trace of it in his judicial deportment or in his decisions. He appeared the picture of orthodoxy as chief justice and I think the same should be said of his judgments.

Once, he gave judgment in a criminal appeal while I waited for some other business to be reached. In a manner long passed he said to the appellant in a tone of cold command: 'Stand up, Mendoza.' The appellant, who was seated in a small pen which served as the dock in the Banco Court, rose to her feet and stood while he gave the court's reasons and order, which ended badly for her but did not detain her on her feet for very long. As far as I know, this cold distance is a thing of the past, even in criminal cases. The Dock has gone. In many courtrooms it was surrounded by a fence of spear-headed iron rails, where the accused were sequestered throughout, evident culprits and obviously the centre of hostile attention: the physical expression of unfair process. Sir Garfield Barwick's disapproval was a large part of the Dock's disappearance.

Dr Herbert Vere Evatt

In 1960 Dr Herbert Vere Evatt was the successor as chief justice to Sir Kenneth Street, to the surprise of many. He remained chief justice for two and a half inglorious years. He was usually referred to as 'The Doc' or as 'Bert.' At that time I was working for a firm, learning how to do conveyancing work using the old system, with its unfathomable antique complexities. Every lawyer should, at least for a year or two, get a foothold in the economic realities of real people who buy ordinary houses with sparse resources and to see how their world and their money go around. This is a better school of life than takeovers, IPOs and Heath-Robinson tax-avoidance devices. I did not see Dr Evatt on the bench. The first rumours were of a new order for new trials. The jury was right, no matter what, so no new trial. Later rumours were of conflicts within the court. Other judges did not want to sit with the Doc, would not sit with

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the Doc, or left him locked in his chambers and sat without him while he fulminated about applying for prerogative writs, to whom I know not. Everybody who took part in this died without publishing the true story, so we will not know it. Certainly I never did. His successor was Sir Leslie Herron, then the longest-serving judge. No-one was entitled to be aggrieved by his appointment.

Sir Leslie Herron

Sir Leslie Herron was a new type of chief justice to me: far less aloof and less scholarly in manner than K W Street CJ, and than Dixon CJ. Herron was a modern person. He did not project remoteness (if that is possible) and could be more clearly recognised by all as another human being. His face revealed his enjoyment of life. He had much experience as a common law judge and in appeals over the previous 22 years. Outside the courtroom he could be bluff and hearty, especially when speaking after dinner, occasionally telling unexpectedly ribald stories and jokes. Hearers were aghast. He may have picked up some of these in his lifelong interest in rugby. For a long time he was president (or some such office) of the rugby union and was its public face. In truth he was a learned lawyer and worked conscientiously as a judge, although his appearance did not project this. As chief justice he usually sat in the full court, as he long had, but each year conducted the Circuit Court at Grafton, two weeks' sittings interrupted by the Spring Race Meeting in the weekend there. On the occasions when I saw him presiding in court he was quite decorous, without the gravity and distance I had earlier seen in chief justices. To some degree he would engage in debate, and counsel could know the drift of his thinking and address that.

Jerrold Cripps once tested Herron's tolerance by some behaviour which expressed undue nonchalance for counsel before the full court. R M Hope QC was asked to write an entry for himself for Who's Who and asked Cripps what he should say were his recreations. Cripps, mindful of the writings of Nancy Mitford, said Hope should say horseback riding (and not horse riding, a non-U expression.) Hope demurred and Cripps said: 'If you put in horseback riding I will wear sunglasses in the full court. If you put in croquet I will take a seeing-eye dog.' Hope laughed this off, but months later Cripps found that Hope's entry in the new Who's Who nominated his recreation as horseback riding

(and not croquet.) Cripps felt committed to the dare and wore his shades on his next appearance before Herron and the full court. For a while there was no remark, and then Herron, who sensed the joke in all this, said: 'Mr Cripps, the court hopes that there is nothing seriously wrong with your eyes.' Cripps replied: 'I can assure the court that there is nothing seriously wrong with my eyes' and was committed to retaining his sunglasses to protect his imputed mild conjunctivitis for the rest of the proceedings, mercifully short.

Herron CJ had to deal with hard feelings among his judges associated with the creation of the Court of Appeal, which some resented as devaluing those who were not to sit there, whereas before all judges were qualified to sit on the full court (but there was usually a smaller circle who actually did). Conflicts like these were not scenes in which Herron would have cared to take part and they must have caused him pain, especially as they were intractable. He liked to see problems solved. Some felt that in principle judges should not be promoted, that judges should not be advanced in precedence over others or appointed to new senior positions. One or two who seemed very suitable for the Court of Appeal may have declined appointment on these principles. More greatly resented were the choices of judges of appeal, as some appointments greatly disturbed earlier precedence, notably the president, Wallace J who gained precedence over all the new judges of appeal and about ten other colleagues, not all of whom took it well. Rumours flew about judges refusing to speak to Wallace P and to others, even refusing to share a robing room or enter the courtroom by the same door. But no-one ever told me who they were who were carrying on in these ways. Rumour said that there were similar flares when Moffitt J became a judge of appeal in 1970, asseverated when he became president in 1974. Again, no-one made his opposition public. Those involved encountered their destinies and no-one since, to my knowledge, has carried on in such ways: a dreadful example to be avoided and not followed. I did not encounter any serious conflict of personalities or even a full-blooded exchange of insults while I served on the court, so the past sadness may have improved manners no end. In my time the attitude was: hear the cases, do your duty, fear God and honour the queen, and no-one wanted to be involved in agonies about precedence.

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I once heard Herron in full flight after dinner relate his first meeting with Ed Clark, known as Mr Ed, an old friend and political supporter whom President Johnson had appointed ambassador to Australia, perhaps thinking that the duties were not demanding. As well as being the everyday name of the ambassador, 'Mr Ed' was the name of a talking horse in a television series then popular. Mr Ed was well versed in Texas law and politics but had no claims to be a diplomat except that the United States had appointed him to be one. Mr Ed was present with Herron at the top table, and spoke after him. Herron told how Mr Ed had paid a formal call on the chief justice, as new ambassadors then did, and had opened the conversation by saying: 'Howdy, chief justice, Y' ole' Grass Fly!' Herron replied in kind, I forget how. The two got on famously, with similarities in their personalities and no really serious business to discuss. Later Mr Ed spoke in warm commendation of Herron, and said: 'You could go to the well with him!' which he explained as meaning that he was a suitable companion if there were hostile Indians about.

Herron CJ retired in May 1972 and was succeeded by Sir John Kerr, who served only for two years. To my mind he was one of the most suitable for that office whom I have seen. The pity of it that he did not stop there, that more was offered to him when he had reached the height of most lawyers' ambitions! The word is 'nimity': Shakespeare should have dealt with this. Kerr had superb ability as a barrister, reinforced by commanding courtroom presence, clear and authoritative manner of speech and careful attention to his appearance, up to a splendid mane of snow-white hair, which must have required much attention and maintenance, some of it out of a bottle. As always with barristers of apparently effortless ability, he worked on preparation with intensity and for endless hours. His bar career was interrupted by some years' service during the war in the Australian Army's somewhat mysterious Directorate of Research headed by the somewhat mysterious Alf Conlon. This was followed by planning for and participation in restoration of civil government in Papua and New Guinea and establishing the Australian School of Pacific Administration, which trained

government staff for Australia's overseas territories. He was skilled at establishing and conducting organisations and took leading parts in many, including this Bar Association: not a common ability for barristers for whom work is intensely a personal and individual responsibility. In his resumed bar career he had great successes in conflicts in federal industrial courts over the affairs of unions and their elections of officers, with (to abbreviate greatly) the effect that some important and large unions were able to have fair elections conducted by Commonwealth electoral officers, enabling their members to elect officers associated with the Labor Party and not the Communist Party. This won Kerr much praise and support, and some enemies. Kerr also had huge success as a jury advocate in personal injury claims by injured workers and in motor accident cases. His conduct of jury cases was superb, in a field where many were less conspicuously talented. Very often

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he was at the head of a team comprising James McClelland ('Diamond Jim') and the firm he headed, and Harold Glass as his junior counsel: a combination of ability, experience and industry which few could equal and few could defeat. Kerr and Glass spent much of the 1960s together at the top of this tree. Glass sometimes spoke of this period as 'the Nello Gravy Train.' Then suddenly and surprisingly in 1966 Kerr was appointed a federal judge, of the Commonwealth Industrial Court and the Supreme Court of the Australian Capital Territory, an apparently incomprehensible step intended as a brief interval before appointment to a planned new court which after a decade of delay became the Federal Court of Australia. The new court long remained a plan only, and Kerr was stranded in Canberra until he was appointed chief justice in 1972. I will not now write more about him: his later career does not always bring out the best in one's readers.

After Kerr I encounter the rule *de vivis nil nisi bonum*.

Barristers in the First World War: Taking up the cause: Rabaul, Gallipoli and the Home Front¹

By Tony Cunneen

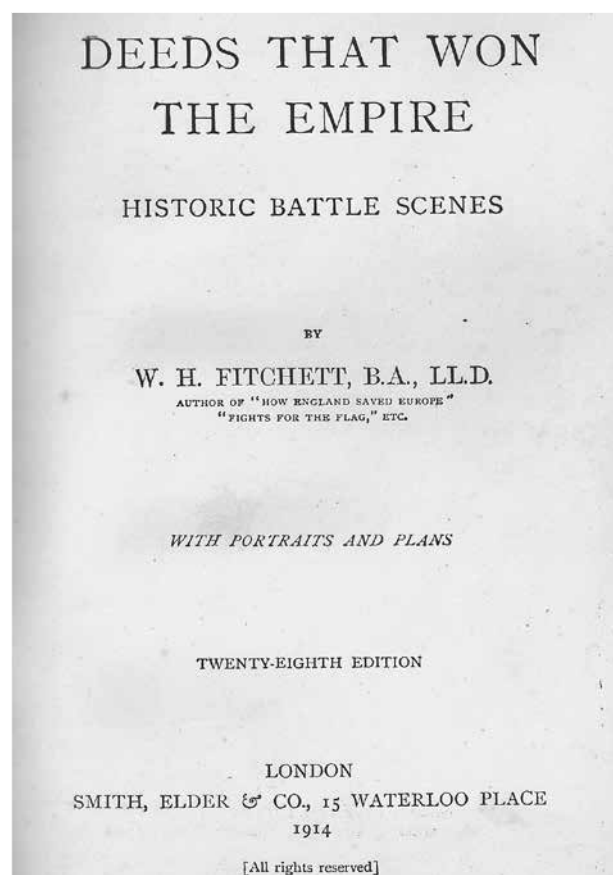
Writing for the *Law and War* Conference in 2012, Justice Brereton commented that both the legal profession and the profession of arms 'provide its practitioners with skills and experience that serve them well in the other.'² Considering this complementary skill set, it is not surprising that such a large number of Sydney barristers served with distinction in the First World War.³ The combination of a sense allegiance for the British Empire⁴ reinforced by education, close personal connections and a generally favourable attitude towards military service made the community of the bar predisposed for war when the opportunity finally came. It is perhaps less widely known that barristers and their families had a significant role well beyond the battlefield, where they were active in a variety of war related organisations and campaigns, including the Red Cross, the many unit-related Comforts' Funds, recruiting activities and politics. The legal profession's social leadership in these areas during the First World War was a unique phenomenon in its history. Furthermore, the extensive involvement of judges' and barristers' wives in many of these activities was a determining factor in parliament's decision to pass the Women's Legal Status Act in 1918 which gave women the right to become lawyers.⁵

A complex web of family, shared interests and education connected barristers in 1914 – both within Australia and as part of the British Empire.⁶ Shared values of service were inculcated through using the exploits of heroic men as models of proper behavior. Heroic men were eulogised in education and everyday life through books such as *Deeds that Won the Empire*⁷ and many other boys' annuals and patriotic texts. With this constant promotion of martial values it is not surprising that barristers had a shared interest in military matters, whether as members of the locally based militia units or a more generalised support for the belief that martial activities underpinned patriotic duty.

A significant number of barristers had combined their professional lives with an active involvement in the formation of the embryonic armed forces before the war, particularly since compulsory military service had been enacted in 1911. One of the leading lawyer-soldiers was Colonel James Gordon Legge who had been admitted to the New South Wales Bar on 6 March 1891 and practised for three years before joining the permanent forces.⁸ Legge had served in the Boer War with distinction and had been instrumental in implementing the defence plan adopted in 1909 known as the Kitchener Scheme. He would have a varied and often controversial career in the

war, and, while a member of the legal community, was more a soldier than a lawyer. Another well-known soldier who fully combined his legal and military careers was the barrister Henry Normand MacLaurin.

MacLaurin had been a well-known personage before the war. He had a thriving legal practice but also worked closely with solicitor Charles MacNaghten to shape ragged clumps of inner city youth into functioning soldiers as part of the prewar militias. Idealistic professionals such as MacLaurin and MacNaghten often met socially in the Australian Club or the newly established University Club. This close-knit professional society provided the leaders of the first units formed in response to the dramatic call to arms in August 1914. The central location of the Supreme Court and attendant chambers gave both bench and bar a close involvement with the excited atmosphere in the heart of the city at the outbreak of the war. The Sydney German Club was a short walk down Phillip Street



and provided a galling reminder of how close to home the supposed enemy were.

The six weeks before the outbreak of war in August 1914 had been a particularly patriotic time in Sydney. The newly appointed governor-general of Australia, Sir Ronald Munro-Ferguson and his equally imposing partner, Lady Helen, had arrived for his first official visit to the city on Friday 10 July. Their stately progress through local society matched the growing excitement as the prospect of war moved from a news story about events in a remote corner of the world to a more personal threat to the safety of the citizens of Sydney. The Munro-Fergusons were aristocratic manifestations of the British Empire: he would inherit the title and lands accorded to Viscount Novar; and Lady Helen was the daughter of a former viceroy of India, the Marquess of Dufferine and Ava.⁹ New South Wales' judges and barristers, led by Chief Justice Sir William Portus Cullen, had made repeated public assertions of their loyalty to that empire in elaborate acts of obeisance reminiscent of medieval oaths of fealty, which the visiting vice-regal family solemnly accepted on behalf of the royal family. By the end of the vice-regal visit, culminating in the formal garden party at *Yaralla* on the Parramatta River on Friday, 31 July, the local legal community had made commitments that proved too strong to break. The war would become a holy crusade where, according to Chief Justice Sir William Portus Cullen, the giving of a man's life for his country was 'the best gift' a man could give.¹⁰ The rhetoric of the war as a 'Holy Crusade' resonated throughout the public and private discourse of both bench and bar for the duration of the conflict.

As the first recruits for the armed forces crowded into Victoria Barracks and the Red Cross started its operations, the bar was galvanised into support of the war in all its forms. Barrister Geoffrey McLaughlin was one of the first four men to enlist in the state.¹¹ Another barrister, Hanbury Davies was chairman of the first General Committee of the Australian Red Cross formed in August 1914. He was ably assisted by a number of women whose husbands were at the bar or on the bench. Mary Langer Owen, the wife of Langer Meade Loftus Owen KC¹², and their daughter Gladys, were passionate supporters of the Red Cross and many other causes. Their son and brother William Francis Langer Owen¹³ would serve in action. Among the others on the inaugural war committee were Mrs Archibald Simpson, wife of Mr Justice Simpson, Lady Cullen, wife of the chief justice, and Ethel Curlewis (nee Turner), the wife of barrister Herbert Curlewis (and mother of Judge Adrian Curlewis). The latter pair of friends were particularly energetic supporters, opening their homes in Mosman from the first days of the

war to Red Cross training courses and organising a variety of fund raising activities.¹⁴ Apart from the great sense of patriotic duty, the simple fact that these ladies had telephones and access to vehicles gave them a practical means of maintaining their networks.¹⁵

The first recruits from the ranks of lawyers in August 1914 tended to be adventurous types with some militia experience in either the school or university cadets. They went into the Australian Naval & Military Expeditionary Force (ANMEF) – organised by Colonel Legge, who was chief of the Commonwealth General Staff at the time. The ANMEF was a rapidly assembled and woefully ill-trained group formed to take over the German wireless station in Rabaul. They embarked on their Quixotic quest at *Man o' War* steps in Sydney on 18 August 1914 happily singing 'Rule Britannia' and 'God Save our Gracious King' in tune with an enormous crowd of well wishers – then somewhat anti-climatically spent the night on board the transport *Berrima* at Cockatoo Island before a most public procession down the harbour on 19 August.

Among the officers of the ANMEF were: Lieutenant Cecil Rodwell Lucas, a 27-year-old barrister from Waverley and Major Windeyer Alexander Ralston, a 29-year-old barrister from Strathfield. Ralston was the son of Alexander Gerard Ralston KC. Commanding the machine-gun section was a 33-year-old Scottish barrister living in North Sydney, Captain James Logie Marcus from University Chambers. Another captain was the 35-year-old Sydney barrister, Charles Edye Manning from Hunters Hill.¹⁶ Captain Marcus, in particular, is recorded as having led his men in a number of important engagements on the Bitapaka Road, displaying the kind of willing aggression in battle which would be the hallmark of barristers in the frontline during the war.

The limited action in New Guinea resulted in a small number of casualties – one of whom was Captain Brian Pockley, the nephew of barrister, Herbert Curlewis. Curlewis heard of his nephew's death early one morning and then raced around central Sydney trying to find the young man's father to tell him of the loss so he would not read of it in the evening news. This was a foretaste of many dramas concerning notifications of casualties where the close proximity of the law courts, the cable offices, gentlemen's clubs, government offices and the local headquarters of the armed forces in Sydney allowed for news to spread via unofficial networks faster than any formal process.

Once the German Wireless Station at Bitapaka was captured the expeditionary force had completed the bulk of its work. Some of the law professionals were employed in the newly established British legal system in what was previously German

held territory. Charles Edye Manning was appointed assistant judge-advocate general for New Guinea on 12 September 1914 – thereby becoming that country's first British judge. Manning worked hard to solve the difficult legal problems of the first few months and administer German law. The official historian for the Australians in Rabaul, Seaforth Simpson Mackenzie, was himself a barrister. He wrote that Manning carried 'out his duties with great legal ability', but, like most legal people who had enlisted he was also 'anxious to be gone, and did not conceive himself bound to do more than cope with the existing situation.'¹⁷ There was little for Manning to do as the German population was not keen on bringing actions before a British judge, but he became entangled in one of the first scandals of the war when Colonel Holmes took it upon himself to order the public flogging of some Germans who had mistreated a local missionary.¹⁸ Manning, along with the other law professionals in the ANMEF, returned safely and re-enlisted for service overseas. By the time most of them were back in Sydney looking for further postings the focus had turned to Gallipoli.

While the men of the ANMEF had battled the few Germans in Rabaul during August/September 1914, Sydney had been dominated by preparations of the first contingent bound for war in what they assumed would be Europe – fighting for justice against the increasingly demonised 'Huns'. The accusations of sinister intentions which focussed on the German Club in Phillip Street were becoming increasingly strident. The previously popular German 'Oompah' bands which plied their trade in the streets around Martin Place and the Supreme Court precinct found themselves in an exquisitely awkward situation while their audiences oscillated between sympathy and suspicion. The choice of the wrong piece of music by the band could lead to lurid accusations of deliberately offensive behaviour. Against this bellicose, paranoid background barrister Colonel Henry Normand MacLaurin oversaw the formation of the New South Wales 1st Infantry Brigade – a force of some 4,000 men made up into the 1st, 2nd, 3rd and 4th Battalions.

MacLaurin was a central figure in the country's response to the war in the last months of 1914. Official historian, CEW Bean was one of many who were greatly impressed by the energetic, patrician, MacLaurin, describing him as a person of 'lofty ideals, direct, determined . . . an educated man of action of the finest type . . .'¹⁹ MacLaurin and his 1st Brigade became a familiar sight around Sydney: in camp at the Showground; training in the sand hills around Kensington; or marching in pomp and splendour along Macquarie Street. He was photographed for the *Evening News* seated on his horse with other leading officers in the 1st Brigade. The straight backed powerful men epitomised

the strength of purpose felt across the country.

MacLaurin's boundless enthusiasm continued throughout training in Egypt and he vaulted excitedly up the stairs of his hotel in Cairo when told of the opportunity to land on Gallipoli. He had maintained his connections with his fellow lawyers at home and had been a regular correspondent with Justice Ferguson, who presciently wrote a letter to MacLaurin on the 25 April 1915 that just such a landing was more than likely.²⁰ Ferguson was of course correct and quite possibly posted the letter the following days, by which time MacLaurin was dead, shot down by a sniper on the ridge just beyond the beach. His active service had lasted barely two days. MacLaurin Hill on Gallipoli became his legacy. Gallipoli became a source of obsessive interest for the Sydney legal community – to such an extent that Justice Ferguson made a scale model of Gallipoli's hills and gullies, which he kept for reference in his chambers.

The grief over MacLaurin's death was keenly felt among the community of the bar. Leading lawyers gathered in the Supreme Court on 5 May 1915 to hear the chief justice, Sir William Cullen speak at a memorial service for their fellow barrister.²¹ It must have been a fearful time as there were many lawyers present who had sons, cousins and brothers on Gallipoli and the news was becoming increasingly ominous.

There were many attacks and counterattacks by Turks and Australians in early May. A focal point of attack was the tenuous hold on a high point known as Quinn's Post. On 10 May a Turkish attack found its way into the post and occupied a short stretch of Australian trenches. A group of about 40 West Australians from the 16th Battalion were ordered to charge the Turks and regain the position. A 29-year-old barrister, Captain Samuel Edward Townshend, who had only arrived on Gallipoli a few hours earlier, led the charge. Townshend had studied law at the University of Sydney and his family lived in Randwick. He had practised in Western Australia as well as New South Wales. At the time of his enlistment he had recorded his occupation as registrar of the University of Western Australia. CEW Bean described his actions in the final charge in some detail. With officers being shot all around Townshend led the men over the parapet in the dark. He shouted to them 'Fix your bayonet,' then told them, 'When I call 'Australia for ever', charge boys.' Some were killed immediately. Townshend was wounded and then killed outright as he was carried out of the fight.²² His body was not located until after the war. The battle was one of extreme violence, unique even on Gallipoli as the Turks and Australians were so close together. The tragic news of deaths in action spread throughout the profession. On 19 May young Laurence Whistler Street, the son of Justice

Sir Adrian Knox, by Arthur D Murgatroyd, published in a supplement to *The Australian Law Journal*, 15 May 1932. National Library of Australia.

Phillip Whistler Street, was killed in a similar action. The sons of Justice Simpson and Justice Rich would also fall. Gallipoli would take a fearful toll.

The sudden influx of notifications of casualties overwhelmed the army's ramshackle system for informing relatives of the fate of their loved ones. People were lucky if they received a telegram. A well known silk, Langer Meade Loftus Owen KC, following the urging of his wife Mary, established the Red Cross Missing and Wounded Enquiry Bureau as a vehicle for collecting information concerning men who were lost in action. The bureau applied legal protocols to sifting through the mass of rumours surrounding the fate of men who were missing or killed.²³ Specifically designated searchers, often barristers of high standing, scoured camps and hospitals then sent reports of interviews to Owen KC who compiled an account as to the likely fate of the casualty, whose family were then invited into the offices at Dalton Chambers to be told the details of the investigation. Families could come in as often as they wanted and stay as long as they needed. Langer Owen advertised his private phone number if people needed emergency contact. His motto was 'Trouble does not exist'.²⁴ The Enquiry Bureau was, deservedly, held with something approaching reverential respect in the country. It was a fine example of the legal profession using its skills to assist the community. Lawyers of high standing willingly interviewed soldiers for the bureau.

Senior silk, Adrian Knox KC²⁵, was one who visited hospitals when he was in Egypt seeking out details of the fate of lost men.

Adrian Knox's widely reported trip to the Middle East, which included a brief landing on Gallipoli, was to personally oversee the system for delivering the tons of donations known as 'Comforts' to soldiers at the front. It was an important mission as the alternative was to see the carefully collected supplies decay and disappear while being stockpiled on Egyptian wharves.²⁶ Other barristers involved themselves at home through passionately advocating recruiting, following the lead of the chief justice, Sir William Cullen, who was similarly determined in his approach, although in the early days there was little need to work hard for volunteers.

Major General James Legge landed on Gallipoli to command the 1st Division on 24 June after its previous commander, General Bridges, had fallen in action. Legge arrived on Gallipoli to be greeted by protests from generals Hamilton M'Cay (himself a Melbourne barrister), Monash and Birdwood concerning his appointment. Legge was only on Gallipoli for a month and according to Charles Bean 'his short tenure (was) not unaccompanied by difficulties.'²⁷ One area of disagreement was over the tactics for the impending attack on Lone Pine in August. Whether he was right or wrong, no doubt many people were relieved when he left in late July to organise the 2nd Division in Egypt.

A variety of barristers served on Gallipoli as reinforcements were fed into the Gallipoli campaign to try and break the deadlock. ANMEF veterans such as Cecil Lucas, and Henry Gordon Liddon Simpson, a 39-year-old barrister from Warrawee arrived to join battle. Simpson was one of those barristers who served as a private soldier, despite his professional standing. Barrister, Geoffrey McLaughlin, served throughout the campaign, was wounded and contracted jaundice. He was eventually awarded the Military Cross and mentioned in despatches by Sir Ian Hamilton for his service on the peninsula. Charles Gavan Duffy, the 32-year-old barrister son of Justice Gavan Duffy of the High Court, travelled to war in mid 1915 with fellow barristers Bert Norris and Francis Coen.²⁸ Many men who enlisted at that stage went into the New South Wales 20th Battalion. This unit had a particularly close link to the Sydney legal profession – Justice Ferguson was president of its very active Comforts Fund. His son, Arthur was in the unit along with the ANMEF veteran Scottish barrister from North Sydney, Major James Logie Harcus. These men all served on Gallipoli. Some barristers were involved in particularly tragic events such as the fate suffered by the 18th Battalion.

The commanding officer of the 18th Battalion was a 46-year-old

police magistrate, Lieutenant Colonel Alfred Ernest Chapman from Crows Nest. His second in command was a 45-year-old solicitor, Major Arthur James McDonald of Double Bay. Also in headquarters was a 36-year-old Sydney barrister, William Samuel Hinton. The 18th Battalion landed on Gallipoli on 19 August. Within a few days it had lost over 600 of its men out of a total of around 900 in a little known series of tragic attacks on a lump of land known as Hill 60 to the north of the ANZAC position.²⁹

Arriving at the same time as the 18th Battalion was another New South Wales unit – the 19th Battalion which also had a number of barristers in its ranks. It was commanded by the 43-year-old barrister, Lieutenant Colonel William Kenneth Seaforth MacKenzie. Mackenzie's second in command was Major James Whiteside Fraser McManamey, a 53-year-old barrister from Milsons Point with Chambers at 8 Wentworth Court. McManamey was a well-known personage. He had been admitted to the bar in 1892 and was president of the Australian Rugby Union and active referee at the time war broke out. He had played in the first NSW – Queensland interstate game. In addition the ANMEF veteran, Major Alexander Windeyer Ralston, was also in the 19th Battalion as was Lieutenant Francis Coen, a 31-year-old barrister from Selborne Chambers. Captain George Heydon, a medical practitioner and the son of Judge Charles Heydon of the Industrial Court, was in C Company. The 19th maintained a defensive role throughout September. Much of their work involved extending and maintaining trenches and the endless grind of carrying water and rations up from the beach. Disease was ever present, and life was always hazardous – Turkish bombs were their main threats. On 5 September, McManamey was killed by artillery fire. He was one of the close-knit rugby and legal fraternity on Gallipoli. His death was the subject of many letters back home to both the rugby and legal fraternities.

One barrister had a lucky escape from death in battle late in the campaign. The ANMEF veteran, Major Charles Edye Manning, was serving with the Victorians in the 24th Battalion in the deep, narrow trenches at Lone Pine in the ice and snow of 29 November. Unexpectedly there was a new, heavy artillery barrage which turned these trenches from safe refuges into death traps. Manning's sector on the northern part of the line bore the brunt of the attack and he was wounded. Many men were badly shocked and others were buried alive. There were 130 casualties in his unit, but he soon had the section in action and ready to defend against a possible attack. Manning was badly hurt. His records show that he had suffered head

wounds when he had been buried by the exploding artillery and was soon diagnosed with shell shock. He was evacuated to Malta where he was also diagnosed with jaundice. Within a few months he contracted mumps, but still went to war in France. Manning was a respected leader. He was described in General Haig's despatches as 'a most reliable and valuable officer whose steadfast devotion to duty was as conspicuous as his cheerful gallantry in action.' He was later killed in action in France on 7 August 1916.

Other barristers on Gallipoli included: Charles Howard Helsham who embarked with the 1st Light Horse Field Ambulance on *Southern* on 23 September 1914. At the time of his enlistment he was the secretary of Sydney Hospital. His age is a mystery. On his August 1914 enlistment paper he wrote that he was 39 years old. A year later, when he applied for a commission he admitted to being 47. Also coming into service in the Middle East was Major Ignatius Bertram Norris, a 34-year-old barrister of University Chambers in Phillip Street. He acted as judge advocate in courts martial in Egypt but was desperately keen to see action and would travel to his death in France in 1916. Other barristers were enlisting overseas. Beaufort Burdekin, son of an Australian family, but born in England, was serving on the Western Front in 1915 with the Royal Field Artillery. He would come to Australia after the war and have a long career, particularly in maritime-related cases.

As the final stages of Gallipoli unfolded, barrister Captain Cecil Lucas was in charge of the last party to leave Quinn's Post in the early morning of 20 December. Lucas shook hands with his commanding officer then set a gramophone playing the piano march *Turkish Patrol* as 'a graceful compliment to a chivalrous foe'.³⁰ Lucas, whose nickname from Sydney Grammar School was 'Caesar', was known to always do things with a certain panache. On the same day as the ANZACs withdrew from Gallipoli at last, *Suevic* left Sydney Harbour once again with another load of men for the war. Two young University of Sydney law students were lieutenants onboard, in charge of the 7th Reinforcements for the 19th Battalion. One young man, Alan Russell Blacket, would be killed in the fierce artillery barrage at Pozieres just on nine months later. The other, Percy Valentine Storkey, would win the Victoria Cross for an action in Bois de Hangard in France in April 1918 and return to Australia to become a judge of the District Court.³¹

Men who had survived Gallipoli died in later battles in France and Belgium. In May 1916 Judge Ferguson's son, Arthur, fell in action in France as his younger brother, Keith, was sailing over to join him in war. On the same ship as Keith Ferguson was

another judge's son: Desmond Duffy – a 26-year-old barrister. Desmond Duffy was the brother of Charles Duffy who had survived Gallipoli. Desmond Duffy was yet another lawyer sailing to his death. There are many more stories to be told from the Home Front – with Prime Minister William Morris Hughes and Premier William Holman still listed as barristers during the war. The war spared no one – at least six judges: Simpson, Higgins, Street, Rich, Ferguson and Duffy, would lose a son in the conflict. Gallipoli was only the beginning.

Endnotes

1. The bulk of the material in this account is taken from newspapers of the period as well as the War records of the men concerned, available through the National Archives online at www.naa.gov.au and the Australian War Memorial www.awm.gov.au. This research is continuing. Anyone with an interest in the topic or with further details is invited to contact the author on acunneen@bigpond.net.au.
2. Major General the Honourable Justice Paul Le Gay Brereton AM RFD, 'Not so Strange Bedfellows: The Professions of Law and Arms'. Paper written for The Legal Profession and the Defence Forces: Historical Connections Conference held at the University of Technology Sydney, 24 March 2012. Brereton J's opinion was shared by many others at the Conference.
3. The author has written a number of articles on lawyers in the First World War. Copies of these articles and other items on the topic of lawyers in war can be found on the website of the Francis Forbes Society for Australian Legal History.
4. The legal network across the British Empire existed in many forms. Many lawyers were educated at least in part in England and there were many unofficial links. See for example Knight, H. 'The organisation of the Bar in the British Empire' *Journal of the Society of Comparative Legislation* New Series. Vol. 15, No. 2 (1915) 161 – 170.
5. See Cunneen, T 'One of the Laws Women Need' *Bar News* Summer 2010-2011 pp 102 – 116 for an account of the background and passage of this bill.
6. The article by H Knight 'The Organisation of the Bar in the British Empire' in *Journal of the Society of Comparative Legislation*, New Series, Vol 15, No. 2 (1915) pp. 161 – 170 was one contemporary reference to barristers across the Empire as having a mutual bond despite local differences.
7. Fitchett, WH *Deeds That Won the Empire* First published in 1896, it ran to 36 editions and sold over 250,000 copies.
8. While in practice Legge had compiled *A Selection of Supreme Court Cases in New South Wales from 1825 to 1862*, generally known as The Legge Reports. His career is well covered but one source is Clark, C. 'Legge, James Gordon,' *Australian Dictionary of Biography*, <http://adb.anu.edu.au/biography/legge-james-gordon-7160>
9. Poynton, JR 'Munro Ferguson, Sir Ronald Craufurd 1860 – 1934', *Australian Dictionary of Biography* <http://adb.anu.edu.au/biography/munro-ferguson-sir-ronald-craufurd-7688>
10. Sir William Portus Cullen, Speech to the Central Methodist Mission, Sydney Town Hall, 8 May 1916, reported in 'The C.M.M.: Lessons from the War' *Sydney Morning Herald* 9 May 1916, p.10. Cullen made many such speeches throughout the war.
11. 'Sydney Barrister's Death', *The Sydney Morning Herald* 16 November 1917, 8.
12. Appointed a judge of the Supreme Court of New South Wales in 1919.
13. Later a judge of the Supreme Court of New South Wales and the High Court of Australia.
14. Ethel Turner Diaries Mitchell Library, Sydney, MAV/FM\$6039. Used with the kind permission of Phillipa Poole.
15. Ethel Curlewis' diary reveals that she was much distracted by the disputations among her domestic workers in her household as the servants suffered from an excess of patriotic zeal and refused to work with the young cook, who was of German background. See the Ethel Turner Diaries, 1914.
16. His father, Charles James Manning, had been, among other positions, the first probate judge in New South Wales. See Holt, HTE, 'Manning, Charles James' *Australian Dictionary of Biography* <http://adb.anu.edu.au/biography/manning-charles-james-4145>
17. Mackenzie, S S. The Australians at Rabaul: *Official History of Australia in the War 1914-1918* Vol X (Angus and Robertson Sydney 1941) pp 263-264.
18. Luckily for Holmes, Professor Pitt Cobbett, then in retirement from the University of Sydney, wrote an opinion that maintained that the action was legal in international law.
19. Bean, CEW *The Story of Anzac: Official History of Australia in the War 1914-1918* Vol I (Angus & Robertson, Sydney, 1921) p51.
20. Ferguson J to MacLaurin 25 April 1915, Ferguson Papers Mitchell Library. MLMSS 2858 / Box 1 / Folder 1
21. The speech and service were widely reported in the press.
22. Bean, CEW *The Story of Anzac: Official History of Australia in the War 1914-1918* Vol II (Angus & Robertson, Sydney, 1924) pp 110 – 111.
23. The searchable online records of its many investigations are an invaluable resource in the Australian War Memorial Website: www.awm.gov.au
24. There were multiple references and advertisements for the Bureau during the war. The motto came from the oft repeated introductory remark from worried relatives: 'I don't want to trouble you but . . .?'
25. Later chief justice of the High Court of Australia.
26. Adrian Knox's visit to the Middle East was widely reported in the press, as was his own report on the state of the Red Cross and charitable activities from the front line.
27. Bean, CEW *The Story of Anzac: Official History of Australia in the War 1914-1918* Vol II (Angus & Robertson, Sydney, 1924) p 424.
28. They had also attended St Ignatius Riverview together and made a point of organising prayers onboard ship. Their stories are told in Rodgers, J *To Give and Not to Count the Cost: Riverview and the Great War* (St Ignatius College, Riverview, 2009).
29. Cunneen, T 'Slaughter of the Innocents: The Destruction of the 18th Battalion at Gallipoli' *Australian Army Journal* (Vol 13, 2, 2010) 115 – 138.
30. Mackenzie, KC *The Story of the Seventeenth Battalion AIF* (Sydney, 1946) p85.
31. Judge Storkey's story is told by the Bar's Defence Correspondent 'His Honour Judge Storkey VC' in *Bar News Summer* 2008-2009, pp 87 – 89.

The Hon Barry O’Keefe AM QC (1933–2014)

The following is an unabridged version of the obituary by Philip O’Keefe and Kevin McCann, published by the *Sydney Morning Herald* on 23 May 2014.



Barry O’Keefe’s life was a testament to service and resolve. He was born in 1933, the first of three children to Ray and Thelma O’Keefe, proud Catholics who had lived through the Great Depression. Ray owned a furniture store on Pitt Street in Sydney and was later mayor of Waverley, while Thelma was reputedly the first woman to surf at Bondi Beach. Earlier O’Keefe forebears had been transported from County Cork to the penal colony of New South Wales in the first half of the nineteenth century, their crimes recorded as stealing empty bottles and poaching two fish from a manorial pond.

Barry was educated by the Christian Brothers at Waverley College. He battled against debilitating bouts of rheumatic fever in his youth but ultimately won a Menzies Scholarship to study law at the University of Sydney. By his own admission, he was a relatively ordinary, if conscientious student. He maintained himself by working as a bowser boy at a local garage, as a taxi driver, as a porter at the Darling Harbour Railway Goods Yard, and finally as associate to the late Mr

Justice Hardie of the NSW Supreme Court.

When Barry went to the bar in 1957, times were tough. For the first three years he kept his head above water only by teaching at the then University of Technology in the Faculties of Economics and Law. His lectures were often delivered on the stage of the Phillip Street Theatre, backdropped by the sets of its latest productions. Given his extroverted personality, the venue was entirely appropriate. He was an outstanding lecturer with a deep and scholarly knowledge of his subject. He was also a popular teacher, dubbed by his students ‘the mild one’ in contrast with his brother Johnny O’Keefe, ‘The Wild One’ of Australian rock ‘n’ roll.

Eventually, Barry developed a wide ranging law practice, often appearing and advising multinational corporations overseas. After he took silk in 1974, he appeared frequently in the Supreme Court of NSW, the High Court of Australia and the Privy Council. He was a formidable cross-examiner, and had a forensic ability to assemble and use complicated facts in sprawling cases. He was counsel in a number of high-profile state and Commonwealth royal commissions concerning the sinking of HMAS *Voyager*, the relationship of Premier Neville Wran and the chief magistrate of NSW, and the impact of Agent Orange on Australian troops in Vietnam.

He also served as president of the New South Wales Bar Association from 1990 until 1991, and sat on the Executive at the Law Council of Australia from 1992 to 1993. Then, at the peak of his career at the bar in 1993, he was appointed chief judge of the Commercial Division of the Supreme Court of New South Wales.

But his career soon took an unexpected turn. In 1994, Barry accepted a five-year appointment as commissioner of the Independent Commission against Corruption (ICAC). He understood that proper administration and effective responses to corruption are integral requirements of good government, and under his tenure, wrongdoers were exposed and ICAC took a leading role in corruption prevention and education. His work saw him subjected to threats on his life and reputation, but ICAC became a model accepted by the Australian police forces and eventually other states. His anti-corruption work eventually extended well beyond Australia, as he became chairman of Interpol’s International Group of Experts on Corruption, and chairman of the International Anticorruption Conference. Latterly, he was the driving force in the establishment and evolution of the Anti-Corruption Academy, a young but already highly esteemed body established to promote justice, anti-corruption and the rule of law globally.

After ICAC, O’Keefe returned to the bench as a judge of the Common Law Division of the NSW Supreme Court and of the NSW Court of Criminal Appeal. He was assigned to try a number of extremely high profile and difficult murder trials in Wollongong and Newcastle. As an acting judge in the NSW Court of Appeal, he also presided over several precedent-setting cases, including on the care that hospitals must provide to terminally ill patients and to patients in a persistent vegetative state. On his retirement as a judge, he became a consultant to Clayton Utz, where he built up a busy practice specialising in construction cases.

But throughout his distinguished legal career, Barry O’Keefe also gave himself to the service of his community with

extraordinary energy and generosity.

He sat as an alderman on Mosman Council from 1968 to 1991, and served a record ten years as mayor. During these terms, he was dedicated to proper town planning and kept the destroyers of the built and natural environments at bay, especially defending Mosman's open spaces and foreshores as sacrosanct. He was also the principal architect of Mosman's town plan, and oversaw the building of the Mosman Library and Mosman Square. One particularly notable feature of his mayoralty was his passion for civic embellishment, and when in full flight he was hard to resist. He managed to persuade Sir Tristan Antico, for example, that Pioneer Concrete should acquire a very expensive Italian fountain from an English stately home and donate it to the municipality. But Barry also personally funded several other fountains and statues in the suburb, including one of a legendary local mongrel 'Fugly' on the Balmoral foreshore. 'Barry was man of great intellect, enthusiasm and generosity,' says former Mosman Council general manager Viv May. 'He was a true leader and no mayor has ever equalled him.'

Beyond Mosman, Barry served as president of the Local Government Association of NSW. He also received numerous offers to stand for safe seats in the NSW Parliament. Wisely he refused. But he did accept a membership of the Order of Australia in 1989 for his services to local government.

Incredibly, his community service did not end there. He also served as president of the National Trust of Australia in New South Wales from 1991 until 2006. Under his leadership, the trust emerged from bankruptcy and built up a large and active membership of heritage defenders. In the age before

social media and community activism, the National Trust was the lone bulwark against the inappropriate redevelopment of built and natural heritage sites by big developers, and as president, Barry was often required to be the public face of that struggle.

In 1998 the Harbour Trust (later the Sydney Harbour Federation Trust) was established by Prime Minister John Howard, to be responsible for the management and rehabilitation of surplus defence lands on Sydney harbour foreshores. Barry was an energetic member of the trust who applied his vast planning experience to help draft the legislation creating the trust, and the management masterplans for the areas vested in the trust, ensuring the creation of magnificent public harbourside amenities for future generations of Australians.

As for Barry's private interests, they were beyond numerous and incredibly diverse. For a man who was in many ways very moderate, the strength of his enthusiasms was remarkable. As he often said, 'All things in moderation, including moderation'.

A first was his great love of regalia and the theatrical. Whether in the mayoral robes and chain, the gowns and wigs of the QC and judge, the dashing cape of the order of St Lazarus, or the tartan kilt of clan O'Keefe, he never failed to take delight in dressing up, a trait he duly acknowledged when receiving an honorary doctorate from the Australian Catholic University earlier this month as he floridly doffed his academic cap to the assembled students. More generally, he took great pride in having the right gear for the right place – safari suits in Tanzania, long riding boots and crop for horse riding in Hyde Park London, or even on one occasion a bullet-proof vest for an appearance with the president

of Israel in Jerusalem. While he loved regalia, at the same time, he never forgot that these things were symbols of institutions and not a source of glory for him. He noted this in an interview with the *Catholic Weekly* where he said 'The power is not from you, it is given to you, and you therefore have to exercise it in trust. That should engender a sense of great responsibility, rather than engender any sense of importance.'

A second abiding enthusiasm was art. He had a wonderful eye for all forms of art, and took deep pleasure from discussing it with his friend Rex Irwin, the notable Sydney dealer. He also took a great interest in engaging with artists themselves. His wonderful taste in higher forms of art did not, however, stop him picking up every trinket known to man on his world travels and hoarding them in a parallel collection of kitsch.

Perhaps the strongest of Barry's enthusiasms was for music, if of a somewhat different brand to his brother's. This manifested itself in his lifelong attendance of and support for the opera and ballet, a passion he shared with his wife Janette. His excitement ahead of a Puccini or Mozart opera was palpable, as he leapt around the house singing arias like a *bel canto* leprechaun. He had an equally soft spot for the ditties of Gilbert and Sullivan.

Given their range, it was inevitable that Barry occasionally overstretched in his passions. One example was the purchase of a vintage steamboat which, in his captain's hat, he planned to take around Sydney Harbour on impromptu reviews of the fleet. However, the vessel also required a vintage steamboat engineer to keep it primed, something easier said than done. In the end, he captained the boat's maiden and only voyage within the confines of the swimming baths at

Clifton Gardens, before donating it to the Sydney Maritime Museum.

But beneath his many enthusiasms, Barry's life was underpinned by three greater forms of devotion: devotion to service, devotion to God, and devotion to his family.

Beyond its grander public expressions, much of Barry's sense of service was through his example of plain decency and courtesy. Many have noted that he always seemed to have time for them no matter how busy he was or how grand the event; others speak of his small (and large) kindnesses to them – as struggling students, as new arrivals in Australia, or as people who had simply fallen on hard times. One of his former associates, Nana Howard recalls, 'I remember him correcting the grammar of pompous barristers from the bench, but then always taking the time to show solicitude to the self-represented litigant whose second language was English'.

He also derived enormous hope and consolation from his faith. Like the rest of his life, his faith expressed itself in many ways, from highly esoteric discussions on matters of theology or church history, to simple heartfelt prayer, especially to the Blessed Virgin Mary. Fundamentally though, it took a very practical form: faith meant most to Barry when it was the motivation for action, whether that was undertaking charitable works with the Brotherhood of St Lazarus, helping raise the funds to complete the spires on St Mary's Cathedral and mounting them with crosses, or simply stepping in as the reader at Mass when the designated

person failed to show. Moreover, for someone who was a devout Catholic, he had enormous respect for people of other faiths and saw all religions as embodying a common search for something deeper in life.

Shortly before the end of his life, Barry agreed, at the request of the Australian Catholic Bishops, to take the chair of the Truth Justice and Healing Council established to co-ordinate the church's response to the royal commission into child sexual abuse. He was unequivocal that the church must acknowledge the wrongs and injustices of the past, develop new policies to protect young people, and respond to future issues by putting the needs of the victims first.

Two days before Barry's death, Pope Francis 1 created him a Knight Grand Cross of the Order of St Gregory the Great (the highest award a layperson of the Catholic Church can receive) for service to the church, to the law and to the community. Typically, he sat up in bed, removing the ventilator which was keeping him alive, to make a speech thanking the church for the great honour.

The complement to his spiritual life was Barry's devotion to his family. He was a proud son who talked to his mother almost every day no matter where in the world he was, and always cited the gentleness of his father Ray as a model for how a man could be. He was a loving and steadfast brother to his sister Anne, as well as to his brother John, of whom he always spoke with pride as a great Australian. He was also enormously proud of his children,

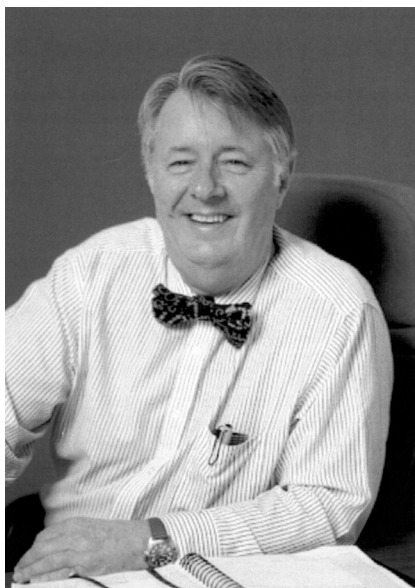
and casually made sure that everyone heard about even their most modest achievements. Most days when they were small, he would make the time to have a five-minute cuddle with each of them before heading off to work at 5.00am. Above all though, he was a loving and devoted husband. By a combination of excellent judgment and sheer luck, he found a wife who returned his devotion in equal measure for over 51 years. That love was more evident than ever during his recent illnesses, through the tender and unstinting care that Janette provided him, and the valiant way in which he bore his suffering and shielded others from it.

Barry O'Keefe embodied the great paradox – that the more fully we embrace our duty, the more we are fully free. Fully embracing his duties took enormous diligence and perseverance; but the freedom, hope and joy that he took from that embrace were profound. They energised his whole life – and so many people in turn derived comfort and energy from their interactions with him.

Always generous with his time and advice, he evinced warmth and human concern, had an ability to engage with people at all levels, and was a straightforward and unpretentious man despite his many achievements. He treasured all of life's blessings.

Barry is survived by his wife Janette, his children Philip, Vanessa, Roger, Andrew and Sophie, seven grandchildren and his sister Anne Rose.

Magistrate Scott Mitchell (1941–2014)



Scott Mitchell was appointed to the Local Court on 18 January 1993 and retired in 2013. He died on 24 April 2014.

For the first four years after his graduation in law from the University of Sydney he led an exciting life in the entertainment world, working in television production, including making live-to-air entertainment programs.

Scott then turned his talent to the practice of law. He practised as a solicitor from 1971 to 1975 with Marks Hood and Kennedy, Sydney. He then practised as a barrister, specialising in family law, from 1975 until January 1993.

Scott was appointed to the Local Court in

January 1993. During the next 20 years he held the titles of magistrate, children's magistrate, senior children's magistrate and coroner. He presided for five years at the Local Court Family Matters from 1994 to 1999, doing both family law and care cases.

Scott was a man of the world. He turned his attention to his Italian heritage – his mother was Italian but Scott grew up when bilingualism was frowned upon and when Haberfield, now a centre of Italian food in Sydney, was a boring place. He studied the Italian language and visited Italy often. At the same time he undertook country service sitting in the Local Court in Bourke and Brewarrina in far western NSW, worlds away from the Rome, Milan and Lucca that he loved.

Scott's wonderfully erudite and readable judgments provided guidance for all those interested in the law, particularly child protection and the adequacy of the services provided by the then Department of Community Services (DOCS).

Scott had a particularly colourful case in November 1997 at North Sydney Local Court, when he dealt with 17 persons who had installed solar panels on the roof of Kirribilli House, free of charge. The government of the day was not amused. Scott's decision (later appealed by the prosecution) to release the protesters on bonds without convictions was reported

in the press, in part, as follows:

Australia would be 'a much duller place' if protesters were not allowed freedom of speech, a magistrate said yesterday.

Magistrate Scott Mitchell said he accepted that the protesters acted out of heartfelt beliefs and integrity in their cause for a sustainable world environment.

Mr Mitchell said he accepted that Greenpeace had planned the operation so as not to damage Kirribilli House or endanger the occupants of the home, including the Prime Minister's daughter.

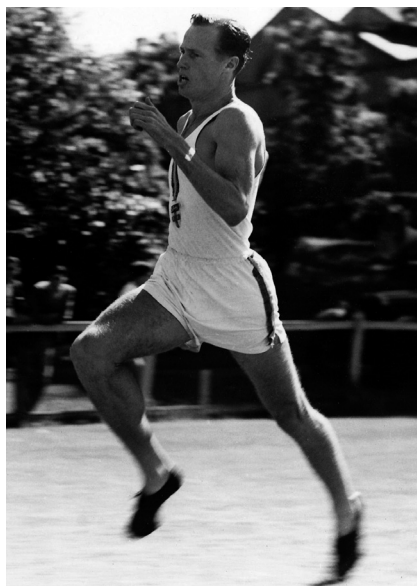
Earlier, Mr Mitchell told the sixth defendant, a young woman, that she had handed to the bench 'terrific references' and commented: 'Australian society would be a lot duller if people weren't allowed to say what they think.'

However, at the start of proceedings, Mr Mitchell noted that it was not his role to hold or expound political views in court and said even Gandhi accepted 'he had to pay the price' for his peaceful protests in India.

The Local Court would have been a lot duller place without Scott Mitchell.

By Magistrate Beverley Schurr

The Hon Mervyn David Finlay QC (1925–2014)



When the Honourable Mervyn Finlay QC died, aged 89 in July this year, it was a shock to the many who knew him, not because of his age, but rather because he had always appeared indestructible, indeed, Olympian.

Mervyn Finlay was born in Balmain in 1925, something he never forgot. He used to say ‘the world is divided into two groups: those who were born in Balmain, and those who wish they were.’ In his last year at Sydney Grammar School, he left when he turned eighteen in June, to join the Royal Australian Air Force, earning his wings and serving both in Australia and in Canada.

After the war he studied for a law degree at the university of Sydney, graduating with honours in 1949. Following a brief period of practice as a solicitor, he was called to the bar in 1952. He began in the old Denman Chambers, located where the joint courts building is now situated. Mr AF Mason, Later Sir Anthony Mason, chief justice of Australia, kindly let Finlay have a desk in his chambers to start his practice. He later had a successful practice in the common law jurisdiction, where he practised throughout NSW, particularly

on the Broken Hill circuit. Later he prosecuted many significant matters for the Commonwealth.

With the construction of Wentworth and Selborne Chambers, Finlay joined what became the 12th Floor Wentworth/Selborne, where he was the chairman of 12 Wentworth Chambers, clerked for by Norman Marks, and Greg Isaac. This writer remembers his first meeting in chambers in the 1970s with Finlay to discuss a possible legal career, where he gave sound advice. He served at various times on the Bar council and was chairman of the Council of Law Reporting. He was president of the Vaucluse House Historical Site Trust and he was on the Parish Council at St Marks Church, Darling Point.

He was appointed to the Supreme Court in 1984, sitting in the Common Law Division and as required in the Court of Criminal Appeal, until his retirement eleven years later. Such was his reputation for fairness, that in the dock in one of the courts at Darlinghurst, an accused carved into the wood the words ‘Finlay is fair’ – an unusual but significant accolade.

His athletic prowess was remarkable. While in 1949 he was the 880 yards champion for NSW, it was in rowing that he made a particular mark. He was a member of the NSW champion King’s Cup rowing eight in 1950 and 1951, and in 1952 rowed in the Australian eight, which won the bronze medal at the Helsinki Olympics. Another member of crew was Ted Pain, later a senior Crown prosecutor. In his middle age he took up marathon running, completing Honolulu, Melbourne and Sydney marathons. He was a keen swimmer late into his 80s and had been president of the Rose Bay Surf Club.

In retirement from the law he became Inspector of the NSW Police Integrity

Commission for five years and headed up a review of the Innocence Panel which led to enactment of the *Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006* (NSW).

Although his contribution to the law was significant, the personal example he set by the way he lived his life was even more notable. His philosophy was that a complete life required daily ‘visits’ to what he described as the four rooms: the physical, the emotional, the spiritual and the mental. He shared his philosophy fully with his wife Prudence, his children and grandchildren who were the centre of his life.

He had read AB Facey’s biography *A Fortunate Life* which, he said, helped him realise that most people suffer hardship, sadness and loss, so that a daily, positive attitude was called for in life.

What never changed even until the end of his life was the presence created by his courtesy, his intelligence, and his integrity.

By Dr James Renwick SC

(The writer first met Finlay in the 1970s and now wears his silk robes.)

The Hon Justice Robertson Wright

Robertson Wright SC was sworn in as a judge of the Supreme Court on 25 October 2013.

The Hon Justice Robertson Wright grew up in a small semi-rural community in south-east Brisbane. After time at the local school, he attended Brisbane Church of England Grammar School before his family moved to Sydney, where he attended Knox Grammar School from the age of 14. His Honour said:

My first brush with the law occurred soon after we moved to Sydney. At the age of 15 I started gardening for Sir Victor and Lady Windeyer. Lady Windeyer said that I was better at conversation than gardening. I offer no comment. Nonetheless, as I progressed to university, Sir Victor encouraged me to raid his library when I needed legal texts and discussed my essay topics with me. A justice of the High Court, a scholar, a soldier, an historian and a gentleman, he established for me the benchmark against which lawyers should be measured.

His Honour graduated from the University of Sydney in 1978 with a Bachelor of Arts with first class honours in Philosophy and in 1980 with a Bachelor of Laws with first class honours.

At St Paul's College, his undergraduate home, his Honour was described as very bright, focussed, outgoing and entertaining, with an ability to structure an argument with seemingly little effort. He fully engaged in college life as a senior and philosophy tutor, lubricating the Socratic challenge with glasses of port and conviviality. He also began his long service in the Army Reserve, in the University Regiment, which continued with the Royal Green Jackets during his postgraduate studies at Cambridge, and on his return with the Royal NSW Regiment.

Graduating from Cambridge with first class honours and after a brief time at Mallesons Stephen Jaques, his Honour was called to the bar in 1983 and read with former High Court justice the Hon Bill Gummow AC QC on 8 Selborne Chambers. His Honour then enjoyed the camaraderie of 15 years in Ground Floor Chambers and 14 years in 12th Floor Chambers, taking silk in 2001.

His Honour has been a leading practitioner in competition law and consumer protection, including significant work on behalf of ASIC and other regulatory agencies. He has also served as a part-time judicial member in the legal disciplinary and equal opportunity divisions of the former Administrative Decisions Tribunal. He frequently contributed to legal education at the University of Sydney and the College of Law and in professional seminars and publications. He is a qualified and experienced mediator.

Speaking on behalf of the state's solicitors, Mr Gary Ulman, treasurer of the Law Society, said:

Your work colleagues and friends describe you as very personable, modest and generous, and of the utmost integrity; that you are also unrelenting both intellectually and analytically; and very much your own person. These attributes should stand you in good stead for the task ahead.

His Honour has been appointed first president of the newly-established New South Wales Civil and Administrative Tribunal, in operation from 1 January 2014, which draws together 400 members of existing tribunals dealing with about 80,000 matters each year. The attorney general for New South Wales, the Hon Greg Smith SC, speaking for the bar, drew attention to descriptions of his Honour as:

an excellent diplomat, with unlimited reserves of patience and a real talent for getting people to see things your way ... endlessly forgiving and optimistic, traits which I am sure will come in handy when you are leading the biggest tribunal in the country through its formative years.

His Honour has a deep knowledge of and passionate interest in history. Wide reading is complemented three-dimensionally by a Roman centurion's helmet and other artefacts that grace chambers.

His Honour paid tribute to the love and strength he drew from his family, the stimulus from many fine educators, true and loyal friendships and the 'enjoyable privilege' of professional colleagues.

His Honour concluded:

For many people in New South Wales, making application to NCAT will be their sole or principal means of obtaining access to justice. As president of NCAT, I see it as my duty to do all I can to ensure that the tribunal's processes are efficient, transparent and proportionate to the subject matters of the claims. The effectiveness of the tribunal will be judged, and rightly so, by the quality, consistency and timeliness of its decisions. ... I hope and pray that I may be given the gifts necessary to carry out my duties.

The Hon Justice Jacqueline Gleeson

Jacqueline Gleeson SC was sworn in as a judge of the Federal Court of Australia on 22 April 2014.

Her Honour is the eldest of four siblings and the daughter of the former chief justice of New South Wales and then of Australia, the Honourable Murray Gleeson AC QC. Nevertheless, as Jane Needham SC who spoke at her Honour's swearing-in reminded, her Honour's success in the law was not to be taken for granted:

Justice Gleeson, it would be easy only to speak about your lineage in the profession of law and the seeming inevitability that your Honour would follow in the footsteps of your esteemed father, the honourable Murray Gleeson, but to do so would overlook the struggle and austerity of your first years as a junior barrister.

It would gloss over the diligence and determination required to reach the pinnacle of the profession, to be judged by your peers as being learned in the law and granted the rank of senior counsel and then to be appointed to the Federal Court of Australia.

Her Honour's mother Robyn stayed at home to raise her children and during her Honour's swearing-in speech, her Honour said: 'My wellbeing and development was my mother's job and she can justly take credit for any success of mine.'

Of her father, her Honour said:

My father and I are the only lawyers in the family. Occasionally my siblings wonder about my admiration of him. His self-discipline is the virtue that I admire most and which I hope most to emulate in my new role.

Her Honour attended high school at Monte Sant' Angelo Mercy College where she excelled at debating and public speaking, participated in tennis and swimming and was a member of the school choir and of the school newspaper's editorial committee and was awarded prizes in French, economics and mathematics. In 1983 her Honour was dux of the school. Her Honour attended the University of Sydney where she completed a Bachelor of Arts in 1986 and a Bachelor of Laws in 1989. Her Honour worked as an associate to the Honourable Justice Trevor Morling of the Federal Court and as a solicitor for the firm of Bush Burke & Company before being called to the New South Wales Bar in September 1991.

Her Honour read with Michael Slattery and Stephen Rares (as their honours were then) as well as with Cliff Hoebe and Malcolm Oakes SC. Her Honour appeared as junior counsel in many leading cases, led by eminent then members of the bar including Chief Justice James Allsop and Justice Arthur Emmett. Her Honour purchased a room on 11 Wentworth Chambers and worked with many of the leading barristers on that and other floors. She practised in many fields, including

construction law and professional disciplinary proceedings.

Her Honour had been practising at the bar for nine years when she was briefed to appear for Mr Alan Jones at the Australian Broadcasting Authority's cash for comment inquiry. This appearance led to her Honour being approached with the offer of the role of general counsel at the ABA, which she accepted, allowing her to pursue her interests in public law and broadcasting law. In 2003 her Honour was offered a position as senior executive lawyer for the Australian Government Solicitor in 2003 where she advised and acted for regulatory agencies, including APRA, the Tax Agents Board, the Companies, Auditors and Liquidators Disciplinary Board, the ABA and the Office of Film and Literature Classification.

In 2005 her Honour completed a Master of Laws focusing on administrative, regulatory and trade practices law.

Her Honour returned to the bar in 2007 and eventually bought chambers on 7 Selborne. Her practice included administrative law, competition and consumer law, professional liability and disciplinary proceedings and taxation. Her Honour was briefed in a number of very significant matters, including the Canberra bushfires litigation in the Supreme Court of the ACT and more recently appeared as counsel for the New South Wales Government at the Royal Commission into Institutional Responses to Child Sexual Abuses. Her Honour took silk in 2012.

Her Honour served as a member of a professional conduct committee and as a member of the Bar Council for four years.

Her Honour noted that she was the fourth member of 7 Selborne to join the Federal Court after Justices Foster, Hely and Jacobson. Her Honour concluded her swearing-in speech with the following words:

I have a profound respect for the rule of law as a bed rock of our society and economy. I look forward to discharging my role as a judge to the best of my ability and hopefully, a little better.

Commonwealth attorney-general, Senator the Hon George Brandis QC, had no doubts about that ability:

You have been described by your colleagues as dedicated to your work, your clients and your briefs and possessing all the qualities of a highly accomplished member of our profession. Your reputation is as one who applies yourself to your work with intelligence and perseverance. Though these skills and attributes will be missed by the bar, they are the qualities which will be most welcome by your new colleagues on the bench. ... You have been, if I may so, a role model in your field and you will continue to be so.

The Hon Justice Peter Hamill

Peter Hamill SC was sworn in as a judge of the Supreme Court of New South Wales on 29 April 2014.

His Honour was raised in Jannali in the Sutherland Shire and attended Jannali Boys High School where he was a keen sportsman and debater.

His Honour began his legal career in 1981 as a clerk in the Court of Petty Sessions. He studied part-time and completed the Barristers Admissions Board exams in September 1986. After a short stint working for a small firm of solicitors at Manly, his Honour served as associate to the Hon Justice Mary Gaudron of the High Court. During his swearing-in, his Honour said of that time:

I was fortunate enough in 1988 virtually or effectively to fall into the position as Justice Gaudron's associate and tipstaff. Associates to High Court judges and judges of the Courts of Appeal often tell stories of the judgments that they have written, the judge only needing to proofread the document and un-split the infinitives. I have no such stories to tell. I spent the entire time that I was with Mary Gaudron just attempting to keep up with her.

In 1989, his Honour was called to the bar, reading with James Allsop (now Allsop CJ of the Federal Court) and Michael King.

Later in that year, his Honour became a founding member of Forbes Chambers where he practised until his appointment. During his swearing-in, his Honour said of Forbes Chambers, 'I cannot imagine that there exists a more committed and rigorous group of criminal lawyers anywhere'.

His Honour's early years of practice were marked by appearances in many jury trials, including in Dubbo, Bourke and Broken Hill, becoming the Western Aboriginal Legal Service's counsel of choice. At his swearing-in, his Honour said, 'some of the friends that I made doing that work in Dubbo and Bourke and Broken Hill and Brewarrina remain among the most important people in my life, and I say that the lawyers that act for the various Aboriginal Legal Services around Australia are amongst the finest people that I have met'.

His Honour developed a solid appellate practice, appearing in more than 150 criminal appeals, including in the High Court. His Honour also appeared in a number of high profile inquests

and commissions of inquiry, including for the family of Tasered Brazilian student Roberto Lauderio Curti and as counsel for Keli Lane at the 2006 inquest into the disappearance of her baby daughter.

Philip Boulton SC, who spoke at his Honour's swearing-in, said:

Justice Hamill, your instructing solicitors often found their cases with you to be very intense – usually intensely enjoyable. You were always alarmingly direct with witnesses and opponents and judges. No-one was ever left wondering what you were thinking.

His Honour mentored numerous readers before taking silk in 2004 and has served on the Bar Association's Professional Conduct committees, the Silk Selection Committee and on Bar Council.

His Honour is a fan of the Collingwood AFL team and the Boston Red Sox baseball team. His Honour remarked that he follows major league baseball 'daily with a fervour that some might say is diagnosable' and that the 'Boston Red Sox represent all that is good and wholesome and right, while the New York Yankees are the manifestation of all things evil'. His Honour also collects Aboriginal artworks and early editions of much sought-after James Joyce books, including multiple copies of *Ulysses*. He also took up cycling and has become, what his Honour said he gathered is known as a 'MAMIL' – a middle-aged man in lycra.

On being appointed to the court, his Honour said:

I return to Justice Gaudron, but only to say that, like so many judges before and after her, her career represents the finest example of the benefits of a fiercely independent judiciary to the maintenance of a fair, just and democratic society. I am proud to be joining a court with a reputation for such independence. Particularly in a time of criminal trial and sentencing by way of media frenzy, it is critical that judges act upon principle and are guided by the rule of law rather than by some ill-defined perception of what the public or politicians or media personalities determine to be an appropriate outcome.

Her Honour Judge Dina Yehia SC

Dina Yehia SC was sworn in as a judge of the District Court of New South Wales on 5 May 2014.

Her Honour arrived in Australia in 1970 from Egypt. Her father had been an officer in the Egyptian Army and was at one point held in secret detention in Egypt during a period of political upheaval. During her Honour's swearing-in speech, her Honour said of her parents' decision to come to Australia:

Today is a long way from December 1970 when my parents, my brother and I arrived in Australia having left Egypt and our very large and close-knit extended family. As a child of nearly eight, unable to speak or understand a word of English, I thought my parents quite mad in choosing to leave our country of birth and our family to come to a foreign land. I was frankly bewildered.

...

It was not long, however, before bewilderment and fear were replaced by understanding and appreciation of my parents' single minded determination to give their children a better future than they thought possible, at the time, in Egypt.

My mother was especially instrumental in that move. For her, education was a religion. And she was a devout believer.

Their decision was especially influential in my life. As an Arab woman I was allowed independence of thought and action that would, no doubt, had been more circumscribed had we stayed in Egypt.

Her Honour graduated from the University of New South Wales with a Bachelor of Arts and Bachelor of Laws in 1989.

While studying at the College of Law her Honour rang the principal solicitor of the Western Aboriginal Legal Service (WALS), Eric Wilson, from a public payphone and asked for a job. Her Honour's application was successful and she spent the next seven years working for WALS and representing Indigenous people across towns including Bourke, Broken Hill, Wilcannia and Brewarrina. The work was gruelling and relentless – a day in court might have involved representing up to 50 people in a list before boarding a midnight coach to the next town to be greeted by the next day's list. Her Honour would take instructions in hotel rooms and the offences might include resisting arrest or offensive language at a time when such offences would certainly result in prison time. Her Honour said that the many people that she met in the Aboriginal communities taught her the lessons of humility, courage and resistance – they took her Honour into their homes with incredible warmth, generosity and good humour.

Her Honour became a solicitor advocate at the Legal Aid

Commission of NSW before coming to the bar in 1999. During her swearing-in, her Honour acknowledged the excellent work of the solicitors of the Aboriginal legal services throughout Australia as well as the solicitors of the Legal Aid Commission of NSW.

In August 1999, her Honour began practice as a barrister. She read with John Stratton SC and Gerard Craddock SC, who had also taught her Honour criminal law at university. For the next 14 years, her Honour worked at the Public Defenders Office. Her Honour's style of advocacy was described as methodical and meticulous – she had an affinity with juries and understood the implications of social and economic exclusion and disadvantage.

Her Honour took silk in 2009 and that same year her Honour appeared in long-running terrorism trials, *R v Baladjam*; *R v Elomar*. In October 2012 her Honour was appointed as a deputy senior public defender.

In 2013, her Honour appeared in *R v Bugmy*. It was the first time since *Neal v The Queen* in 1982 that the High Court considered disadvantage and Aboriginality. The High Court held that the effects of profound childhood deprivation do not diminish over time and should be given full weight when sentencing the offender. Phillip Boulton SC, who spoke at her Honour's swearing-in, said of this case:

R v Bugmy was the case which some say your Honour was 'destined to argue'. The gallery was packed; people lined up to shake your hand. Your advocacy has been described as 'electrifying'.

Her Honour made a sobering remark on the over-representation of Aboriginal people in the prison population during her swearing-in:

Anyone who truly reflects upon the fact that Aboriginal people make up approximately 27 per cent of the prison population, with Aboriginal women representing over 30 per cent and Aboriginal children approximately 50 per cent of those in juvenile detention, must acknowledge that there is a continuing and distressing crisis.

Her Honour worked on the committee organising the annual Public Defenders Conference and has presented papers on various aspects of criminal law, including being invited to speak to representatives of the International Criminal Court in The Hague in 2005. Her Honour has been involved in legal mentoring programs at the University of Sydney and the University of Wollongong and supervised the Public Defenders' Aboriginal Law Graduate Program.

Her Honour Judge Helen Wilson SC

Helen Wilson SC was sworn in as a judge of the District Court of New South Wales on 28 April 2014.

Her Honour studied arts and law at the University of Sydney. During her studies, her Honour volunteered at the Redfern Community Legal Centre during which time the Hon Justice Virginia Bell was principal solicitor.

Her Honour first worked as a solicitor in the Criminal Division at Legal Aid between 1990 and 1992. The next seven years of her Honour's career were spent in the Office of the DPP, where her Honour served as a senior solicitor between 1992 and 1995, then managing lawyer at the Campbelltown branch from 1995 to 1997 before rising to the rank of trial advocate.

Her Honour began practising at the bar in April 1999, initially as an acting Crown prosecutor before attaining a permanent appointment in 2001. In 2005 her Honour moved to the Newcastle Crown Prosecutors Chambers. Throughout her career, her Honour appeared in hundreds of jury trials as Counsel for the Crown. Notably, her Honour prosecuted former MP Milton Orkopoulos, who was jailed in 2008 for child sexual assault and drugs charges. In 2010 her Honour prosecuted former Catholic priest and school teacher John Denham for the sexual abuse of multiple boys.

Her Honour took silk in 2013. In the two years alone prior to her Honour's appointment, she appeared in nearly 40 cases before the Court of Criminal Appeal. Her Honour has also appeared in the High Court and was previously seconded to the public prosecutor's office in Vanuatu.

Her Honour has also written about human rights for judges in China and prepared a prosecution policy for legal staff in Vanuatu.

Other appointments of note

On 10 February 2014 former solicitor Michael O'Brien was sworn in as a Magistrate of the Local Court of NSW and as an industrial magistrate.

On 10 February 2014 former Crown Prosecutor David Williams was sworn in as a Magistrate of the Local Court of NSW and as an industrial magistrate.

Michael McHugh SC, who spoke at her Honour's swearing-in said:

Judge Wilson, your former colleagues, in the ranks of both the Crown prosecutors and the criminal defence lawyers, are effusive in their admiration. You bring to this role a formidable breadth and depth of experience in criminal law – from Illawarra and Campbelltown to Newcastle and from the Local Court to the High Court. You are renowned for being a forceful cross-examiner and a formidable opponent in the courtroom. A common observation was that your Honour rarely needed to read from a statement during cross-examination, such was the extent to which you were across the brief.

McHugh SC concluded:

The New South Wales Bar Association is satisfied that you are eminently well qualified and suited to a place on the bench of the District Court. Furthermore, your appointment is a clear demonstration on the part of the attorney and the chief judge of confidence in the skill and learning of the Newcastle Bar.

Peter Krisenthal and Antony Evers have been appointed as acting public defenders commencing 14 July 2014 and expiring on 13 July 2015.

Bullfry and the hot chip

By Lee Aitken

‘Mr Smith, I suggest to you that the chip was not still steaming when you first saw it?’

Another ‘slip and fall’ – Bullfry’s common law case of choice for the plaintiff, now that the CLA had removed all other traditional opportunities for recovery for negligence. No wonder Mr Warren Buffett was ‘long’ in insurance companies. With his old football knee, Bullfry himself was sometimes tempted to take a tumble on a topsy turvy footpath and come against a convenient County Council after sustaining a massive psychogenic illness – he had two problems with this stratagem: a section 50 ‘defence’ would in his case provide an insurmountable barrier to recovery, and his usual mental state was difficult to define at the best of times – a charitable ex-wife had once described it as ‘all mania, and no depression’.

Who would have thought that a thirty-five year legal career would culminate here? Bullfry could have been a contender – in his dreams, he had soared to forensic heights, running a complex (but bloodless) Part IV application before a Full Federal Court with econometricians piled to the roof; or, a difficult appeal to a full High Court, taking on the Commonwealth, and overpowering her Solicitor-General, to show that money could not be disbursed to give every pensioner a birthday cardigan without a special appropriation.

But no, here he was. Here, in 17B on a cold winter’s morning before Judge

Snowdrop SC, struggling to show that a chip had been on the floor of the fast-food shop for at least 35 minutes, it had been missed by the recalcitrant cleaner, it had not been thrown by another customer’s younger son onto the floor, and that the manager of ‘Harry’s Hot Chips and Fryup’ had failed to follow the ‘dropped chip protocol’ – ergo, negligence!

OH & S had removed most of the charm and risk of modern life. We lived in a severely risk averse world – a patient of 86 might be admitted *in extremis* for open pancreatic surgery, and die under the knife – there would be immediate demands for a coronial inquest, allegations of negligence, or worse, on the more meretricious of the ‘current affairs’ programmes – interviews with sobbing relatives complaining that a very old, very sick, man undergoing a dangerous medical procedure had died – letters before action suggesting a mistake by someone or other.

Mind you, of course, much of the distaff side of Bullfry’s burgeoning medico-legal practice involved defending quacks on the welcome instructions of the MDU from egregious iatrogenic ‘errors’ – removal of the wrong eye,

or leg! Misdiagnosis of a sinister spot as a benign ‘ink mark’ – failure to check the patient for the presence of blood pressure, or a heart beat, upon admission. Medicine was an art, not a science and an expert could frequently be conjured up to ‘hot tub’ and swear that the treatment advanced had been entirely appropriate if not, perhaps, a little before its time. Bullfry was waiting for leeches to make a come-back.

‘I object as to form – invites argument’ – the laconic forensic interjection of ‘Sissy’ Cyril Cuthbertson SC always got on Bullfry’s nerves, though he never showed it.

‘Argumentative? That is only something that a callow SC, whose practice began to flower during the sad, recent, ascendancy of the Uniform Evidence Act, could possibly contend, your Honour. In olden times, a silk might argue with and badger a witness in a common law trial in order to seek the truth. *Magna est veritas et praevallebit*. We are not in your etiolated Equity Division world now, Cuthbertson, with its affidavits, set-offs, and nice demurrers, whispering away – this is the real world of hamburgers and chips’.

We are not in your etiolated Equity Division world now, Cuthbertson, with its affidavits, set-offs, and nice demurrers, whispering away – this is the real world of hamburgers and chips

‘Mr Bullfry, please calm down – luckily for us you have not had the chance yet to have your usual lunchtime ‘refresher’ – just rephrase the question if you would. And at some stage you will need to focus on the 5D issue. And please also remember, to paraphrase Gleeson CJ - ‘The fact that a chip shop could be made safer does not mean it is dangerous or defective.’.

‘As your Honour pleases. Might the question be read back?’

Bullfry swung to the lectern. It was going to be a long, hard struggle to avoid a ‘V for the D’.

Would he not be better off sitting at his favourite fish and chip shop in Umina himself and watching the pelicans, rather than arguing about where, and when, a bucket of chips had been spilt?

That was the great problem with the practice of law – the amount of time devoted to mundane facts, most of which were in dispute, and which, tomorrow, would matter to no-one at all.

The plaintiff had returned Cuthbertson’s

Would he not be better off sitting at his favourite fish and chip shop in Umina himself and watching the pelicans, rather than arguing about where, and when, a bucket of chips had been spilt?

fire with gusto when cross-examined, although the video of him doing a handstand on the skateboard, shortly after the ‘accident’, must have damaged his credit to a small degree. Nothing that Bullfry could not ‘paper over’ in address.

Bullfry was also right up to date on the ‘co-efficient of friction’ with respect to a hot chip or any other fried food – indeed, he had given a well-received paper on the topic only recently to the Plaintiffs’ Lawyers’ Association - much more troubling was the section 5D issue – how long had that hot chip been on the ground? And was it, in any event, within the curtilage of the shop? Could Snowdrop DCJ be ‘comfortably persuaded’, on the balance of probabilities, that it had been missed by the negligence of the cleaning staff? Was there, in fact, a safe system in place?

The more Bullfry mulled this over, the more he fretted. He knew to a nicety the ‘tariff’ for a badly broken leg, the out-of-pockets, his solicitor’s WIP – he leant over to Cuthbertson –

‘Sissy, is that \$420K ‘incl’ still on the table?’

‘Indeed it is Jack, but only until lunchtime’.

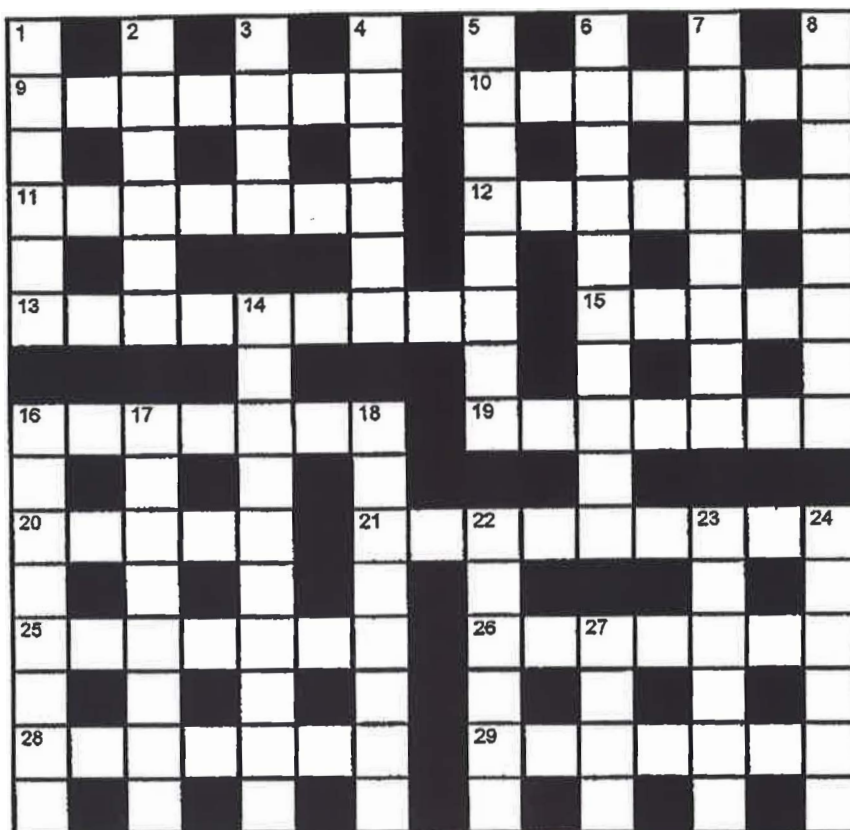
‘Your Honour, might my learned friend and I have the court’s indulgence briefly to discuss a matter which might permit your Honour a free afternoon to catch up on judgments, reading, or golf.’

‘Music to my ears, Mr Bullfry, music to my ear. I will rise for 10 minutes. Let my associate know when you are ready’.



Crossword

By Rapunzel



Across

- 9 Ivory Sound, a New York heart of Italian culture (7)
 10 Breastbone? Firm doubt. (7)
 11 No Oz trees heard in Aztec language. (7)
 12 For HLM, 'the only American invention as perfect as the sonnet', i.e. 'culture in coupe'. (7)
 13 Lawmen row about grasscutter. (4,5)
 15 Build before court? (5)
 16 Keep CPA broken patella? (7)
 19 Shortie stirred up raise. (7)
 20 Go out around the opposite of income. (5)
 21 One of us, I'm a noun. (9)
 25 Relative's cool relationships. (7)
 26 Car model, the Spanish fly for why sound new CJ? (7)
 28 Where to golf via satellite? (7)
 29 Silent sound lad of the lamp a chivalrous knight? (7)

Down

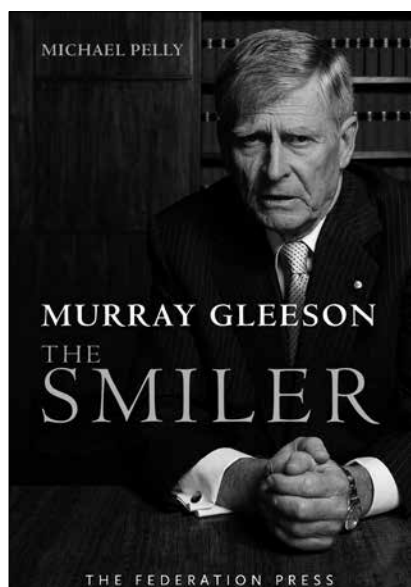
- 1 An alto rescaled without scale? (6)
 2 Escape (abbr) (cut) (avoid). (6)
 3 Spanish bubbles sound like Polynesian plonk. (4)
 4 Wobbly wobbly side-strike. (2-4)
 5 Equal form, I so change. (8)
 6 Order unless otherwise needier (sic). (6,4)
 7 Poor ending it poor. (8)
 8 I'm better twisted (twist with lemon). (8)
 14 Mike extends tiny acid measure on ecstasy. (10)
 16 Kelvin Kirby's old partner gone down for the count. (8)
 17 Mix gent with elan mix? (8)
 18 Fattest fruit fly? (8)
 22 Take on account old establishment church, quiet to a T. (6)
 23 O empty sulphur eggs! (6)
 24 South Australian dynasty with Greek leader? Common wisdom! (6)
 27 Place old look back round about (4)

Solution on page 95

Murray Gleeson The Smiler

By Michael Pelly | The Federation Press | 2014

On 27 May 2014 the Hon James Spigelman AC QC delivered the following speech at the launch of Michael Pelly's book *Murray Gleeson The Smiler* before a full house in Queens Square.



I am constrained by the subject matter of this evening's event to be short, to the point, to eliminate subordinate clauses, restrict the number of adjectives and adverbs and abjure my propensity for repetition. I will also attempt to refrain from saying anything funny, unless it can be compressed into a single sentence that cuts to the core.

Any discourse on Michael Pelly's biography must observe the requirement so well expressed by Tennessee Williams in *The Glass Menagerie*, to consider only 'Things of importance going on in the world! Never anything coarse or common or vulgar.' Otherwise, in the presence of the subject of the biography, one risks being subject to *the stare*. This book contains numerous references to Murray Gleeson's capacity to convey his feelings, of disapproval or worse, wordlessly just by looking. As Roddy Meagher so memorably put it: 'Murray Gleeson likes flowers. He stares at them to make them wilt.'

Murray would have made a great actor

in Kabuki theatre. Anyone who has experienced that genre will know that the Japanese audience will wait breathlessly for, say, the middle of Act 2 when the lead actor performs *The Look*. It is a great tribute to that nation's cultural unity that every member of the audience knows it is coming. If executed perfectly, *The Look* will draw shouts of encouragement from the audience – such as 'matte imashita' – 'We have been waiting!' – by way of applause. Murray was always content with a shudder.

To the 'stare' anecdotes in the book, I will add one. As chief justice, Murray sat as a trial judge in murder trials – something I never dared to do. As I recall the story, the first such occasion was in Taree, a triumphal return to his home district.

After the trial, Murray was asked, by a very experienced criminal trial judge, how he had dealt with objections to evidence. He replied: 'I never made any ruling on evidence. I stared at either the person asking the question or the person making the objection and, on every occasion, either the question or the objection was withdrawn.' As I recall the story, this trial ended in a hung jury. This is the only result from which there can be no appeal of any kind.

This is quite typical of the career so thoroughly set out in Michael Pelly's book. There was never a misstep along the way.

Pelly recites many tales which are familiar to the legal profession. However, there is much in this book that is new. He has done Australian legal history a great service by interviewing family, friends and colleagues whose reminiscences may not otherwise have been recorded.

As the book recounts, Murray Gleeson's

professional trajectory is a chronology of the luminaries of the Sydney Bar: Garfield Barwick, Jack Cassidy, Jack Smythe, Nigel Bowen, Bill Deane, Tony Mason, Maurice Byers, Laurence Street, Michael Kirby, Michael McHugh, Roddy Meagher, Tom Hughes, Bob Ellicott, Mary Gaudron, Bill Gummow, Dyson Heydon, Dennis Mahoney, David Hunt, Ken Handley, Roger Gyles, Peter Young, Graham Hill, Terry Cole, Bob Stitt, David Jackson. Each person on this list features in the book as an actor; some as a commentator.

This extraordinary range of talent deserves emphasis. For it was out of this ruck that Murray Gleeson rose to pre-eminence as an advocate, as a leader of the profession and as a judge. Along his professional journey, he acquired the confidence and the respect of the entire legal profession, first in New South Wales and, then, throughout Australia.

To those of us who grew up in Murray Gleeson's professional shadow it is the early chapters of this book, about his family background and education, which provide the most new information. His verbal dexterity in court, like his physical dexterity on the tennis court may, in part, be explained by the inheritance of the skills his father Leo displayed as a graduate of the Arthur Murray School of Dancing.

The core of his future professional style was on full display – not merely in his outstanding high school achievements as a debater and orator but, we now learn, revealingly, in his approach to cricket. He was not known for the reckless indulgence of pull shots or hook strokes. It appears that his favourite – and most effective shot – was the low-risk, sublimely effective leg glance. More than

anything else, this batting style reflects the quality most essential for success at the bar and on the bench – the capacity for detachment.

The central spine of the narrative after these introductory chapters primarily consists of major cases in which Murray Gleeson was involved as an advocate and as a judge. From the thousands of such cases Michael Pelly, understandably for a journalist, has, primarily but not exclusively, selected those which achieved public prominence. There were many such.

As an advocate he was involved in landmark cases: on the corporations power in the Constitution; on the legality of abortions; on taxation law – including what became known as the Curren scheme – in the prosecution of Iain Sinclair; the Combe Royal Commission and the Paddington Bear Affair; the defamation of Kate Fitzpatrick; the *Fine Cotton* ring-in scandal; and the Tasmanian Dams Case.

As a judge there was a similar diversity from which to choose: allowing Nick Greiner's appeal against ICAC; requiring the New South Wales executive to provide information to parliament; giving finality to the Chelmsford Hospital affair; determining principles of when a criminal proceeding has miscarried because of the incompetence of counsel; accepting the battered wife syndrome principle; determining appeals in such publicly significant criminal trials as the Jeanine Balding murder, the Ivan Milat and Ananda Marga cases.

The New South Wales case that gives me most grief is the decision in which the New South Wales Court of Appeal allowed Channel 9 to gazump the ABC and take away its hitherto traditional broadcast of the Commonwealth Games. This marked the beginning of the end of the ABC's financial capacity to compete

for major sporting events on television. As the current chairman of the ABC, this is a sad bit of history, but I felt worse at the time as the unsuccessful counsel for the ABC.

Many of Chief Justice Gleeson's judgments in the Supreme Court will stand the test of time. However, inevitably, it is the judgments in the High Court, as the court of final appeal, that will prove most influential in the decades to come. Pelly discusses many of the key cases on constitutional law – the corporations power, foreign affairs power, judicial power, the constitutional protection of political speech, the right to vote and one-off cases such as whether a British citizen has now to be treated as a foreigner. In addition there are numerous cases on the principles of statutory interpretation, particularly in the context of immigration appeals. There is also a wide range of criminal judgments on matters such as the principle of double jeopardy and the identification of miscarriages of justice. In the civil law there are important cases on the scope of negligence – restoring an appropriate focus on the personal responsibility of the injured. Further, the acute moral dilemmas of cases of 'wrongful birth' and 'wrongful death' have been resolved for purposes of Australian common law.

The story is filled out by references to Murray Gleeson's speeches. No one has ever articulated more forcefully or more effectively the social significance of the roles played by the profession and by the judiciary, in maintaining the rule of law and judicial independence. In addition, the book reflects the demands of leadership, particularly on issues which engaged public interest, such as the backlog of common law cases in the New South Wales Supreme Court, the suicide of David Yeldham, the judgment writing paralysis of Vince Bruce and the

allegations made by Senator Heffernan against Michael Kirby.

The most novel content of the book for many lawyers is the information Michael Pelly has been able to obtain about the internal workings of the High Court with respect to the process of judgment writing. There is a great deal of detail, not all of it edifying. One of the most revealing aspects of Murray Gleeson's character in this biography, albeit unintentionally revealing, is the fact that not one piece of this new information comes from him.

The life that is celebrated in this biography is not only a legal life. Scattered throughout the book are observations which reflect a major transition in Australian society. I refer to his Catholicism. This was his mother's but not his father's religion. Nor was it the religion of his wife Robyn, who is quoted in the book as saying that if her father had been alive at the time he would never have allowed her to marry a Catholic.

Murray Gleeson is quoted as saying that, as the first Catholic ever appointed as chief justice of New South Wales, he was gratified that no one thought that fact was worthy of comment. However, as Gough Whitlam told him at the time: 'Until recently nobody with your name could have been appointed to that job.'

Gough Whitlam would have had in mind the election of Philip Lynch as deputy leader of the Liberal Party in 1973, the first Catholic to hold such senior office in that party, regarded as remarkable at the time. One only has to take a cursory look at the Abbott Cabinet to realise how much things have changed.

This was one of the great transitions in Australian life. For over a century the schism between Catholics and Protestants was the basic division of Australian society – in politics, commerce, class,

education, marriage and every form of social intercourse. When Murray Gleeson graduated most of the significant law firms in Sydney had either never had a Catholic partner or had never had a Protestant partner. It was no accident that he found articles at Murphy and Maloney. I presume Freehill, Hollingdale and Page had a preference for Riverview boys at the time.

Nothing better reflects this social division than the fact that the police commissioner of New South Wales had long been alternatively a Catholic and a Mason, a practice that continued until the late 70s. Unlike the office of the governor, premier or chief justice, that of police commissioner was much too important to allow either group to monopolise it.

This all-pervasive, century-old division disappeared within a decade or two, without conscious effort and without a trace. It was a definitive transition of the same general character that occurred in the middle of the nineteenth century when the previous tectonic division of Australian society – whether or not you had been a convict or a descendant of convicts – just dissolved. Nothing indicates the Australian capacity for tolerance better than such peaceful, unremarked abolition of long-standing social conflict.

This schism is reflected in the song which, according to Pelly, Murray Gleeson led the family in singing on the drive from Pymble to visit his mother in Wingham. The song was by the English comedy

duo Flanders and Swann. It is not the one I remember – *The Hippopotamus Song* with its glorious refrain: ‘Mud, mud glorious mud’. The song was entitled *Misalliance* about two kinds of creeper – the honeysuckle, which spirals clockwise; and the bindweed, which spirals anticlockwise. Growing on either side of a door, according to the songwriter, the two kinds of creepers wanted to meet and get married. However,

To the Honeysuckle’s parents it came as a shock,

‘The Bindweeds,’ they cried, ‘are inferior stock!’

They’re uncultivated, of breeding bereft;

We twine to the right and they twine to the left.

The class-based distinction is clear in this passage. However, there is also a political message. Indeed class and politics were closely inter-twined throughout the Catholic/Protestant division era. When Murray Gleeson came to the Sydney Bar, his religion was a fundamental aspect of his career prospects. By the time he became chief justice of New South Wales it was just irrelevant.

In most nations in the world, divisions of this character fester for centuries. To the outsider they often appear as inane as the conflict triggered in Lilliput, as Gulliver recounts, between those who believe boiled eggs should be opened at the fat end and those committed to opening at the thin end. Murray’s career personifies the extraordinary Australian capacity for

peacefully dissolving tension.

For a person steeped in the principles of the common law, as Murray Gleeson was and is, his life in the law as an advocate and as a judge is, appropriately, analogous to the development of the common law, as manifest in the sequence of cases that constitutes the narrative structure of this biography.

As the great American Judge Learned Hand put it, in his review of Benjamin Cardozo’s book *The Nature of the Judicial Process*:

The ... structure of the common law ... stands as a monument slowly raised, like a coral reef, from the minute accretions of past individuals, of whom each built on the relics which his predecessors left, and in his turn left a foundation upon which his successors might work.¹

Murray Gleeson’s life and work – in the words of Judge Learned Hand, who shared Murray’s philosophy of judicial restraint – is such a ‘slowly raised monument’ built on the work of his predecessors and he has ‘left a foundation upon which his successors might work.’

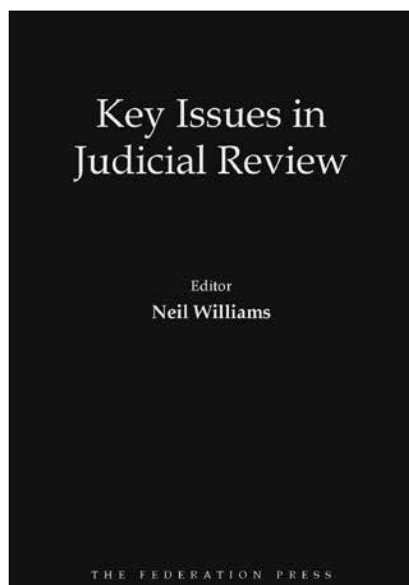
Both the monument and the foundation are wondrous to behold.

Endnotes

1. Book Review 35 Harv. L. Rev. [479, 479 (1922)]

Key Issues in Judicial Review

By Neil Williams (ed) | The Federation Press | 2014



This book comprises a collection of essays predominantly from members of the New South Wales Bar, as well as from judges and one from Peter Quiggan PSM, the first parliamentary counsel of the Office of Parliamentary Counsel. There are 13 essays in total. While one may be forgiven for thinking from the title of the work that it is a text or case book on judicial review, in fact it covers a variety of topics all of which bear upon and are important in a consideration of judicial review.

The book commences with reflections on the role of courts in public law by the Hon PA Keane. It is a helpful starting point for the rest of the work in that it reflects upon the nature and limits of judicial power, integral to an exercise of judicial review. Jeremy Kirk SC is the author of a chapter on the concept of jurisdictional error which will assist and interest administrative law practitioners and those with an academic interest in the topic alike. Among other aspects of the doctrine, the chapter examines privative clauses; and the significance of *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 in relation to the possible existence of constitutional limits protecting the supervisory jurisdiction of state supreme

courts to grant relief for jurisdictional error in respect of decisions made under state enactments.

The Hon John Basten's essay on judicial review of executive action considers the impact of the High Court's seminal decision in *Minister for Immigration and Citizenship v Li* [2013] HCA 18 and how that decision contributed to the development in the law of the issues of rationality, reasons and reasoning and procedural fairness.

The concept of satisfaction as a jurisdictional fact is examined by James Hutton in view of the High Court's decision in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611. Hutton's essay examines the implications of treating a decision-maker's state of satisfaction as a jurisdictional fact to be determined by the court, and highlights some of the limitations upon such an approach.

Theresa Baw has examined another aspect of *SZMDS*: the availability of illogicality or irrationality as a stand-alone ground of judicial review; and she argues that the High Court's decision in *Li* has made unreasonableness a more accessible ground of review which in turn has influenced the nature of the illogicality or irrationality ground of review.

Integral to the process of judicial review is the task of statutory construction. The essay by Peter Quiggin PSM covers both statutory interpretation and statute-drafting in a rare and interesting insight into both aspects of statutory construction from a drafter's perspective. The essay that follows Mr Quiggin's is a comment on his paper by Justice Nye Perram. This paper helpfully considers some differences in approaches, between drafters on the one hand, and judges and barristers on the other, to the task of statutory interpretation.

Stephen Lloyd SC and Houada Younan have authored an essay on partial invalidity of both legislative instruments and, significantly, administrative instruments and decisions. They examine the basic principles in relation to reading down legislative instruments, considering cases which have applied principles of distributive reading down, then they consider related principles of construction before examining severance in relation to administrative instruments and decisions.

The essay on evidence in public law cases by Neil Williams SC and Alan Shearer will interest administrative law practitioners, as it provides a practical and thorough consideration of issues associated with the admissibility of extrinsic evidence, starting from preliminary evidence gathering, and considering the admissibility of various types of evidence according to the ground of review of the decision under challenge.

In an essay entitled 'Nothing Like the Curate's Egg', the Hon Alan Robertson has examined the 15 main recommendations of the Administrative Review Council's Report *Federal Judicial Review in Australia* published by the Administrative Review Council in September 2012. Justice Robertson's review of the recommendations is thoughtful and raises many questions for consideration in respect of them. The essay also examines the suggestion that the ADJR Act be repealed and the consequences should such a proposal be carried out.

The book also contains an essay by Kristina Stern SC entitled 'The Rationale for the Grant of Relief by Way of Judicial Review and Potential Areas for Future Development' which examines these areas by reference to the English position. Geoffrey Kennett SC and David Thomas have presented an analysis of constitutional and administrative law

aspects of tax, an area of fertile ground which will no doubt be of interest to both public law and tax practitioners.

The book concludes with an essay by Richard Lancaster SC and Stephen Free on the relevancy grounds in environmental and administrative law. Rather than setting out the fundamentals

of the law in relation to this topic, the authors comment upon particular issues and trends in an impressive array of recent decisions, in environmental law specifically, and administrative law more generally.

Barristers who practise in administrative law, or who have an interest in public

law more generally, will find this work an interesting and useful addition to their libraries.

Reviewed by Victoria Brigden

Mutiny on the Bounty

White Star Publishers | 2006

Mutiny on the Bounty is a compilation of works by William Bligh and others.

Captain Bligh and the flora-laden HMS *Bounty* were returning to England from Tahiti when, early on the morning of 29 April 1789, one of the officers, Master's Mate Fletcher Christian, mutinied with most of the crew members. The captain and 18 loyal members were set adrift in a longboat, with minimal food, clothing and essential supplies.

Loyalty counted for nothing. Christian had been a beneficiary of Bligh's assistance during his brief naval career. Three voyages with Bligh, the last at a time when any voyage, anywhere in peacetime, was a treasured jewel. As Bligh's star rose, so too did that of Christian. As second in command, Christian was extended officers' courtesies. The night before mutiny he had been invited to the captain's table. The invitation was declined. It was later evidenced that Christian had been drinking until midnight before the mutiny: grog for courage. As Bligh was manhandled over the side, Christian (talking of past benefits from his friend) exclaimed 'That – Captain Bligh – is the thing; I am in hell, I am in hell.' (Bligh's own memory). A Bligh loyalist witness, the ship's carpenter,

at court martial deposed that Christian said to Bligh: 'Hold your tongue and I'll not hurt you; ...I have been in hell for weeks past with you.'

It was reported that Bligh expected high standards of performance from his pupil (Christian), and humiliated Christian publicly in pursuit of same. One mutineer supported this by later, post court martial evidence. Another expressed to the contrary, also by post court evidence. Another (a Bligh loyalist) evidenced (post court martial) that Bligh did not ill-treat Christian. All officers were obliged to do their duty and Bligh had shown great professional care for Christian's development.

All that was behind Bligh and Christian from early 29 April 1789. With compass, quadrant and extraordinary seamanship and leadership, as well as the iron self and imposed discipline of the crew, the ejected *Bounty* crew landed in West Timor on 14 June 1789. One of his crew had been tragically killed by native attack on the first and only landfall in the Tahitian Islands after their ejection. The senior sailor had sacrificed himself to enable the others to escape an attack by hostile natives.

First landfall thereafter was Restoration Island (named by Bligh for their restoration, it being also the anniversary of restoration of Charles II) off the New Holland (Queensland) coast (29 May 1789). The days spent off and on the land of New Holland had been restorative. They had secured much needed fresh food and water. They showed a self protecting respect of the Aboriginal occupants, with Bligh ensuring that his party kept well distanced and alert.

After arrival in Dutch territory, the Dutch convened an enquiry into the loss of the *Bounty*. No Dutch vessels or citizens were involved, but, just as piracy was (and is) regarded as a scourge for all seafaring nations to address, so was mutiny. It was noted that four remaining on *Bounty* '... are deserving of mercy, being detained against their inclinations'. Such must have been based on the evidence of Bligh and his loyalists, and is a tribute to the integrity of the evidence. All four were acquitted at later court martial.

Unfortunately, two of Bligh's loyalists died of illness despite best Dutch efforts.

Captain Bligh landed back in England on 2 January 1790.

The court martial

Of 25 mutineers, 10 were tried at court martial on 12 August 1792 before an admiral and 11 captains.

Bligh himself had sailed by July 1792, and was not present. His statement, dated 18 August 1789 and written while in Timor, comprised the charge. It was a clinical, succinct narrative, deviating to acknowledge the untimely death of the sailor in Tahiti, and concluding with thanks to Divine Providence. The captain's statement named only Christian as seizing him in his cabin (post court martial he did publicly name others). Thus it was the evidence of his loyalists that led to findings of guilt, or to acquittals. A transcript of evidence was made and included in this book.

The first witness was Bligh's second in command in the longboat. A clear account of his seizure and ejection into the longboat. Questioned by the court, he showed remarkable balance and fairness in his answers. If he did not know, he said so. It was very much in the common law way – including *res gestae* based hearsay, conversations in the presence or hearing of some of the accused, and opinion on what was meant by what was attested as having been said by the mutineers (including Christian), and by Bligh.

Then it was the turn of the prisoners to question the witness. No prisoner was represented by counsel. Some asked, others didn't. The evidence-in-chief and in response to questions from the court must have been intimidating in its matter of factness and apparent honesty. The full import of that momentous morning is laid bare.

Six others of the Bligh loyalists also gave evidence of that fateful morning. One, in response to a question of the court 'Who were...under arms?' gave 17

names, followed by 'were under arms at different times'. The court was thorough in questioning, and was seeking to sieve out the principals in the first and second degree, from the mere observers, or unwilling actors.

A midshipman, probably in his mid teens during the mutiny, deposed as to events. Asked by a prisoner 'Do you remember calling on me to assist to retake his Majesty's ship?'

Answer: I have a faint remembrance of a circumstance of that nature.'

Court: Relate it.

A. It is so faint I can hardly remember it.

Court: Relate it.

And again later in the hapless junior officer's best attempts, there was a series of questions about 'your opinion' on whether particular *Bounty* members were being detained against their will. He named two, who were later acquitted. The midshipman was later promoted to lieutenant and was aboard HMS *Pandora*.

The inciseness of the court calls to mind fictional court martial scenes. From the Hornblower series. From *The Caine Mutiny*. Contra, the laziness of the court as depicted in *Breaker Morant*.

Another young midshipman was convicted on the evidence of his being obviously closely associated with Christian on the mutiny morning; and enjoying a joke with Christian. This was in the face of his own statement in evidence – impliedly, that he was detained by the mutineers. He was condemned to hang but granted mercy and pardoned in November 1792. Perhaps the evidence that he had refused to drink (with fellow mutineers) the rum ration ordered by Christian saved him. The same prisoner had taken the extraordinary (if not brazen and astonishing) step of writing to Bligh's

wife whilst awaiting court martial, hoping for 'an equitable tribunal to plead' his innocence. He had apparently known her before sailing on the *Bounty*. He had left her with power of attorney over his possessions. Following his pardon he wrote to the press alluding to the abuse by Bligh of Christian, and as to Christian's 'most worthy character'.

One prisoner was found to have no case to answer. He was not under arms and not assisting the mutineers. He assisted those ejected by putting equipment (incl a tool box) into the longboat. He wept when the longboat pulled away and asked that it be remembered he had no part in the mutiny.

One of those convicted and condemned to hang asked that the former (upon his acquittal) be allowed to give evidence for the latter. Denied. Judges reconsidered after the latter found guilty and condemned to death. The court concluded that it should have allowed the former to give evidence for the latter. Acquitted the latter. The latter was extraordinarily fortunate, because evidence was given by one witness of his being armed; two others did not attest that he was armed. Enough for a retrospective reasonable doubt. The versatility of the court's process is noteworthy, revisiting a ruling on procedure.

The fourth acquitted was not under arms and was observed to have assisted with readying the long boat.

The three convicted, condemned (no mercy commended), and hanged, were all evidenced to be under arms. It was attested that one of the three had jeered at the longboat crew, taunting them to live on meager daily rations. Another of the three was observed to have accompanied (whilst armed) Christian down below en route to seizing Bligh. The third was

observed at the helm of *Bounty* after Bligh was seized, to arm himself upon seeing Bligh under arrest, and to be standing close guard over Bligh.

The final three witnesses were Captain Edwards (of HMS *Pandora*) and two of his lieutenants, deposing to the arrests of the mutineers. The first to surrender did so before *Pandora* anchored in Tahitian waters. He was one of the acquitted. Climbing on board a moving vessel is cooperative, and it was deposed that he was ready to give the arresting party 'any information'. Even in those days, an early confession helped.

Post court martial, Edward Christian (brother of Fletcher Christian) consulted a senior barrister. He then conducted his own enquiry as to his infamous brother's conduct, and mounted a determined public relations campaign to restore Fletcher's name. He published his enquiry and Captain Bligh published a reply. Much of the post court martial evidence referred to above emerged during this enquiry and post enquiry period.

What of those who were not tried? In 1810 an American vessel arrived at Pitcairn Island. They found the sole surviving member of the *Bounty* mutineers (of the party which stayed on the *Bounty* after it left Tahiti for Pitcairn). The American captain, and a later visiting Royal Navy captain, and others, reported differently. What the accounts have in common is that Christian and eight fellow mutineers had left Tahiti with native wives, and native men. On arriving at Pitcairn Island, HMS *Bounty*

was broken up in 1790. Settlement was established and cultivation pursued. A killing spree by native men left four mutineers only alive. One later suicided under the effects of newly distilled liquor. One was executed by his fellow mutineers for behaviour (interfering with a native woman contrary to her native husband's preference) that threatened the harmony necessary for survival of the settlement.

One of the two Pitcairn survivors died of natural causes, leaving one survivor as patriarch of several women and children. Population circa 35 in 1810. The community was supported by its own agriculture.

He was alive in 1814 when a British warship visited. He divulged his identity as a *Bounty* mutineer, but gave a false name (Adams). He was not arrested. The captain described him as an elderly man (in fact he was in his late 40s), of exemplary conduct in leading the island community, which spoke English and practised the Christian faith. He was extraordinarily fortunate that the British captain was most impressed by the community and its governance. A fine example of a public officer with the power of arrest exercising his discretion and leaving the suspect a free man. Nor did the captain proceed by way of summons. Moreover, the community was supplied with some comforts from the Royal Navy vessel prior to its departure. Adams's gravestone marks his death on Pitcairn Island.

Had he been arrested and court martialled he may well have been hanged. He

admitted in his journal to standing guard over Captain Bligh, despite his initial rejection of the mutiny. He was the only mutineer to die of natural causes, happy in the South Pacific.

Telling, and ironic, words were recorded by an anonymous writer in this book. 'O happy people...in your sequestered state...May...no hoary proficient in swinish sensuality rob you of that innocence and simplicity which it is peculiarly your present lot to enjoy!' We now know that Pitcairn males degenerated into sexual predators.

Fourteen of the *Bounty* crew were located in Tahiti and removed by HMS *Pandora* in 1791. Four were drowned when *Pandora* sunk off the Queensland coast on 29 August 1791. There was no requirement to take prisoners to the nearest police station. They were on board during a three month search for *Bounty* prior to the ill-fated return voyage. Thirty-one of *Pandora's* crew also drowned. It was the 10 alleged mutineer survivors who eventually faced court martial.

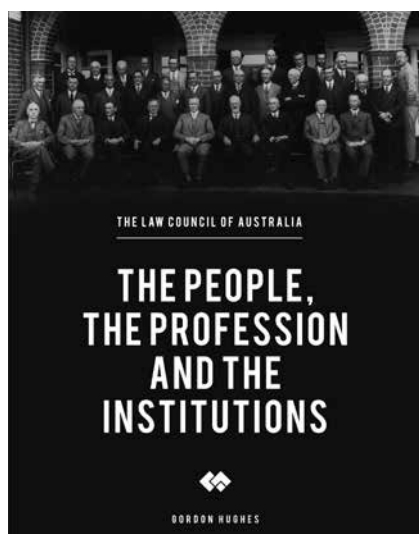
Of the remaining two *Bounty* crew, one was killed in Tahiti by a fellow mutineer (who had been made a chief) who was then himself killed by natives.

Was Bligh excessively strict? Recent literature suggests that Captain Cook was stricter. Interestingly, Bligh had served under Cook. The key, on balance, is the lack of character of Fletcher Christian.

Reviewed by Christopher Ryan

The Law Council of Australia: The People, the Profession and the Institutions

By Gordon Hughes | Halstead Press | 2013



This book traces the history and operations of the Law Council of Australia from its inception in 1933 to the present day in commendable detail, against the broader backdrop of Australian legal and political history.

Dr Hughes describes the social and political landscape of Australia in the early 1930s, arguing that in a climate of political upheaval (with every government in Australia changing between 1931 and 1934) and high unemployment in the aftermath of the Great Depression, the legal profession ‘demonstrated a reassuring degree of stability and leadership’ (at p.26). By 1933 there was a stable judiciary, three federal courts, a Supreme Court in each state, four long-established law schools, a number of law firms in the capital cities which were the forebears of today’s large firms, and a well-established independent bar in each of Sydney, Melbourne and Brisbane. By 1927, it had been observed that the legal profession was one of the few professions or businesses in Australia without a federal organisation of some kind. Dr Hughes explains that it was felt that such an association would promote a united profession throughout Australia, at a

...the work goes beyond a strict review of the structure and work of the Law Council itself to outline the history and development of many aspects of the modern legal profession in Australia.

time when an enhanced sense of national identity arising from the First World War and an enhanced social conscience following the Great Depression had just come into existence.

As one might expect, the book outlines the formation and structure of the Law Council, its contribution to practice regulation (for example in establishing uniform admission rules and requirements and uniform principles for assessing overseas qualifications) and its contribution to shaping law and policy in Australia. The work and major achievements of each ‘section’ of the Law Council is examined, and its response to broader political issues, for example, the council’s opposition to the ‘intervention’ by the federal government in Northern Territory Aboriginal communities in 2007.

However, the work goes beyond a strict review of the structure and work of the Law Council itself to outline the history and development of many aspects of the modern legal profession in Australia. The history of the federal courts and tribunals, each of Australia’s largest law firms, main law schools and the development of the independent bar in each state and territory are outlined. The book also examines developments which have contributed to change in the profession over time including the provision of legal aid, community legal centre services and pro bono representation, the introduction of corporate in-house counsel, the advent of alternative dispute resolution and the

internationalisation of legal practice.

Issues such as recruitment and retention of lawyers and equal opportunity in the workplace are also briefly analysed.

The book contains a number of historical points of interest, identifying the earliest lawyers in Australia, including the first convict transportees to Australia who were qualified legal practitioners, the first free legal practitioners, the first lawyers to fully complete legal training in Australia, the first native-born Australian admitted to practice as a solicitor and the first practitioners to be admitted as independent barristers.

The author is certainly well-qualified to write this work. In addition to being a partner of Ashurst Australia, Dr Hughes was president of the Law Institute of Victoria from 1992 to 1993, president of the Law Council of Australia in 1999, president of LAWASIA from 2003 to 2005, and has been the chair of the International Law Section of the Law Council of Australia since 2008.

This book will undoubtedly appeal to those with an interest in the development and work of the Law Council of Australia and its constituent bodies, but should have broader appeal to anyone with an interest in the evolution of, and personalities within, the Australian legal profession over the twentieth and twenty-first centuries.

Reviewed by Victoria Brigden

Hayes & Eburn Criminal Law and Procedure in NSW, 4th edition

By Michael Eburn et al | LexisNexis | 2013



The 4th edition of *Hayes and Eburn Criminal Law and Procedure in NSW* is a well set out, helpful and up-to-date textbook on criminal law. It contains the usual and mandatory topics that cover this area of law as well as a few chapters on criminal procedure and evidence.

Chapter 1 sets out the general principles of criminal law, including the important issue of elements of a crime. (I note that it is good to see that the authors have included the Commonwealth criminal law on the elements of a Commonwealth offence). There is also an interesting discussion on the lack of a Bill of Rights and the European Convention on Human Rights, as well as the issue of 'discretion'.

Chapter 2 deals with murder and includes an interesting extract from the Model Criminal Code Officers Committee about murder and manslaughter. Chapters 3 and 4 deal with the complex law of manslaughter and chapter 5 is headed 'Non fatal offences against the person' which essentially means the law of assault including grievous bodily harm.

Chapter 6 deals with sexual offences, including a separate section on child sexual assault and the special evidential and procedural rules applying in sexual assault trials. It is good to see a separate chapter on this area of law as it is becoming more and more complex for criminal law practitioners. Chapter 7 deals with stealing and other property offences; and Chapter 8 deals with the important concepts of insanity, voluntariness, automatism and intoxication.

Chapter 9 deals with some of the defences relied upon in criminal law, i.e., duress, necessity and self-defence; and chapter 10 deals with the ever difficult law of attempt, conspiracy and complicity, including the distinctions between the various forms of accessorial liability.

Chapters 11 and 12 deal with criminal procedure and evidence, and this includes police powers of investigation, arrest and the law of bail, including commentary on

the new *Bail Act 2013*. There is also the law relevant to procedure in a criminal trial, as well as summary matters, some of the basic law of sentencing; and appeals and some of the fundamental laws of evidence most relied upon in any criminal matter, i.e., the admissibility of confessions/admissions and the exclusion of evidence under Part 3.11 of the Evidence Act. The book concludes with an interesting discussion on the right to silence and of course the new s 89A of the Evidence Act.

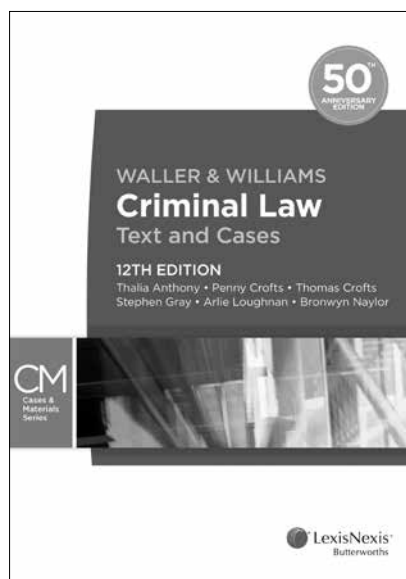
The commentary is interesting throughout and follows a logical order, which is easy to read. There are also extracts from cases as examples of the law, both the standard cases and examples of recent authority, which is most useful. In my view most of the basic issues relevant to the practice of criminal law are included, especially in relation to NSW crime. Although the book is obviously a textbook, with discussion questions at the end of each chapter suitable for the teaching of law, this book is still useful for criminal law practitioners.

I recommend this book as a useful addition to your criminal law library.

Reviewed by Caroline Dobraszczyk

Waller & Williams Criminal Law Text and Cases, 12th edition

By Thalia Anthony et al | LexisNexis | 2013



This is a very comprehensive criminal law textbook, in excess of 1,000 pages, mainly dealing with criminal law as it applies in NSW and Victoria.

Chapter 1 is headed 'Foundations' and deals with important topics such as 'What is a crime', the sources of the criminal law, how a crime can be committed (i.e., the

different mental elements and physical acts needed), who can commit a crime, and an introduction to punishment, discretion and appeals among other things. Chapter 2 deals with assault and related offences such as stalking and affray, as well as an interesting discussion about ritual circumcision and the limits of consent in contact sports and some surgery.

Chapter 3 deals with sexual offences, including child sexual assault and sexual servitude. Chapter 4 deals with murder and chapters 5 and 6 deal with manslaughter, including an interesting discussion on industrial manslaughter. Chapters 7 and 8 deal with property offences in NSW and Victoria; and chapter 9 discusses drug offences, dealing also with the relevant Commonwealth legislation in relation to the importation of narcotics. Chapters 10 and 11 then deal with the law of attempting to commit an offence and the law in relation to the extension of criminal liability

including the law of conspiracy.

Chapters 12 – 15 deal with the most common defences relied upon in criminal law including self defence, necessity, duress, mistake (and strict liability), mental impairment and intoxication.

As stated above, in my view the textbook is very comprehensive, covering all of the main areas associated with criminal law, although mainly concentrating on the state criminal laws of NSW and Victoria. The actual commentary is well written, easy to read and comprehensive. Most of the case law extracts are the standard authorities and there are some English decisions as well, but this is understandable given that the primary purpose of the book is for law students and therefore for teaching law.

This textbook would be useful and valuable to any criminal law practitioner.

Reviewed by Caroline Dobraszczyk

Crossword solution

