



THE JOURNAL OF THE NSW BAR ASSOCIATION | SUMMER 2016

barnews

INNOCENCE AND LIFE WITHOUT PAROLE IN LOUISIANA

PLUS

The short, sad life of Derek Bentley

Lawyers and politics:
The 2016 Hal Wootten Lecture

barnews

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

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Cover: Death row, Louisiana State Penitentiary at Angola, Louisiana. © Robin Nelson/ZUMA Press .



It is just as well, on occasion – and the last issue of the year is as good an occasion as any – to acknowledge the strengths of our justice system, rather than dwell on the problems. This issue includes a story which suggests that our system is avoiding some of the issues affecting other jurisdictions.

The story is by Bernadette O'Reilly, who travelled with a colleague to Louisiana earlier this year to volunteer at the Innocence Project. The Innocence Project works on freeing wrongfully convicted prisoners.

Louisiana's justice system is different to ours. The numbers tell the story. Bernadette O'Reilly recounts that Louisiana has an incarceration rate of 816 prisoners per 100,000 people, the highest such rate in the world. In contrast Russia has an incarceration rate of 492 prisoners per 100,000 people; Germany's is 78. Australia also has a reasonably high incarceration rate: 196 prisoners per 100,000 people, somewhat higher than, for example, China's rate of 119.

Why does Louisiana have such a high rate of incarceration? There seem to be various reasons. One is that Louisiana has 'three strikes and you're out' laws, which mean that a third felony conviction generally results in a life sentence. Another is that in some areas prisoners of limited means – most prisoners, in other words – have limited access to public defenders. In some instances local private lawyers are allocated to appear pro bono for accused persons according to some sort of roster. The problem with that system is that someone facing a very serious charge may end up being represented by a lawyer having no particular interest

in, or experience of, criminal law. And as Bernadette O'Reilly points out, there have also been problems with false confessions – that is, confessions given or extracted after inappropriate interrogation techniques. Juveniles or persons with intellectual disabilities are particularly vulnerable to this.

We tend to step back and look at our justice system only after something has gone wrong. And of course the system isn't perfect – among other things there have been notable wrongful convictions in this country as well. But, without for a minute becoming complacent, we can at least be glad that we have many safeguards and programs – including programs such as Just Reinvest NSW¹ – which help avoid at least some of the issues that have affected other jurisdictions. As Bernadette O'Reilly points out in her article:

Although mistakes do occur, we at least have a funded Legal Aid and Aboriginal Legal Service. We have procedures and policies, such as recording a suspect's interviews, recording ID parades, children's independent person present when interviewed, and recording of forensic procedures, that provide some safeguards against many of the issues we observed in Louisiana.

The problem of wrongful convictions is the subject of another story in this edition. Geoffrey Watson SC recounts the sad story of Derek Bentley, who was convicted of murdering a policeman in 1952 and executed. He was nineteen years old. After sustained efforts by his family, in 1998 the Court of Appeal finally determined that the outcome of his trial was unsafe and unanimously quashed his conviction.

Other articles in this issue include Bret Walker SC's 2016 Hal Wootten Lecture on 'Lawyers and politics'. Anthony McGrath SC explains the new National Model Gender Equitable Briefing Policy. Dominic Villa has contributed a very useful piece comparing the SILQ and BarBooks accounting software systems for barristers. And Advocata's column asks why some barristers receive briefs and some don't.

This being the last issue of the year it is timely to acknowledge the effort of all those on the *Bar News* committee and elsewhere who have worked so hard in putting *Bar News* together during 2016. Putting out three issues a year takes a great deal of work. We couldn't do it without hard-working committee members, contributors – especially regular contributors and columnists – and other members of the bar who have been kind enough to help out in various ways with putting articles together. Chris Winslow of the Bar Association deserves a special mention. Thanks to everyone involved. And best wishes to all *Bar News* readers for the Christmas break and the new year.

Jeremy Stoljar SC
Editor

Endnotes

1. www.justreinvest.org.au

Who's that next to John Kerr?

The Hon Keith Mason AC QC kindly sent *Bar News* this original photograph of the 10th Floor Wentworth dinner in mid-1974 to celebrate her Majesty's recent appointment of Sir John Kerr as governor-general on the recommendation of Gough Whitlam, prime minister.



Front row, L to R: John Foord, Justice Hal Wootten, Brian Hill, Trevor Morling QC, Keith Mason. The standing row: Justice Paul Toose, Chief Judge James Staunton QC, Michael Grove, Noel Hemmings, David Bennett, Kenneth Gee QC, Gough Whitlam QC, Sir John Kerr KCMG QC, David Shillington, Martin Einfeld, Master Henry (Bill) Cantor QC, Bertram Wright MBE QC, John Bryson, Marcel Pile QC, Judge Carl Shannon QC, Paul Webb.

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Still pursuing justice for innocent victims of motor accidents

By Noel Hutley SC



Following the recent Bar Council ballot, I was honoured to be re-elected as president by the Bar Council on 10 November. I congratulate all Executive office holders and Bar Councillors on their election and look forward to leading the Bar Association with their assistance in the coming year.

In my column in the last edition of *Bar News* I provided an update on the New South Wales Government's proposed CTP reforms. Since that time, the government has shelved its plans to legislate during 2016, and has indicated that there will be a further period of consultation with stakeholders, including the legal profession.

The government has indicated that it will be seeking input regarding the best mechanisms to control insurer super-profits and premiums and dispute resolution processes. The government has also indicated that some further refinement is also required to the design of the proposed 'fairness test' for people with lower severity injuries who may require additional assistance.

The Bar Association, along with other legal profession groups, has consistently pointed out the potential effect of the government's proposed reforms on the rights of the injured. Although our advocacy efforts may have had some effect on the government's decision to put its reforms on hold for the time being, there is no guarantee that the general direction of the proposals will alter radically and at this stage it seems likely that a legislative package will be introduced in the new year. The Bar Association will continue to advocate the rights of innocent victims of motor accidents to proper compensation and legal representation under our motor accidents scheme.

Since my last column, Philip Selth OAM has retired as the Bar Association's executive director. Since he commenced in the position on 10 November 1997, Philip has been an exemplary chief executive officer of our organisation. He has brought a wealth of experience to each Bar Council, to each member of the Executive and a fearless determination to give his honest opinion, no matter how apparently unpalatable that may have appeared at any particular time.

However, having discharged his duty once a decision has been adopted by the Bar Council or the Executive, he has with dedication, proceeded to implement it personally and through the staff of the association irrespective of his views.

In relation to our staff, I should say he has been instrumental in moulding the employees of the Bar Association into the loyal and effective body they are for the achievement of our aims and policies. The Bar Council recently

recognised Philip's contribution by awarding him life membership of this association.

Philip's successor, Greg Tolhurst, commenced in the position on 24 October. Greg was appointed after a comprehensive recruitment process and comes to the role with an extensive background in academia and commercial law. On behalf of the Bar Council I congratulate Greg on his appointment and wish him well in the position.

This edition of *Bar News* features Bret Walker SC's recent 2016 Hal Wootten lecture 'Lawyers and Politics' and a fascinating article regarding the Innocence Project in New Orleans by Bernadette O'Reilly, who worked there as a volunteer earlier this year. It also includes, among other things, a piece from the chair of the association's Diversity and Equality Committee, Anthony McGrath SC, analysing the implications of the Law Council's Gender Equitable Briefing policy for both solicitors and barristers and outlining the role of the Bar Association in its implementation, and an analysis of practice management software packages and their relative merits by Dominic Villa.

As the end of law term approaches I would like to wish all members a happy and relaxing Christmas break and a fulfilling New Year.

LETTER TO THE EDITOR

Sir,

I am now a 'Tassie barrister', erstwhile New South Wales Bar. Whereas most legal practitioners down here are admitted as both barrister and solicitor - a practice adopted due to the shortage of lawyers originally in this state - I can look back at the state of the New South Wales Bar and, I would imagine at those around Australia, and wonder at the lack of cultural diversity in our profession.

Where are the graduates and admissions from the vast population west of the CBD, I wonder? Many names, like that of Street, keep cropping up like perennials.

There is no such thing as 'one of us', I hope, in the mindset of the majority of the bar but it was said more than once to me when I began my own career in 1971 in Phillip Street.

It's important that class sterility be avoided. Very often, I imagine, it is simply a matter of economics for the 'westies' and vast numbers of foreign settlers in our fair land, that they either do not want their children to take the step as a barrister or are excluded by an unsympathetic establishment.

I am now 73 and I have not long to go in my race, but I counsel the future New South Wales Bar to seriously consider the need for the fresh blood that only new immigration can bring.

This is not a criticism, but rather a request based on my years here on Earth and as a barrister. Sponsor some students from the migrant areas - Fairfield, Blacktown, Penrith - and show that the profession is for *all* Australians.

The later judiciary will thank you for taking this lead.

Rod Skiller
Sandy Bay, Tasmania

Correction

An article in [2016] (Spring) *Bar News* regarding the appointment of the Hon Justice Stephen Burley reported that Noel Hutley SC spoke on behalf of the New South Wales Bar at the ceremonial welcome. That was incorrect. It was

Chrissa Loukas SC, treasurer of the Bar Association, who spoke on behalf of state and territory bars. *Bar News* apologises to Loukas SC for the mistake and regrets any confusion it might have caused.

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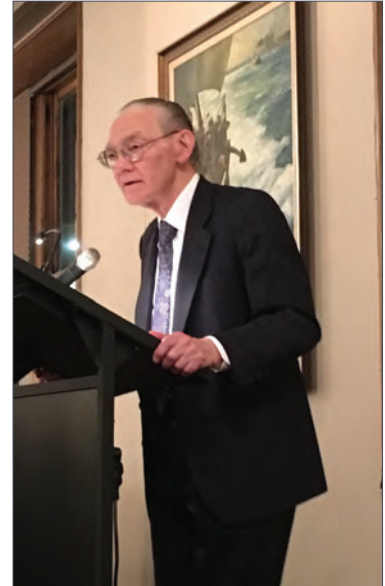
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Lionel Robberds AM QC: celebrating 50 years at the NSW Bar



L to R: The Hon Michael Kirby AC CMG, Lionel Robberds AM QC, Ian Barker QC, Irene Ryan and Dean Letcher QC



Lionel Robberds AM QC



Louise Goodchild, Elizabeth Welsh & Chris Simpson SC



Sandra and Lionel Robberds

On Friday, 16 September 2016 a function was held at the University Union and Schools Club to celebrate Lionel Robberds AM QC's 50th anniversary at the New South Wales Bar.

Speakers included Chris Simpson SC, master of ceremonies Tom Molomby SC and, of course, Mr Robberds himself. Tom Molomby relayed a message from Greg James QC, who was unable to attend. He recounted a number of tales accumulated during 50 years as a colleague and friend.

I remember Lionel's redoubtable efforts for the tenants in the building in Darlinghurst Road, Kings Cross, which included a retired professional wrestler and a witch. I remember at the bar being opposed to, and appearing with, Lionel. He ran his cases just as he played his squash. No matter how you hit it he returned every ball. Even my ingenuity still meant that at the end of the day I crawled home exhausted. I don't ever recall winning a case against Lionel.

Bar Practice Course 02/2016



Top row, L to R: David Turner, Emily Graham, David Palmer, Lucy McGovern, Stephen Ryan, Jonathan Michie, Michael Wells, Josh Brock, Brian Royce, Damien Beaufile

Middle row: Derek Wong, Luke Hammond, Daniel Habashy, Cameron Murphy, Alexander Djurdjevic, Declan Byrne, Vicky Boutas, Sonia Stewart, Cate Dodds, Armen Karlozian, Piotr Klank

Bottom Row: Anna Spies, Madeline Hall, Adele Carr, Dean Robinson, Madeleine Bridgett, Kay Marinos, Margaux Harris, Alton Chen, Joshua Beran, Jamie Ronalds



Madeline Hall, Cate Dodds, Lucy McGovern, Emily Graham, Vicky Boutas, Sonia Stewart

Madeleine Bridgett, Anna Spies, Adele Carr, Kay Marinos, Margaux Harris

Tedeschi QC snaps Bar Council in session

Mark Tedeschi AM QC captured Bar Council in action at its meeting on 6 October 2016, the final one attended by the long-serving executive director, Philip Selth OAM.



Kara Shead SC, Michael McHugh SC, Chrissa Loukas SC, Greg Antipas, David Bennett AO QC, Julia Lonergan SC, Catherine Gleeson, Andrew Bell SC, Arthur Moses SC, James Mack, Jennifer Pearce, Philip Selth OAM, Noel Hutley SC, Paresh Khandhar, Margaret Cunneen SC, Tim Game SC.



Clockwise: Bar Council in session. Jennifer Pearce and Philip Selth conferring with Noel Hutley SC; Arthur Moses SC; Noel Hutley, Philip Selth and Jennifer Pearce.

Procedural fairness and international treaty obligations

Emily Graham reports on *Minister for Immigration and Border Protection & Anor v SZSSJ* (S75/2016); *Minister for Immigration and Border Protection & Ors v SZTZI* (S76/2016) [2016] HCA 29; (2016) 333 ALR 653 (27 July 2016).

The High Court in a joint judgment of all seven members held that two former protection visa applicants had not been denied procedural fairness in an International Treaties Obligations Assessment (ITOA) process conducted by officers of the Department of Immigration and Border Protection (the department) under the *Migration Act 1958* (Cth) (the Act). The ITOA process was undertaken to assess the consequences of the publication of a document on the department's website that disclosed the identities of protection visa applicants (the data breach).

The respondents, in separate claims, sought declaratory and injunctive relief in the Federal Circuit Court (FCC) on the basis that they had been denied procedural fairness in the ITOA process. The Full Federal Court allowed each appeal, finding that the FCC had jurisdiction, that procedural fairness was required, and that the process was procedurally unfair. The minister appealed each decision to the High Court.

Issues for the High Court

The court identified three issues for determination in each appeal:¹

- Did the FCC have jurisdiction?
- Was procedural fairness required in the ITOA process?
- If so, was procedural fairness afforded?

Further, the court indicated that, to determine the questions posed it was necessary to characterise the ITOA process within the statutory framework.²

Factual background

SZSSJ and SZTZI arrived in Australia lawfully. SZSSJ, a Bangladeshi national, arrived under a student visa and SZTZI, a Chinese national, under a visitor's visa. They overstayed their visas and were in immigration detention when they applied for protection visas. At the time of the data breach, their respective applications had been refused. SZSSJ was awaiting removal from Australia, having exhausted avenues of review. Refusal of SZTZI's application for a protection visa had been affirmed on merits review.

Data breach and ITOA process

9,258 protection visa applicants in immigration detention had their identities disclosed by the data breach on 10 February 2014. The document remained online for 14 days.

The department informed those affected in early March 2014 and engaged KPMG to prepare a report on access to the

document. The department later provided an abridged version of the report that disclosed the number of times the document had been accessed and the number of Internet protocol (IP) addresses from which that access had originated. It did not disclose the IP addresses or give precise time of access.

The department conducted an ITOA process to assess the consequences of the data breach on Australia's international obligations – in particular, non-refoulement obligations – with respect to those affected.

The information disclosed was 'identifying information' that was protected from unauthorised access and disclosure under Pt 4A of the Act.

The data breach was serious.³ There was a risk that the document may have been accessed by 'those in other countries from whom applicants for protection visas claimed to fear persecution or other relevant harm' who may have 'become aware of the identities of applicants for protection visas in Australia'.⁴

Departmental officers conducting the ITOAs were instructed to assume that 'an applicant's personal information may have been accessed by authorities in the country in which the applicant feared persecution or other relevant harm'.⁵

Following the ITOA process, if the officer found that a non-refoulement obligation was engaged, the individual's case may be referred to the minister for a decision whether to exercise a non-compellable power to grant a visa (ss 195A and 417 of the Act) or to lift a bar to the making of an application for a visa (s 48B of the Act).

The ITOA process commenced on 30 September 2014 for SZSSJ and on 13 January 2015 for SZTZI.

SZSSJ and SZTZI claimed that procedural fairness required that they be provided 'all relevant information related to' the data breach, including the full KPMG report.

The court applied *Plaintiff M61/2010E*⁶ and *Plaintiff S10/2011*⁷ in considering the two-step decision-making process for exercising the non-compellable powers of the minister:

- i) a procedural decision of the minister to consider an exercise of the powers and
- ii) the substantive decision to exercise the power to grant the visa or lift the bar.

Based on the Full Federal Court's unchallenged factual finding that the minister had personally made a procedural decision to 'consider whether to exercise the powers conferred by ss 48B, 195A and 417 of the Act in respect of [those affected]'⁸, the

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court characterised the ITOA as 'a process undertaken by an officer of the department under and for the purposes of ss 48B, 195A and 417 of the Act [to assist the minister in making the substantive decision]'.⁹

The High Court

The court allowed each appeal. The court upheld the Full Federal Court's findings that:

- i) the FCC had jurisdiction to hear the matters, finding that s 476(2)(d) of the Act did not exclude jurisdiction and identifying the precise 'decision' alleged to be affected by jurisdictional error; and
- ii) the ITOA process was a process undertaken for the purpose of assisting the minister in considering an exercise of statutory powers, such that SZSSJ and SZTZI were owed procedural fairness because of an implied condition of procedural fairness in such an exercise of statutory power (considering and applying the court's decisions in *Plaintiff M61/2010E*¹⁰ and *Plaintiff S10/2011*¹¹), in circumstances where the conduct of the ITOA was apt to affect their interests in liberty by prolonging their immigration detention.

The Full Federal Court had held that the process was procedurally unfair on two bases:

- i) the process was not adequately explained to SZSSJ and SZTZI; and
- ii) the refusal to provide the unabridged KPMG report.

The Full Federal Court said that procedural fairness required the department to reveal 'all that it knows about its own disclosures'. However, the High Court ultimately held that the Full Federal Court had erred in finding that SZSSJ and SZTZI were denied procedural fairness in the ITOA process.

Jurisdiction of the FCC

Section 476(2)(d) of the Act removes the jurisdiction conferred on the FCC in respect of migration decisions that are 'privative clause decisions' or 'purported privative clause decisions', except those affected by jurisdictional error.¹²

The court considered in detail the operation of ss 474 and 476 of the Act. It held that s 474(3)(h) (which extends the meaning of 'decision') should not be read into s 474(7) and that, even if it could, it could not encompass conduct other than that of the minister.

Accordingly, the court held that the FCC's jurisdiction to hear a challenge to a departmental officer's conduct was not excluded by s 476(2)(d) of the Act.¹³

Procedural fairness owed

The court held that procedural fairness was required because the ITOA was a process undertaken by an officer of the department under and for the purposes of ss 48B, 195A and 417 of the Act. The court referred to the settled principle¹⁴ that statutes conferring an exercise of executive power that is apt to affect an interest of an individual is presumed to confer that power on condition that it is exercised in a manner that affords procedural fairness, unless clearly displaced in the statutory scheme. The court held that the interests of SZSSJ and SZTZI were affected by the ITOA process because it prolonged their detention, affecting their rights and interests to freedom from detention, so it was necessary to afford procedural fairness to those whose liberty was thus constrained.

Procedural fairness afforded

The court considered¹⁵ what is usually required to ensure an affected person has a reasonable opportunity to be heard as follows:¹⁶

Ordinarily, affording a reasonable opportunity to be heard in the exercise of a statutory power to conduct an inquiry requires that a person whose interest is apt to be affected be put on notice of: the nature and purpose of the inquiry; the issues to be considered in conducting the inquiry; and the nature and content of information that the repository of power undertaking the inquiry might take into account as a reason for coming to a conclusion adverse to the person. Ordinarily, there is no requirement that the person be notified of information which is in the possession of, or accessible to, the repository but which the repository has chosen not to take into account at all in the conduct of the inquiry. [footnotes omitted]

The court held that 'the circumstances of the data breach [did] not warrant a departure from those ordinary requirements'.¹⁷ In respect of giving an affected person reasonable opportunity to be heard, the court found that there is no requirement that the affected party be notified of information that is not taken into account nor that the department reveal 'all it knows' about the data breach.

The court examined the information that was provided to SZSSJ and SZTZI.¹⁸ The court found that they had been provided adequate information and opportunity to make submissions in respect of the ITOA process and to understand the nature of it. Further, the court found that procedural fairness did not require the department to provide the full unabridged report in circumstances where additional information would not 'advance their cases for engagement of Australia's non-

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refoulement obligations any further than the assumption already made in their favour [that personal information may have been accessed by authorities in Bangladesh and China].¹⁹ Accordingly, the court found that there had been no breach of procedural fairness in the ITOA process in respect of SZSSJ or SZTZI.

In *obiter*, the court also considered the application of s 197C of the Act²⁰ which was inserted into the Act after the data breach that relates to the powers of removal of an 'unlawful non-citizen' pursuant to s 198 of the Act.

Endnotes

1. At [39].
2. At [40] and [57].
3. At [5].
4. At [7].
5. At [10]. See also at [22] with regards to SZSSJ and at [26] in respect of SZTZI.
6. (2010) 243 CLR 319; [2010] HCA 41.
7. (2012) 246 CLR 636; [2012] HCA 31.
8. At [33]–[34] and see also [56]–[57].
9. At [56].
10. *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319; [2010] HCA 41.
11. *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636; [2012] HCA 31.
12. Citing *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476; [2003] HCA 2.
13. At [71]–[73].
14. At [75].
15. Citing *Lam – Re Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 162 [32].
16. At [83].
17. At [84].
18. See [86]–[92].
19. At [92].
20. At [14]–[16].

Substituted verdicts and admissibility of evidence from an unavailable witness

Helen Roberts reports on *Sio v The Queen* [2016] HCA 32; 90 ALJR 963.

Introduction

This appeal raised two issues:

- Whether the appellant's conviction for armed robbery with wounding was inconsistent with his acquittal on the charge of murder, and if so, whether a substitute verdict should be entered; and
- The proper application of s 65(2)(d) of the *Evidence Act 1995* (NSW) in the circumstances of the case.

The facts and course of the trial

The appellant, Daniel Sio, drove Mr Filihia to a brothel in Clyde, Sydney. Also present in the front seat was a Ms Coffson. Mr Filihia entered the brothel alone, armed with a knife, intending to commit robbery. During an altercation Mr Filihia stabbed Mr Gaudry, who later died from his wounds. Mr Filihia stole cash from Mr Gaudry and left the brothel, running past Mr Sio's car. Mr Sio caught up with and collected Mr Filihia, and accelerated away from the scene. Both offenders were apprehended by police shortly afterwards.

Mr Sio was charged with the murder of Mr Gaudry¹ and, in the alternative, with armed robbery with wounding.² The Crown case was one of constructive murder by way of a joint criminal enterprise to commit armed robbery with foresight of the

possibility of wounding by use of the knife by Mr Filihia.³ The Crown case of armed robbery with wounding was put on the basis of joint criminal enterprise to commit armed robbery with foresight of the possibility of the use of the knife. Following a trial by jury, Mr Sio was acquitted of the murder but convicted of armed robbery with wounding.

The admissibility of out-of-court representations of an unavailable accomplice

Mr Filihia participated in an Electronically Recorded Interview with Suspected Person (ERISP). He said that there was another man driving the car, who had provided the knife. Initially he referred to him as 'Jacob' but also 'Dan'. In a later statement, Mr Filihia said the other man's real name was 'Dan' or 'Danny'; that 'Dan' had 'put him up to' robbing the brothel; that 'Dan' had provided the knife; and that 'Dan' had driven him to the brothel. Mr Filihia omitted any reference to Ms Coffson's presence in the car. He selected a photograph of the appellant from a photo array procedure, which was also electronically recorded.

At the trial Mr Filihia was called to give evidence but refused to answer any questions. The Crown then sought to tender his statements pursuant to s 65(2)(d) of the *Evidence Act 1995* (NSW) ('the Evidence Act'), which provides for the admission

Helen Roberts, 'Substituted verdicts and admissibility of evidence from an unavailable witness'

of a previous representation of a witness who is not available, if the court is satisfied the representation was:

- against the interests of the person who made it at the time it was made; and
- made in circumstances that make it likely that the representation is reliable.

It was accepted that Mr Filihia was 'unavailable' within the definition provided by the Evidence Act, and that the representations made by Filihia were against his interests. The trial judge held it was likely that the representation was reliable, taking into account the timing of the interview, the forthcoming nature of the answers and the apparently unrehearsed nature of Mr Filihia's responses. The Court of Criminal Appeal upheld the correctness of this ruling.

The High Court⁴ held that the Court of Criminal Appeal erred by considering the question of likely reliability by reference to the totality of Mr Filihia's statements, rather than focusing upon the representation of the particular fact sought to be proved.⁵ The court said:⁶

It is no light thing to admit a hearsay statement inculcating an accused. Where s 65 is successfully invoked by the prosecution, the accused will have no opportunity to cross-examine the maker of the statement with a view to undermining the inculpatory assertion ...

The serious consequences of the successful invocation of s 65(2)(d) emphasise the need for compliance with the conditions of admissibility prescribed by the section. The focus demanded by the language of s 65 is inconsistent with the impressionistic evaluation involved in the compendious approach adopted by the Court of Criminal Appeal. The language of the statute assumes the identification of each material fact to be proved by a hearsay statement tendered in reliance on s 65 and the application of the section to that statement ... The court found that Mr Filihia's assertions that Mr Sio gave him the knife and put him up to the robbery were made in circumstances that were plainly apt to minimise his culpability and maximise that of Mr Sio.⁷ It was held that it was not open to the trial judge to be positively satisfied of the likely reliability of Mr Filihia's assertion that Mr Sio gave him the knife by reference to the circumstances in which that assertion was made. Accordingly, the High Court held that the evidence should not have been admitted.⁸

The elements of the offences and substitution of verdicts

The jury was directed that in order to convict on murder, they

must be satisfied that Mr Sio participated in a joint criminal enterprise of armed robbery with Mr Filihia, and that Mr Sio foresaw the possibility that the victim might be wounded by the use of a knife. With respect to the armed robbery with wounding, the jury was directed that they must be satisfied that Mr Sio participated in a joint criminal enterprise of armed robbery with Mr Filiha. The respondent accepted that the directions regarding the latter offence erroneously omitted reference to the foresight of wounding element of the armed robbery with wounding charge. Had such a direction been given, there would have been a complete coincidence of the elements in issue for the jury in relation to both charges.⁹

In the High Court, the respondent accepted that this misdirection meant that the appeal must be allowed and that the conviction for armed robbery with wounding must be quashed. The court held that no new trial for an armed robbery with wounding could be ordered because such a course would impermissibly traverse the verdict of acquittal on the charge of murder.¹⁰

The court then considered the substitution of a verdict for an offence of armed robbery pursuant to s 7(2) of the *Criminal Appeal Act 1912* (NSW). In dealing with the question of a substituted verdict, the court confirmed the correctness of *Calabria v The Queen*¹¹ and *Spies v The Queen*¹², establishing that the power of the court to substitute a verdict is not confined to offences alleged on the trial indictment but also applies to offences for which the appellant could have been found guilty on the basis that the elements were necessarily subsumed within the offence of which the appellant was found guilty.¹³ Armed robbery was such an offence, however, in view of the conclusion reached by the court as to the admissibility of the evidence of Mr Filihia, a substituted verdict was not available and the court instead ordered a new trial on a charge of armed robbery.¹⁴

Endnotes

1. *Crimes Act 1900* (NSW), s 18(1)(a).
2. *Crimes Act 1900* (NSW), s 98.
3. Pursuant to the doctrine of extended joint criminal enterprise enunciated in *McAuliffe v The Queen* (1995) 183 CLR 108; [1995] HCA 37.
4. French CJ, Bell, Gageler, Keane and Gordon JJ.
5. At [58]–[59].
6. At [60]–[61].
7. At [68].
8. At [73].
9. At [27].
10. At [76].
11. (1983) 151 CLR 670; [1983] HCA 33.
12. (2000) 201 CLR 603; [2000] HCA 43.
13. At [43]–[44].
14. At [84].

Extension of time

Daniel Habashy reports on *Prince Alfred College Incorporated v ADC* [2016] HCA 37.

The respondent was sexually abused in 1962 by a housemaster employed at the time by a boarding school, Prince Alfred College (PAC). He commenced proceedings in the Supreme Court of South Australia on 4 December 2008 against PAC, claiming that it was liable in damages to him for breach of its duty of care, breach of a non-delegable duty of care, and that it was vicariously liable for the wrongful acts of the housemaster.

The two issues before the High Court were:

- whether the respondent should have an extension of time under the relevant South Australian limitation of actions legislation; and
- identification of the basis of the boarding school's liability, if any.

The primary judge found against the respondent on both questions. The Full Court found for the respondent on both questions. The High Court held an extension of time should not be granted, and that it was unnecessary, inappropriate and indeed not possible to decide liability.

Extension of time issue

At the time of the abuse in 1962, the respondent was 12 years old. Sections 36 and 45 of the *Limitation of Actions Act 1936* (SA), in effect, required the respondent to commence proceedings by 17 July 1973, three years after his 21st birthday.

However, s 48 confers on a court a discretion to extend the time prescribed, provided that (a) facts material to the action were not ascertained until after that time, and (b) the action is instituted within 12 months after those facts were ascertained.

The primary judge found that a fact material to the action, namely low prospects of future recovery from psychiatric injury as a result of the abuse, was only ascertained on 6 December 2007, after receipt of a report from the respondent's treating psychiatrist. However, the primary judge refused to exercise the discretion to extend the limitation period because the absence or death of critical witnesses, and the loss of documentary evidence, placed PAC at a marked disadvantage in defending the action.

On appeal, the Full Court held the primary judge's discretion miscarried, and granted an extension of time. Kourakis CJ and Gray J supported their conclusion by reference to the seriousness of the abuse, its effect on the respondent, the opinion in the psychiatrist's report of 6 December 2007, PAC's ability to have taken steps to preserve records within its control once it became aware of the abuse in the 1960s, PAC's failure to obtain a release

in return for compensation paid to the respondent in 1997, and the court's ability to address difficulties of proof of extent of injury by taking a conservative approach to the assessment of damages.

The High Court held that the Full Court should not have extended time under s 48(3).

French CJ, Kiefel, Bell, Keane and Nettle JJ emphasised the importance of two principles in considering the exercise of the discretion under s 48(3). First, the party seeking extension bears the onus of persuasion and must show good reason for exercising the discretion, taking into account the reasons for the limitation regime. Extension is not a presumptive entitlement arising upon satisfaction of the pre-conditions that enliven the discretion. Secondly, the purpose of the discretion is to ensure a fair trial. Loss of evidence which will tend against the prospects of a fair trial, will usually be fatal to an argument for extension, and is seldom outweighed by the justice of the plaintiff's claim.

The delay of over 11 years between the time of an apparent resolution of any claim against PAC and the commencement of proceedings meant that a fair trial on the merits was no longer possible, due to the loss of evidence. It was no answer to say that PAC should have retained records for so long after the expiration of the limitation period, particularly when the respondent made arrangements for compensation that suggested no proceedings would be brought against PAC.

Gageler and Gordon JJ arrived at the same conclusion. They reasoned that the deliberate decision of the respondent to bring an action against the housemaster personally, but enter an arrangement with PAC that was to resolve the issues between them, and then, after a delay of 11 years, to change his mind and institute proceedings against PAC, demonstrated that it was wrong to extend the time. They did not base their conclusion on loss of evidence.

Liability issue

The High Court did not decide the question of liability, holding that it was inappropriate and not possible to do so, but provided some guidance about the proper approach for determining questions of vicarious liability for intentional wrongdoing. The key paragraphs are [80]–[85] of the judgment of the plurality.

The fact that a wrongful act is a criminal offence does not preclude the possibility of vicarious liability. It is possible for a criminal offence to be an act for which the apparent performance of employment provides the occasion.

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The High Court did not decide the question of liability, holding that it was inappropriate and not possible to do so, but provided some guidance about the proper approach for determining questions of vicarious liability for intentional wrongdoing.

Conversely, the fact that employment affords an opportunity for the commission of a wrongful act is not of itself a sufficient reason to attract vicarious liability. A wrongful act for which employment provides an opportunity may yet be entirely unconnected with the employment.

The role given to the employee and the nature of the employee's responsibilities may justify the conclusion that the employment not only provided an opportunity but also was the occasion

for the commission of the wrongful act. By way of example, it may be sufficient to hold an employer vicariously liable for a criminal act committed by an employee where, in the commission of that act, the employee used or took advantage of the position in which the employment placed the employee vis-à-vis the victim.

The 'relevant approach' is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the 'occasion' for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim. Where, in such circumstances, the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable.

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Jury service – whose right?

Glenn Fredericks reports on *Lyons v Queensland* [2016] HCA 38

In *Lyons v Queensland* [2016] HCA 38 (Lyons), the High Court was required to consider whether the exclusion of a profoundly deaf person (Ms Lyons – the appellant) amounted to either direct or indirect discrimination under the *Anti-Discrimination Act 1991* (Qld) (the AD Act). The court held that it did not.¹

Background

Ms Lyons was sent a notice informing her that she was on the list of prospective jurors. Ms Lyons completed and returned a questionnaire included with the notice, but did not write anything on the questionnaire to suggest that she was not qualified for jury service. Ms Lyons was then summoned to attend for jury service at Ipswich District Court. On receiving the summons, Ms Lyons wrote to the Ipswich Courthouse advising that she was deaf and would require the service of two Auslan interpreters in order to serve on the jury. Ms Lyons was then informed by the deputy-registrar of the Ipswich District Court Registry that she would not 'be able to perform jury service' and that she would be excused from jury service.² Ms Lyons then made complaints, of both direct discrimination³ and indirect discrimination⁴ under the AD Act, to anti-discrimination commissioner. The complaint was not resolved and the complaint was referred to the Queensland Civil and Administrative Tribunal (QCAT). The tribunal dismissed the complaint.⁵ Ms Lyons then appealed to the Appeal Tribunal of QCAT⁶ and then to the Queensland Court of Appeal.⁷ Both of these appeals were unsuccessful.

Ms Lyons then applied for and was granted special leave to appeal to the High Court.

Prior to Ms Lyons's appeal to the Appeal Tribunal, the Supreme Court of Queensland had handed down a decision in a matter dealing with a similar issue, *Re Application by Sheriff (Qld)*.⁸ In that case, the court had determined that 'a deaf person who required the services of an Auslan interpreter was not eligible for jury service under s 4(3)(l) of the *Jury Act 1995* (Qld)'⁹ as the person could not perform the functions of a juror effectively. This was on the basis that:

- in the absence of legislative provision, the necessity to maintain the secrecy of jury deliberations does not permit an interpreter to be present in the jury room during the jury's retirement;¹
- the absence of a statutory provision to administer an oath or affirmation requiring an interpreter to keep the jury's deliberations secret reinforced this conclusion;¹¹ and

- while the person concerned could lip read, she had acknowledged that she would miss parts of the conversation. Accordingly there was a real risk that, without an interpreter, she would not be able to fully participate in jury room discussions.¹

The parties' submissions to the High Court

Ms Lyons's submission was that the Jury Act should be given an 'harmonious operation' with the AD Act and that the Jury Act requirements should be read as being subject to the requirements of the AD Act.¹ A key to this was section 10(5) of the AD Act. This provided that (for the purpose of determining a direct discrimination claim) in considering whether a person with an impairment had been treated less favourably, it was irrelevant that the person with an impairment may require special services or facilities. That is, the tribunal (and Courts) could not have regard to fact that Ms Lyons required an interpreter to be present in the jury room when considering whether she had been treated unfavourably. Ms Lyons submitted that this meant that the tribunal should not have used as a comparator a hearing person who needed assistance in the jury room.

Ms Lyons's alternative indirect discrimination case was that the deputy registrar imposed an unreasonable condition on her, with which she could not comply, namely, that she not have an interpreter in the Jury Room.¹⁴

Ms Lyons also submitted that a judge's power under section 54(1) of the Jury Act (to allow non-jurors to be present in the jury room) was sufficiently broad to allow leave to be given for an interpreter to be present in the jury room.¹⁵

The State of Queensland adopted the approach of the Supreme Court in *Re Application by Sheriff (Qld)* and also submitted that:¹

- Ms Lyons was excluded from being a juror as she could not perform the functions of a juror, including the hearing of oral evidence and participating in deliberations;
- She would not be able to give a 'true verdict' (as required by the oath administered to jurors) as her verdict would not be on her assessment of the evidence as that would be mediated by the Auslan interpreter; and
- The accuracy of any interpretation in the jury room could not be challenged by a party (in contrast to challenging the accuracy of an interpretation of a witness's evidence).

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The decision

The plurality adopted an approach which meant that it was not necessary for the court to decide the interaction of the two statutes. Rather, their Honours reached the view that a '13th person', such as an Auslan interpreter, was not permitted in the jury room by the Jury Act and that the presence of such a person would be 'an incurable irregularity' regardless of whether or not that person took part in the deliberations.¹⁷ Their Honours held that the power conferred by s 54(1) of the Jury Act to grant leave to a person to communicate with the jury while they are being kept together is not a power to permit a person to be present during the jury's deliberations.¹⁸

Their Honours regarded this as being reinforced by the fact that:

- There was no provision in the Jury Act to apply an oath to an interpreter, in contrast to the Oaths Act 1867 (Qld) which dealt with oaths administered to interpreters in judicial proceedings;¹⁹ and
- There would be no prohibition on a person seeking jury information from an interpreter, in contrast to a juror, although there would still be a prohibition on publishing it.²⁰
- Accordingly, the plurality held that, in the absence of specific legislative provision, Queensland law did not permit an Auslan interpreter to be present in the jury room. This meant that Ms Lyons was incapable of serving as a jury member and the deputy registrar was required by law to exclude her. The exercise of such power by the deputy registrar did not infringe the AD Act's prohibition on unlawful discrimination.²¹
- Gageler J took a similar approach. He did express some doubts as to the correctness of the submissions of the state that an inconsistency between the ADA Act and the Jury Act should be resolved in favour of the Jury Act. His Honour regarded this as sitting uncomfortably 'both with the enactment of the Jury Act against the background of s 101 of the ADA²² and with the avowed purpose of the Jury Act of ensuring that juries are more representative of

the community'.²³ His Honour preferred the view that, in excluding Ms Lyons, the deputy registrar had been giving effect to section 4(3) of the Jury Act.²⁴ This was not a matter of discretion but was objective and self-executing.²⁵ Accordingly, his Honour concluded that there was no direct discrimination as the reason for the action was to give effect to the definition under the Jury Act. Further, there could be no indirect discrimination as the imposition of a term could not be unreasonable where it was giving effect that definition.²⁶

Endnotes

1. Lyons [1] per French CJ, Bell, Keane and Nettle JJ, [41] per Gageler J.
2. Ibid at [7]–[10].
3. That she was a person with an attribute who was treated less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different (see AD Act section 10).
4. That she had an unreasonable term imposed on her with which she (having a particular attribute) was not able to comply and with which a higher proportion of people without the attribute were able to comply (see AD Act s11).
5. *Lyons v State of Queensland (No 2)* [2013] QCAT 731.
6. *Lyons v State of Queensland* [2014] QCATA 302.
7. *Lyons v State of Queensland* [2015] QCA 159.
8. (2014) 241 A Crim R 169. Possible issues arising under the AD Act were not considered in this matter.
9. *Lyons* at [22].
10. Ibid at [4], [6].
11. Ibid at [5].
12. Ibid at [8].
13. *Lyons* at [30].
14. Ibid at [25].
15. Ibid at [30].
16. Ibid at [32].
17. Ibid at [34].
18. Ibid at [34].
19. Ibid at [35].
20. Ibid at [36].
21. Ibid at [38].
22. Section 101 of the AD Act prohibits discrimination in the administration of state laws and programs.
23. *Lyons* at [51].
24. Section 4(3) of the Jury Act sets out who is not eligible for jury service.
25. *Lyons* at [50].
26. Ibid at [52].

Extended joint criminal enterprise

Lucy McGovern reports on *Miller v The Queen*; *Smith v The Queen*; *Presley v Director of Public Prosecutions (SA)* [2016] HCA 30.

Introduction

In *Miller v The Queen*; *Smith v The Queen*; *Presley v Director of Public Prosecutions (SA)* [2016] HCA 30 (*Miller*), the High Court held, by majority, that the principle of 'extended joint criminal enterprise' liability remains part of the common law in Australia.¹

The principle

The principle is enunciated in *McAuliffe v The Queen* (1995) 183 CLR 108 (*McAuliffe*) and, as French CJ, Kiefel, Bell, Nettle and Gordon JJ stated in their joint judgment, although of general application, is commonly applied to render a secondary offender guilty of murder.² In those circumstances, the offender must be a party to an agreement to commit a crime, must foresee that death or 'really serious bodily injury' might be intentionally occasioned by a co-offender and, with that awareness, continues to participate in the agreed criminal enterprise.³ It is only necessary for the party to foresee the possible commission of the incidental crime and continue to participate in the enterprise. The party need not agree to or intend its commission.

The principle has attracted criticism, amongst other reasons, for 'over-criminalising' in that it attaches criminal liability where moral culpability does not justify that liability.⁴ In *Clayton v The Queen* (2006) 81 ALJR 439 (*Clayton*), the High Court, by majority, previously declined to reopen *McAuliffe*, noting that the principle formed part of the common law in other countries.⁵ However, following the decision of the Supreme Court of the United Kingdom and the Privy Council in *R v Jogee*; *Ruddock v The Queen*⁶ (*Jogee*), which held that there was no place for joint criminal enterprise liability, the opportunity arose for the High Court to reconsider the principle in the present case.⁷ In *Jogee*, it was held that foresight was not sufficient; the proper fault element of liability was intention.⁸ That is, the secondary party must intend by participating in the enterprise to assist the principal to commit the incidental offence.

Facts and procedural history

Four men, Miller, Smith, Presley and Betts had been convicted of murder after a trial in the Supreme Court of South Australia.⁹ Before the altercation in which Betts fatally stabbed the deceased, the men had been drinking.

At trial, the jury was left to consider the liability for the murder on the basis of joint criminal enterprise or extended joint criminal enterprise.¹⁰ Miller, Smith, Presley and Betts unsuccessfully appealed to the South Australian Court of Criminal Appeal.¹¹ Miller, Smith and Presley argued the verdicts were unreasonable

and could not be supported by the evidence having regard to their states of intoxication.¹²

Miller sought, and was granted special leave, to appeal on the ground that the Court of Criminal Appeal erred in holding the convictions were capable of being supported by the evidence.¹³ Smith and Presley's applications for special leave were referred, with a view to being heard with Miller's application.¹⁴ Following the decision in *Jogee*, Miller, Smith and Presley sought, and were granted leave, to amend their grounds of appeal to contend the trial miscarried as the result of the issue of liability for the murder of the deceased being left for the jury's consideration on the basis of extended joint criminal enterprise principles.¹⁵

Joint judgment

French CJ, Kiefel, Bell, Nettle and Gordon JJ set out in detail the history of the principle and held that it was not appropriate for the High Court to abandon the concept of extended joint criminal enterprise liability and require proof of intention in line with *Jogee*.¹⁶

Their Honours stated that none of the submissions before the High Court had identified decided cases in which the principle had occasioned injustice.¹⁷ The joint judgment referred to *Clayton*, in which the High Court had found that the principle had not made criminal trials unduly complex, and said that no change should occur without examining the whole of the law with respect to secondary liability for crime.¹⁸ Tracking through legislative developments, the majority noted that Victoria had since abolished the common law of complicity and recommendations had been made to amend the law of complicity in New South Wales.¹⁹

Further, their Honours rejected the submission that *McAuliffe* occasioned public misunderstanding by allowing a form of 'guilt by association' or 'guilt by simple presence without more'.²⁰ In the instance of murder, the principle requires that the accused participates in the agreed criminal enterprise knowing that a party to it may commit murder. It is not simply 'foresight...that in executing the agreed criminal enterprise a person may die or suffer grievous bodily harm'.²¹ Their Honours accepted that there may be cases, albeit few, in which an accused contemplates the incidental offence, but dismisses it as a fanciful possibility. In those circumstances, the secondary party would not possess the requisite foresight.²²

French CJ, Kiefel, Bell, Nettle and Gordon JJ held that the Court of Criminal Appeal did not review the sufficiency of the evidence to sustain the verdict in relation to the issue of intoxication. They allowed the appeal on that basis and remitted

Lucy McGovern, 'Extended joint criminal enterprise'

each case to the Court of Criminal Appeal for determination on that ground.

Keane J concurred with the joint judgment and the reasons for maintaining the extended joint criminal enterprise doctrine, making some additional observations on the principle and policy underlining the reason for departing from the approach in *Jogee*.²³

Gageler J

Gageler J dissented as to whether the doctrine of extended joint criminal enterprise should be maintained. His Honour considered that the doctrine was anomalous and unjust and that *McAuliffe* should be reopened and overruled.²⁴ In his Honour's view, the doctrine had resulted in over-criminalisation.²⁵

Gageler J identified two predominate and, in his Honour's view, 'unanswerable' criticisms of the doctrine.²⁶ First, that there was a disconnect between criminal liability and moral culpability where a party is liable for a crime that the party foresaw but did not intend. Secondly, there was an anomaly in making criminal liability of the secondary party turn on mere foresight when the principal party's criminal liability turns on intention.²⁷

...there was an anomaly in making criminal liability of the secondary party turn on mere foresight when the principal party's criminal liability turns on intention.

In his Honour view, despite the 'troubling' outcome that overruling the doctrine would result in a legitimate sense of injustice in persons convicted on that ground, his Honour stated that it was better for the High Court to be 'ultimately right' than 'persistently wrong'.²⁸

Conclusion

Gageler J stated that application of the doctrine may seem acceptable where the group consists of three men, the weapon is a gun and the plan is to take co-ordinated action to rob a bank. However, the application becomes more troubling where the group consists of an indeterminate number of youths, the weapon is a knife or baseball bat and the plan is an evolving tacit

agreement to assault or to engage in affray.²⁹ One of the group may be prone to violence and may end up stabbing or hitting with intention to kill or cause grievous harm with the result that someone dies. Following *Miller*, it appears that courts will maintain that even if the other members of the group did not agree to that result, and did not intend it, each will be liable for murder if he or she foresaw the possibility that a participant would go beyond the agreed plan and would stab or hit with intent to kill or cause grievous harm.³⁰

Endnotes

1. French CJ, Kiefel, Bell, Nettle and Gordon JJ at [2]; Keane J concurring at [131]; Gageler J dissenting at [129].
2. *Miller* at [1].
3. *Miller* at [1].
4. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [2].
5. (2006) 81 ALJR 439 at 443 [18] per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ.
6. [2016] UKPC 7; UKSC 8; [2016] 2 WLR 681.
7. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [2].
8. *Jogee* at 702 [73] per Lord Hughes and Lord Toulson (Lord Neuberger, Lady Hale and Lord Thomas agreeing).
9. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [46].
10. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [46].
11. *R v Presley* (2015) 122 SASR 476 per Gray, Sulan and Blue JJ; *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [48].
12. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [48].
13. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [49].
14. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [49].
15. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [50].
16. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [43].
17. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [39].
18. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [40].
19. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [42].
20. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [45].
21. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [45].
22. *Miller* per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [44].
23. *Miller* per Keane J at [131].
24. *Miller* per Gageler J at [129].
25. *Miller* per Gageler J at [128].
26. *Miller* per Gageler J at [111] – [112].
27. *Miller* per Gageler J at [111].
28. *Miller* per Gageler J at [128].
29. *Miller* per Gageler J at [92].
30. *Miller* per Gageler J at [92].

Disqualification from entitlement to vote

Louise Hulmes reports on *Murphy & Anor v Electoral Commissioner & Anor* [2016] HCA 36.

Overview

On 12 May 2016, in answer to questions posed in a special case, the High Court held that certain provisions of the *Commonwealth Electoral Act 1918* (Cth) (the Act) are not invalid for inconsistency with the requirement in ss 7 and 24 of the Constitution that the parliament be 'directly chosen by the people'. On 5 September 2016, the High Court delivered its delayed reasons.

There were six questions stated by the parties in the special case and referred for consideration, with Question 2 being the central question in the challenge and therefore the focus of this case note:

Question 2

Are any or all of sections 94A(4), 95(4), 96(4), 102(4), 103A(5), 103B(5) and 118(5) of the *Commonwealth Electoral Act 1918* (Cth) contrary to ss 7 and 24 of the Constitution and therefore invalid?

Answer

No.

The judges of the High Court answered all six questions in the same form, for different reasons, in six judgments.¹

The impugned provisions and the relevant Constitutional provisions

Sections 94A(4), 95(4), 96(4), 102(4) and 103B(5) of the Act provide that a person's name must not be added to the Electoral Roll for a division during the period between 8.00pm on the day of the close of the rolls and the close of poll for the election (the suspension period). Sections 102(4) and 103A(5) provide that a claim for a transfer of enrolment must not be considered until after the end of the suspension period. Section 118(5) provides that a person's name must not be removed from the roll during the suspension period.

As Kiefel J noted,² the practical effect of the impugned provisions is that when a writ for a federal election issues, a person who is not enrolled has seven days within which to do so or they will not be on the roll and will not be able to vote. Similarly, a person who wishes to transfer their enrolment to another division has seven days within which to do so, otherwise they will not be able to vote in the division in which they live.

Sections 7 and 24 of the Constitution provide that the members of the Senate and the House of Representatives shall be directly chosen 'by the people of the state', in the case of the Senate and 'by the people of the Commonwealth', in the case of the House of Representatives.

The plaintiff's case

The plaintiffs submitted that the suspension period precluded people otherwise eligible to enrol and vote from doing so and produced an inaccurate and distorted roll. Based on the decisions of the High Court in *Roach v Electoral Commissioner*³ and *Rowe v Electoral Commissioner*,⁴ the plaintiffs submitted that:⁵

- a law which has the practical operation of effecting a legislative disqualification from what otherwise is the popular choice mandated by the Constitution is invalid unless it is for a substantial reason; and
- such a law will be for a substantial reason only if it is reasonably appropriate and adapted to serve an end which is consistent or compatible with the Constitutionally mandated system of representative government.

In *Roach*, the High Court held that legislation that disqualified people serving a sentence of imprisonment on the day of the federal election was invalid as it was contrary to ss 7 and 24 of the Constitution.

In *Rowe*, the High Court held by majority that amendments to the Act to remove the grace period (that is, to change the commencement point of the suspension period from seven days after the issue of writs to the day of issue of writs (and for transfers of enrolment, three days later)) were invalid.

The judgments

As noted above, six separate judgments were delivered. A majority of the High Court found that the plaintiffs could not establish that the impugned provisions amounted to a burden on the Constitutional mandate of popular choice and the High Court was unanimous in finding that, even if there was a relevant burden, it was justified by a substantial reason.

French CJ and Bell J noted that the impugned laws in this case were similar to the impugned laws in *Rowe* only to the extent that they both provided for suspension periods. The significant difference was that *Rowe* concerned laws which reduced existing opportunities for enrolment or transfer of enrolment prior to an election.⁶ The plaintiffs' approach depended on generalising the principles in *Rowe* and *Roach*.

French CJ and Bell J also considered whether the plaintiffs' argument that the proportionality approach articulated in *McCloy v New South Wales*⁷, in the context of the implied freedom of political communication, could be invoked the present case. They stated that the three considerations relevant to proportionality (namely, suitability, necessity and adequacy

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in balancing the law and the purpose it served) are capable of application to laws infringing a Constitutional guarantee, but were not appropriate in the present case. The present case was concerned with provisions reflecting long-standing limits on the times at which a qualified person could be registered on the roll; it was not a case about a law reducing the extent of the realisation of the Constitutional mandate.⁸

French CJ and Bell J concluded by noting that the impugned provisions do not become invalid because it is possible to identify alternative measures, using modern technology, that may extend opportunities for enrolment. The plaintiffs' premise that the suspension period reflects a burden on the Constitutional mandate of popular choice was not made out.⁹

Kiefel J inferred that the premise of the plaintiffs' argument was that legislation will not be valid unless it ensures the maximum number of people can vote at elections.¹⁰ However, Kiefel J stated that neither *Roach* nor *Rowe* was authority for that proposition.¹¹ Rather, *Roach* required that there be a substantial reason for provisions which effect disqualification from the entitlement to vote and that requirement would be satisfied if the means adopted were not disproportionate to the legitimate end they sought to achieve. After examining the provisions of the Act, Kiefel J found that the provisions for the closure of the roll had a rational connection to their purposes.¹²

Gageler J stated that the substantive question for judicial determination was whether the imposition of a cut-off time for enrolment was an exclusion for a substantial reason.¹³ Gageler J had reservations about the 'stylised propositions' advanced by the plaintiffs in support of their argument and stated that this highlighted the inappropriateness of attempting to apply such a form of proportionality testing.¹⁴ Gageler J stated that there was a substantial reason for the impugned provisions: to give contemporary expression to a standard incident of the traditional legislative scheme for the orderly conduct of national elections.¹⁵

Keane J stated that the plaintiffs failed to identify a burden on the Constitutional mandate of choice by the people, stating that their case was 'no more than a complaint that better arrangements might be made to fulfil the mandate'.¹⁶ Keane J also noted that the Constitution looks to the parliament for the establishment of an electoral system in which the competing considerations are balanced by parliament; an election is not a single day event.¹⁷ In addition, Keane J expressly rejected the suggestion that the impugned laws, though valid when made, became invalid because of changes in technology and the circumstances in which the Act operates.¹⁸ Further, Keane J found that nothing in *Rowe* cast doubt upon the validity of the

suspension period moderated by the grace period in this case.¹⁹

Nettle J noted that the impugned provisions are calculated to persuade electors to comply with their obligations to enrol and to allow sufficient time to ensure the accuracy of the roll in advance of the election. Nettle J held that, taken as a whole, the means chosen to regulate elections are directed to achieving a greater degree of order and certainty which enhances the democratic process consistently with the system of representative government.²⁰ Nettle J noted that although alternative systems were available which might take less time and allow the roll to be kept open until closer to an election, there was no basis to infer that alternative systems are capable of achieving the same level of certainty and order as the system prescribed by the Act.²¹ There is a relatively broad discretion conferred on parliament to select the means to regulate elections and it is open for parliament to prefer the relative order and certainty of the Act's system.²²

Gordon J noted that the electoral system chosen by parliament has a detailed, coherent structure and includes practical and logical steps directed to the orderly and efficient conduct of elections.²³ Gordon J found that there was a critical difference between the implied freedom of political communication considered in *McCloy* and the issues in this case, in circumstances where parliament has a positive obligation to enact laws for an electoral system.²⁴ Finally, Gordon J held that the impugned provisions did not provide a relevant restriction on, or exclusion from, the franchise in this case²⁵ and that in any event, even if there was such a restriction or exclusion, the features of the Australian electoral system demonstrate that there is a substantial reason for the impugned provisions.²⁶

Endnotes

1. French CJ and Bell J at [6], Kiefel J at [44], Gageler J at [83], Keane J at [118], Nettle J at [257], Gordon J at [259].
2. Kiefel J at [46].
3. (2007) 233 CLR 162.
4. (2010) 243 CLR 1.
5. French CJ and Bell J at [22].
6. French CJ and Bell J at [25].
7. (2015) 325 ALR 15; [2015] HCA 34.
8. French CJ and Bell J at [39].
9. French CJ and Bell J at [42].
10. Kiefel J at [51].
11. Kiefel J at [58].
12. Kiefel J at [69].
13. Gageler J at [97].
14. Gageler J at [101].
15. Gageler J at [103].
16. Keane J at [181].
17. Keane J at [183]-[184].
18. Keane J at [194].
19. Keane J at [220].
20. Nettle J at [250].
21. Nettle J at [252].
22. Nettle J at [254].
23. Gordon J at [288].
24. Gordon J at [300]-[303].
25. Gordon J at [309].
26. Gordon J at [324].

SILQ v BarBooks

By Dominic Villa

Earlier this year a new practice management software package developed for barristers named BarBooks burst onto the scene, challenging the monopoly enjoyed by SILQ over many years. As more and more practice management is performed online and while mobile, it is time to compare BarBooks and SILQ.

BarBooks

As its name suggests, BarBooks is primarily an accounting program. In a nutshell, it allows you to record time, generate invoices from that time record, keep track of expenses and receipts, reconcile receipts and expenses with bank statements, and generate various financial and tax-related reports. BarBooks has been around for a little over 18 months, and has a modern, browser-style interface as a result.

BarBooks is available as a 'web app' which can be used in your browser, or as a download for Windows or Mac, from the BarBooks website (www.BarBooksaustralia.com). There is also a mobile version available for iOS devices. While the downloads are free, continued access beyond a fully-functional 14 day trial period requires a subscription which is available for \$72 per month (which includes the new BankRec feature), or \$720 (without BankRec) or \$864 (with BankRec) per year, or as a reader for \$180 (with BankRec) for the year. These prices are ex GST, although not identified as such until you reach the subscription page.

The single subscription provides access to a user's data using any of the available software formats on multiple devices. The data is stored locally on the user's device as well as on a server maintained by BarBooks, and synchronized across devices. Multiple users can also be given access to the user's data for no additional fee.

Getting started with BarBooks is very simple. You simply go to the website and click 'Register for a 14 day trial', enter an email address and a password and away you go. The registration process does not seek confirmation of your email or password, nor does it assess the strength of your password. Given that the data is stored and synchronized in 'the cloud', security is of the utmost importance.

Once the registration process is complete, you simply log in using the previously registered email address and password, and the software then presents you with a program-wide 'Preferences' pane consisting of two tabs: 'Profile' where you can enter your contact and banking details; and 'Rates' where you can enter the rates to be charged for various different items of work, and various other accounting details.

There are some quirky things about this Preferences window.

The 'Profile' tab prompts you for a title, but suggests only 'Mr/Mrs'. It prompts you for an ABN, but suggests the format '000 000 000', not recognising that an ABN has 11 digits. And unless you also include 'ABN', it will appear in documents generated using the default templates simply as the numbers. The 'Profile' tab also prompts you for a mobile number, which by default is given the non-mobile area code '02'. It also asks for a state and Country, without having a lookup table for the state, and without including Australia as the default Country.

The 'Rates' tab also has some quirks. It usefully presents you with a default GST/VAT option of 10 per cent, Invoice Payment Terms are 30 days, and the Accounting Methods is Cash, the Invoice Interest Rate is 0 per cent. It could more usefully default to the currently prevailing rate under the Uniform Law. However, where this tab is useful is that it allows you to create, during the sign-up process, default rates for all of the various different activities that one might charge a specific rate for. By default, it prompts for hourly, half-day and daily rates, a rate for directions/mentions and a rate for motions. You can add new activities, or delete any of the defaults.

One thing about the 'Rates' tab, however, is that it makes much more sense if you've seen the costs agreement template, and in a sense what is lacking from the initial set-up process in BarBooks is an explanation of why you are entering certain information, and how it will be used by BarBooks. And a word of warning: if you delete any of the default Rates options you will need to also amend the costs agreement template. BarBooks' templates do not seem to recognise when a field is blank (more on that later). And if you add additional Rates options, they too will need to be added to the costs agreement template.

Rather than using 'Save' and 'Don't Save' buttons, BarBooks uses a Green Tick and a Red Cross (while they are buttons they don't have a border). This is fine if you are a mouse-user. However, if you tend to navigate and select using the keyboard then when you tab through to the Green Tick or the Red Cross there is no change of the background colour or dotted line to highlight the currently-selected button. Instead, there is a barely perceptible change of shade, so it is not always obvious where you have landed. On a similar note, every new dialogue box requires you to tab twice to move the cursor into the first text field, or use the mouse to do so. System-wide BarBooks needs to be made a little more keyboard-friendly.

Once you've completed the Preferences window, you are then presented with the BarBooks Dashboard. Half the window is occupied by the 'Trend' section which presents graphs visually displaying weekly, monthly and quarterly WIP. My jury is out as to whether this is likely to produce motivation, or induce

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depression. Underneath is an 'Overview' enabling the display of no less than 28 items of financial information at a frequency and for a period selected by the user. No doubt the developers thought this was a great idea. It's not. There is no way to select which of these items to display, although you do have the option of displaying GST inclusive or exclusive amounts only. The remainder of the Dashboard displays the 'Tasks' that have been entered into the system since a user-selected date. By default, that date is the current date. If you're working on a 13 inch laptop, you will need to scroll down to access this section, which is perhaps the only useful section of the Dashboard window.

By 'window' I really mean tabs. Apart from the Dashboard tab there is a tab for Matters, Invoices, Receipts, Expenses, Reports, Contacts, Templates, and BankRec. These tabs are the basic way of navigating through the different sections of BarBooks. There are no real menus to speak of.

Within each tab (other than the Dashboard) there are a number of recurring elements. There is a green button with a white + sign enabling you to create a new matter, invoice, receipt etc. On some of the tabs filters can be used so as to display only items of a particular description (for example, current matters or archived matters, unpaid or overdue invoices, billed and unbilled expenses), and further filtered to display items from all time, or the last 7, 30, 60 or 90 days. Strangely, you cannot filter items in the Invoices, Receipts or Expenses by reference to a particular date range or by reference to a financial year. That information can only be obtained by generating a report, or by using the filters in the Overview section of the Dashboard.

The Matters tab is where the day-to-day action happens. This tab displays a summary of each of the matters, listing the name, the individual instructing solicitor, the 'Date' (which is the date the matter was created), the 'Total Hours' (which is the total of the billed and unbilled activity that is charged by the hour, but does not include activity that is charged per item, such as attending court at your daily rate), 'Invoices Overdue' (which is the number of days the oldest invoice is overdue, and not the amount that is overdue), 'Invoices Outstanding' (which is all unpaid invoices, whether or not due), 'Unbilled Work' (which is both unbilled time and matter-specific expenses), and a 'Total'. When you click on the name of a matter, it brings up a further 4 tabs named 'Tasks', 'Disbursements', 'Invoices' and 'Receipts'. From here you can add new items of those descriptions, and see a summary of the item already generated in that particular matter. You also have the option of creating a 'New Matter Document' which enables you to produce

a 'Blank' document (essentially just a letterhead), a costs agreement, a variation of fees (to update a costs agreement) and a Statement of Outstanding Fees.

Creation of a new matter is a simple task. Clicking 'Add Matter' brings up a dialogue box consisting of two tabs: 'Details' to provide descriptive information about the matter and 'Rates' which allows for matter-specific rates to override the default rates inserted in the general Preferences. The Details tab also allows you to allocate a solicitor to the matter, and to add a new solicitor's contact details (and create a Firm contact as well).

Time recording is undertaken by going into the particular matter and clicking on 'Add Task', which brings up a dialogue box asking for a description (you will need to double tab into, or click on, the Description box...the curse of the missing cursor) and providing other options such as the 'Rate' (which is really the unit of calculation), the 'Rate Amount' (which is really the rate, prepopulated with the default amount but allowing for a task-specific override), whether or not apply a discount to the task, and also the task's 'Duration'. The 'Duration' is prompted in HH:MM format, but again the text input is somewhat clumsily executed (here, for a refreshing change, the keyboard has it over the mouse). Once you have created a task it appears in the tasks list for the particular matter, and will appear in the Tasks list in the Dashboard.

Areas where the 'Add Task' functionality could be improved is by allowing a particular Task to be duplicated, and having a lookup table for commonly-used descriptions. It is also somewhat limiting that you can only add a new task or create a new timer from within a particular matter. Commonly-executed commands such as creating a new task or a new timer really should be accessible wherever you are in the program. There really should be keyboard shortcuts to allow this to occur as well.

If the 'Rate' selected for the task is 'hourly' then a light grey clock appears on the right hand side of the entry which then enables you to start a timer for that task (confusingly, there is also a smaller blue clock next to the 'Duration' entry for each task, but this icon simply denotes that the 'Duration' entry is in fact a timed activity). Clicking on the light grey clock starts the timer and a counter appears at the top of the screen. There is a button that allows you to pause (which when clicked turns into a 'play' button to allow you to resume the timer) and a button that allows you to stop the timer. Once stopped, the timer automatically rounds up to the nearest 15 minutes (a default option that can be changed in the Matter Details to 6, 10 or

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20 minutes). The timer for a particular task can be restarted after it is stopped by clicking on the grey clock icon again, but it will restart from the rounded-up time. You can have multiple timers for different tasks open at the same time, but only 1 timer will be counting at any one time. Unfortunately, the tasks list for a particular matter does not indicate which timers are open (whether counting or paused), and at the time of review there is no central location where all timers across all matters can be operated. However, in an update that will go live while this article is being published the timer feature is to be updated so that multiple timers will be displayed.

Creating invoices is relatively straightforward. You simply go to the particular matter, click on the Invoices tab, and then click on 'Add Invoice'. You are then given the option of an 'Interest' or a 'Regular' Invoice (curiously the Interest invoice is first in the list and one wonders whether, given the relative infrequency with which most people would generate an interest invoice, this simply creates an additional unnecessary step in the process). This then brings up a dialog box allowing you to select the tasks you want to invoice (by default all unbilled tasks are selected – there is no Select All or Deselect All option). The dialogue box then becomes slightly confusing. The usual Green Tick to save is now a Green Arrow which you need to click on to tab through the options of selecting outstanding disbursements, applying a discount and finally to select the invoice template. The pop-up for this process uses such a small part of the screen that one wonders why all of these options couldn't appear in a single tab. Ultimately, when you then click on the Green Tick (which has reappeared) BarBooks will then generate an invoice in Microsoft Word and either open it (Windows) or place it in your Downloads folder (Mac). The process is fairly straightforward. However....

Remember those pesky timers? There's a bit of a glitch when generating invoices while timers are open. If a timer is running then it will not allow you to invoice the matter until the timer has been stopped. It will generate an invoice while there are timers for the matter that are open, but paused. However, when it generates the invoice it does not round those timers up to the nearest 15 minutes (as it would if they were stopped) but will record on the invoice the actual time and charge according to the elapsed time not the rounded up time.

The templates that come with BarBooks are not pretty, but they can be relatively easily amended and reformatted, and the process for doing so is quite intuitive. For example, the default letterhead is in the following format:

Barrister Name
12 345 345 345 | DX 123 Sydney
T 1234 5678 | F 9876 5432 | barristername@gmail.com
Old Chambers | 180 Phillip Street, , Sydney 2000, NSW

The double comma in the address line is an artefact of the fact that no text was input into the 'Street Line 2' in the preferences. It does not, by default, identify the ABN as an ABN. There is no mobile phone number (although asked for in the initial Preferences setup), and no website (which is not asked for during initial setup). The simple workaround is to modify the BarBooks templates so that the letterhead information is manually but permanently part of the template, rather than pulling in the details from the Preferences using field codes everytime a document was generated. BarBooks will also take your existing template documents and import them into BarBooks for you.

While the layout of some of the documents leaves a lot to be desired (the costs agreement is seven pages of mostly single-spaced text with no space between paragraphs) the content itself is comprehensive. The costs agreement contains a detailed set of provisions with reference to both the 2004 Legal Profession Act and the new Uniform Law. Similarly, invoices include text relating to the payment of interest and information about a client's rights to have costs assessed. A few glitches remain, however. The invoices state that the 'fees are calculated in accordance with the costs agreement dated' which refers to the date of the original costs agreement, but does not take into account a subsequent Variation of Fees. The Interest Invoice simply states the amount of interest owing, with no detail whatsoever of the basis upon which the interest has been calculated.

Interest is an area where both BarBooks and SILQ fail to deliver. In BarBooks there is only one place to select the interest rate, and that is in the general Rates tab in the BarBooks preferences. Effectively, in order to calculate interest on an unpaid invoice it is necessary to determine what is the applicable rate of interest (ie the Cash Rate Target plus two per cent as at the date of the issue of the relevant tax invoice), change the interest rate in the Rates tab in the general Preferences, and then generate the Interest Invoice. There is no lookup table of interest rates and effective dates that can be added to from time to time so that BarBooks can simply calculate interest by reference to the date of issue of the unpaid invoice. And the only way to calculate interest is to generate an interest invoice within BarBooks (it

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creates an invoice record in BarBooks, although it does not automatically create an invoice document).

The amount generated by the Interest Invoice cannot be readily verified without doing the calculation manually. Unfortunately, BarBooks does not tell you for how many days the invoice is unpaid. It also does not tell you how the interest calculation has been performed. This is problematic from a compliance point of view. Previously BarBooks calculated interest on the GST-exclusive amount of the unpaid invoice and calculated interest from the due date (ie 30 days after the issue date). In an update that will go live while this article is being published, that calculation will be changed to calculate interest on the GST-inclusive amount of the unpaid invoice and will calculate interest from the date of issue of the invoice. Practitioners will do well to remember that the entitlement to charge interest does not arise, however, until the invoice has been unpaid for 30 days or more.

I was able to determine how the interest calculation was performed by contacting BarBooks Support. Permanently positioned at the bottom right of the screen is a pop-up that says 'Send us a message and we will respond to you shortly'. If you click on that you are then provided with an option to send BarBooks a message, or alternatively to ring the help desk directly. It does say that 'We will get back to you within 3 hours of sending a message through' which is a slight overstatement: the author's experience has been that this is correct from early morning until late evening, and while late night queries have not been answered 'within three hours of sending' that have been promptly responded to very early the next morning. The support team has been very responsive, both in terms of responding to questions about how to do things and also in terms of helping to fix glitches, of which there were a few. Support is available by sharing screens remotely, web chat, telephone, email and on-site.

BarBooks does not come with sample data to play around with, although it does have a demonstration account that can be used for this purpose if required. However, the software is intuitive and simple to use and so it does not take a great deal of effort to quickly generate data to test its functionality during the trial period.

Recognising that many barristers already use any number of packages to undertake their accounting and time recording, BarBooks will assist with transferring that data across. This is not just data from SILQ, but also any number of other popular accounting programs such as MYOB. BarBooks will personally visit chambers to download the data for you and take it back to BarBooks to import it into your account, or alternatively walk

you through the download process so it can be emailed to them. They will clean-up the existing data to make it compatible for import, and if it can't be imported will manually enter the existing data for you. Similarly, they will take your precedent costs agreements, invoices, letterhead etc and set them up as BarBooks-friendly templates.

In terms of setup and demonstration, this can also be done in person, at the user's desk and the training is quite flexible so that the pace changes depending on how competent (or not) the user is in relation to a particular task. Online support documentation is lacking, however, and while there are a limited number of video tutorials usability would be greatly improved by having online manuals available.

The BarBooks iOS app is extremely useful for recording time and expenses, which is likely to be the main reason to use the iOS app. It is very easy to create new time entries (including using timers), and to record disbursements and expenses. It does not report a significant amount of financial information about invoices and receipts (although some totals are provided), but it does report which tasks in a particular matter have been billed, and provides a total of outstanding invoices and unbilled tasks for a particular matter. Enabling access to more detailed invoice information would also be useful: at present while out on the road you can tell your solicitor how much is outstanding on a matter, but you can't tell them when a particular invoice was issued, or for how much.

BarBooks is in many respects a work in progress, and the developers have been very responsive to suggestions for improvement. New features are being added regularly. The latest significant feature added to BarBooks is the Bank Reconciliation feature. This allows BarBooks to directly communicate with your online banking, download your transactions from one or more accounts, and then within BarBooks perform a reconciliation with invoices and expenses. It is not automatic, but it is a huge time saver, and the process can be semi-automated by setting up rules telling BarBooks to automatically recognise transactions with particular characteristics. The reconciliation of those transactions must still be confirmed manually, which is no bad thing, and the time saved justifies the additional fee charged for access to this feature. BarBooks is also working on Xero integration to allow accountants to get direct feeds of the data.

SILQ

SILQ has been around since the early days of Windows XP, and it shows. It is not elegant. In many ways it is the classic design of a horse ending as a camel. The accretion of additional functionality over 14 years has resulted in a more complicated

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piece of software than it needs to be. It crashed on more than one occasion while being evaluated. Having said that, there can be no doubting that this is a powerful, and capable, piece of software.

It is only fair to make this observation at the outset: SILQ does many, many things that BarBooks does not attempt to do. For example, it allows for the creation of matter-specific chronologies. It also allows for the creation of a database of master authorities (including storage of a copy of the authority or a link to an online copy) which can then be used to generate matter-specific lists of authorities. It provides a document management system, automatically storing documents generated by SILQ in user-specified locations. It is also highly-customisable, a feature that is both a blessing and a curse.

The software itself is a standalone app available in Windows and Mac versions. There is a SILQ Plus version available for Windows only which allows multi-user access to the data (which requires a copy of Microsoft's SQL Server). While there is the option to purchase outright for \$2,400 this does not include ongoing upgrade and support which must be purchased separately. Most users opt for the subscription program, which is \$60 per month, or \$30 per month during the readers' year. These prices are exclusive of GST. There is also a mobile version of SILQ which requires SILQ Plus (which is Windows only at this time) and therefore was not able to be reviewed by the author.

Download and installation was relatively straightforward. The setup process is quite detailed, and the setup wizard provides useful commentary to the user as to how some of the information will be used. Some aspects of it seem a little unusual, however. There is no specific prompt for a mobile telephone number, nor a specific prompt for a direct line and a general chambers switch number (there is a prompt for 'Phone 1' and 'Phone 2', but no indication as to how they will be used in the default letterhead). The usual prompts to input rates are present, but the only default options are for an Hourly or a Daily Rate. Creating a rate for, say, a particular activity such as attending a mention or a directions hearing can only be done once the setup process is complete, and a matter has been created. You will then find the 'Define Global Activity/Sundry Rates' as an option when you try to create a new time entry from the Matter tab (more on that below). It cannot be done in the general preferences, is not particularly intuitive, and required a session with the helpdesk to work it out.

The setup process takes you through regional settings, something that seems unnecessary. It allows for the creation of 'Accounts' which will be familiar to users of MYOB, and SILQ is preloaded

with a set of accounts that most users will never need to alter. The next step in the process is setting interest rates. By default the 'Calculation Method' is set to Compound, which is curious given the calculation of interest on a compounding basis would seem to be impermissible under the Uniform Law. It allows for the input of multiple rates from a specified 'Effective Date', but this is actually less useful than it seems given the way SILQ calculates interest (see below). The setup continues through a section to insert Exchange Rates, again probably superfluous for most users as part of an initial setup process.

The next sections provides for the user to select the location of templates and where documents will be saved to, as well as the 'Folder naming strategy' and the 'File naming strategy'. These really make sense once you've had an opportunity to use the document-creation capabilities of SILQ and one suspects most users will simply adopt the default parameters. There are default 'Statement Settings', which is preloaded text containing the various notices required under the Uniform Law for documents such as invoices and the limited liability notice required under the professional standards legislation. The setup then enables you to edit 'Lookup Tables' that are used extensively throughout SILQ for the insertion of text. Again, this will make more sense once the user has become familiar with SILQ, and is probably unnecessary as part of the setup.

SILQ comes preloaded with a sample data file that can be used to familiarise yourself with the functionality of SILQ. It is a fully-featured fully-editable file except that it is date limited, and does not synchronise with Outlook.

As with BarBooks, the heart of the day-to-day use of SILQ begins with the creation of matters. This is a little more cumbersome than it is in BarBooks because you must select an instructing solicitor and cannot create a new matter without allocating a solicitor to it. As time goes by, and more solicitors are added to the contacts list, this becomes less of an issue. There is the option to change from the default rates for the specific matter, although only the hourly and daily rates are displayed. For some reason the default Activity Rates (if they have been created) are not displayed in the 'Rates' tab of the New Matter setup and so there is no immediate prompt to consider whether or not the default rates should be used for the particular matter. Other tabs to include information about the particular case (such as the various court details) are also available.

One useful compliance feature is that if you don't insert a costs agreement date it will prompt you to make sure you want to create the matter without inserting a costs agreement date before it will allow you to save it. Another useful compliance feature is that it prompts (but doesn't require) an estimate to

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be given. SILQ has the capacity to alert you when the costs associated with a matter reach a certain percentage of the given estimate. It will also include the estimate in the costs agreement.

Creation of a costs agreement is a little less obvious than it is in BarBooks. You need to highlight the name of the matter, click on the 'Documents' button which then brings up a dialogue box with a directory tree listing all of the available templates. It is a little overwhelming at first, particularly if you haven't been through a demonstration with SILQ's sales or support team. By default the 'costs agreement' is in fact a template called 'Fee Agreement' (although the document itself uses the term 'Costs Agreement' when it is generated). It is fairly bare-boned and most users would probably want to have SILQ adapt their existing costs agreement document (which is a process readily achieved through the support network).

The document creation process then generates the relevant document (in this case a costs agreement) as a Word document and prompts the user to 'Save as a pdf', specify a different name or location for it to be saved to, not save it as a pdf, or to turn off the 'Save as PDF' feature altogether. This function had the occasional glitch, as sometimes instead of creating a pdf of the generated document it created a pdf of this article instead!

There are a couple of ways of entering your time. One way, similar to BarBooks, is from within the Matters tab, by highlighting the name of the matter and clicking on 'Time and Billing'. It then opens up the matter and presents the Work in Progress tab which lists unbilled activity (there are also separate tabs which display invoices and receipts). From there you can create a new Time Entry (or an activity Entry or Sundry Entry), create a new Timer, or create a new Matter Expense. You have to include 'Invoice Text', and clicking in that text box brings up a new dialogue box called 'Enter Text'. This is a recurring feature throughout SILQ. You have the option to lookup commonly-used text items (these are customisable in the System Settings) or you can type in your own text. As you type, it brings up the first item in the lookup table that matches the text as it is typed, and once the matching item appears you can click on 'Type as Text' or Tab then Return to select the text. Another way to enter time is from the Day Book tab where you can quickly create multiple entries for multiple matters from the one location. This method does not automatically bring up the text entry dialogue box, or prompt entries from partially typed text. However, there is a small pencil icon that can be clicked to enable that functionality for each entry.

Activating timers can only be achieved from the Work In Progress tab of a particular matter, accessible from the Time and Billing section of the Matters tab. Hit 'New Timer'

and it brings up a Timer dialogue box which you can 'Start' immediately, later filling in the Invoice Text details to allow it to be saved. The timer does not have a pause function, but as the timer does not round up to the nearest 15 minute unit (or whatever other user-defined unitised time period has been chosen) stopping and starting the timer has the same effect. You can have multiple timers open at a time, and they appear together on the left hand side of the screen (by default...this is also customisable). They are identified by the matter's short name but there is no other identifying information to the user which timer is for which particular activity. To do that you need to go into the timer itself. The fact that it does not round up creates an issue if you bill to the nearest 15 minute (or other time period) unit. There is a workaround for this, but it is not elegant.

Invoices can also be prepared from a number of different locations. One is from the Time and Billing section of the Matters tab. Simply select a matter, click on 'Prepare an Invoice', and select the unbilled activity you wish to invoice (and matter-related expenses, if any). A similar process can be undertaken from the Invoices tab by clicking on 'Create Invoice' and selecting the appropriate matter from the pop-up window. By default none of the unbilled activity or disbursements is selected, although there is a Tag All button that rectifies that position. Hitting 'Create Invoice' then brings up a dialogue box enabling an override of the total amount, the editing of invoice details and addition of comments, and for a discount to be applied. Click 'Save' and you then get a series of Invoice-specific Document Packs or you can generate the invoice only. One Document Pack, 'Invoice – Email' will generate the invoice as a pdf and then attach it to an email addressed to the relevant solicitor (with their email address prefilled if it is part of the solicitor's contact details). The downside of this is that you don't get to see the invoice before it is attached to the email to vet it, and if there is something wrong with it (a spelling error, for example) then you need to delete the invoice and then regenerate it.

There is one other thing to note in relation to using SILQ to email documents, at least for Mac users. SILQ's system settings give you the option of which mail program to use. By default it is set to 'Default'. However, it does not seem to recognise Apple Mail as a default mail program (it in fact opens up Outlook) and so Apple Mail users need to go into the System Settings and choose 'Mail'. This should probably be included as part of the setup process.

To charge interest one needs to highlight the relevant invoice and then go to the Tools menu and select 'Calculate Interest'.

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It then calculates the interest amount, and from there gives you the option of creating an invoice. In the Comments section relating to the invoice (but not on the invoice itself) it sets out the rate used and for how many days. However, there is a flaw in the way SILQ calculates interest. It calculates interest from the due date (ie 30 days from the date of issue) as opposed to the date of issue of the invoice, but it does so at the rates applicable from time to time according to the Interest Rates table in the System Settings, rather than the rate as at the date of issue of the invoice over the entire period. This is contrary to the requirements of the Uniform Law, at least where the interest rate increases after the date of issue of the invoice.

Expenses can be entered in a number of different ways. Matter expenses can be entered through the Time and Billing section of a particular matter, and all expenses (including matter-related expenses) can be entered through the 'Spend Money' tab. One irritating feature is that you can't simply tab through the fields and type in the account code. Moving the cursor into the account code box automatically brings up the Chart of Accounts and requires you to select the account. This will annoy keyboard warriors.

Like BarBooks, SILQ allows for bank reconciliation although it is a more manual process with users having to download their online banking data and import it into SILQ. SILQ is, however, working on developing a Xero integration which will allow for direct bank feeds.

As noted above the SILQ template system is very sophisticated. There are hundreds of different field codes available to generate any manner of template documents. There are pdf manuals and online video tutorials describing in detail how to do this. And the SILQ support staff are also available to assist in the creation of templates as well. It is a process that seems daunting at first, but with a little perseverance opens up a world of possibility.

Upon installation SILQ creates its own Folder on the user's hard drive, and within that folder there is a directory structure where the documents generated by SILQ are stored in accordance with user-defined preferences, but which by default create a new folder for each matter into which all matter-related documents are saved. This automatic document management is a powerful feature of SILQ.

Conclusion

SILQ has obvious advantages over BarBooks that make it a complete practice management package in a way that BarBooks, in fairness, is not attempting to be.

When comparing them in the areas where they truly compete,

then the advantages are less obvious. SILQ offers a more complicated accounting package that will appeal to users familiar with MYOB's accounting structure, or have more complicated accounting needs outside the mere recording of practice-related incomings and outgoings. The more sophisticated accounting system is accompanied by more powerful reporting. Having said that, BarBooks' user-friendly interface may be more appealing for users whose accounting needs are less ambitious. It is certainly much more intuitive than SILQ, and SILQ has a lot of functionality that many (perhaps most) will simply never use.

BarBooks does have the disadvantage that it does not provide a document management capability for the accounting documents it generates. That's not necessarily a bad thing if, like the author, you tend to store documents by type rather than by matter. If BarBooks can build in user-customisable preferences that directed particular types of documents into particular subfolders then that would take care of the document management for many users.

SILQ's interface needs to be updated, as do its menus. One can't help but think that some of the glitchy behaviour (it often spasms when executing complicated multi-step tasks such as generating document packs) suggests some updated coding might be in order. Nevertheless, it remains a powerful workhorse for the busy practitioner.

BarBooks is the relative newcomer, and while it was released as a relatively basic package it has made significant advances in its short life span. The developers are responsive to user feedback and even during the course of preparing this article queries by the author have prompted changes to the software, some of which have been rolled out and others are works in progress. Being cloud-based has distinct advantages in terms of mobility and accessibility, and its direct import bank reconciliation facility is a time-saver. The iOS app provides a useful mobile data input capability, although at this stage it is somewhat lacking in terms of the matter-related information it provides. For Mac users who do not have access to the mobile version of SILQ because it requires SILQ Plus, this currently gives BarBooks a distinct advantage, although a mobile version compatible with all versions of SILQ is planned for 2017.

Gender equitable briefing at the bar

By Anthony McGrath SC

It is important that the independent Bar continues to thrive because of the role it plays in the administration of justice. Ensuring that the bar attracts and retains the best talent is fundamental to the future of the bar. Failing to attract and retain the best female talent undermines the quality of the bar and the manner in which it is viewed by the community it serves. Those matters affect every member of the bar. Any step which can be taken by barristers to assist in attracting and retaining women barristers is therefore vital to the profession.

In June 2016 the Law Council of Australia released the National Model Gender Equitable Briefing Policy (GEB Policy), replacing the previous policy that had been released in 2004. The development and implementation of the GEB Policy is a significant renewal of efforts by the Australian legal profession as a whole towards achieving gender equity at the bar in Australia. The promotion of the GEB Policy is very timely in the profession as a majority of law graduates are women and the number of women choosing a career at the bar is growing steadily.

The primary feature of the GEB Policy is what sets it apart from the previous policy: it now provides interim and long term targets, with the ultimate intention being that by 2020 women barristers will be briefed in at least 30 per cent of all briefs and receive at least 30 per cent of the value of all brief fees, and also requires annual reporting against those targets.

The expressed aim of the GEB Policy is to achieve a nationally consistent approach to drive cultural and attitudinal change within the legal profession with respect to gender briefing practices. It is not only aimed at benefitting women. It seeks to maximise choice for legal practitioners and their clients, promote the full use of the independent Bar and optimise opportunities for practice development of all barristers. In other words, it is unashamedly directed at strengthening the whole Bar as a profession, men included.

Underlying this overarching aim are a set of objectives, which are supporting the progression of women in the law and the judiciary, address the underrepresentation of women as barristers in Australia, acknowledge that diverse groups bring a greater variety of experience and enhance decision making, promote role models for women in the legal profession generally, reflect community expectations of fairness in the administration of the law and enhance the profession's credibility by making it more representative of the composition of the community it serves.

In September 2016 the Law Council of Australia launched the GEB Policy's online register¹ which allows what the GEB Policy describes as 'briefing entities' (generally comprising solicitors,

clients and barristers) to adopt the GEB Policy easily, swiftly and, just as importantly, publicly. At the time of writing this article, amongst those who have adopted the GEB Policy are the NSW Bar Association, the Law Society of NSW, ASX 200 companies Telstra, Woolworths and Westpac, 11 national law firms and 45 barristers, 33 of whom are from the NSW Bar.

What does the GEB Policy say?

At the heart of the GEB Policy is the encouragement of those persons or entities who brief or select barristers 'to make all reasonable endeavours to brief or select women barristers with relevant seniority and expertise, experience or interest in the relevant practice area.'

The GEB Policy provides for the collection of quantitative and qualitative information with the overall aim of meeting targets in the interim and moving towards targets in the long term. The targets are not mandatory and are not intended to be quotas. The purpose of setting targets contributes to the long term GEB Policy strategy of attracting, retaining and ensuring women get work that is meaningful, challenging and equal to that of their male peers.

With adjustment allowed for local conditions, the interim target in the GEB Policy provides that, by 1 July 2018, briefing entities are:

- to brief or select senior women barristers accounting for at least 20 per cent of all briefs and/or 20 per cent of the value of all brief fees paid to senior barristers;
- to brief or select junior women barristers for at least 30 per cent of all briefs and/or 30 per cent of the value of all brief fees paid to junior barristers.

The GEB Policy defines a 'senior barrister' as a barrister with 10 or more years standing at the independent Bar or who is a queen's counsel or senior counsel and a 'junior barrister' as all other barristers.

It is important to note here that presently 21.66 per cent of the NSW Bar are women, and women constitute 10.13 percent of senior counsel².

The GEB Policy states that in 2018 the targets will be reviewed to reflect the reporting provided by those who have adopted it. The long term targets contained in the GEB Policy that by 2020 – only four years away – women are to be briefed in at least 30 per cent of all briefs and are to receive at least 30 per cent of the value of all brief fees, in accordance with international benchmarks concerning the retention and promotion of women.

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Briefing entities have the option to confidentially report to the local Bar Association, the local Law Society or directly to the Law Council by 30 September of each year. The reported data is then sent to the Law Council by 30 October each year. The Law Council is required to publish figures on state-by-state and National bases by 30 November of the reporting year, with the material published in a format that does not identify any individual barrister or briefing entity. It is contemplated that a standard form of reporting will be developed by the Law Council in consultation with its constituent bodies.

What are barristers required to do under the GEB Policy?

Page six of the GEB Policy outlines the role and commitment of barristers who adopt the GEB Policy. Barristers who adopt the GEB Policy are encouraged to make all reasonable endeavours to ensure that all recommendations they make of other barristers include at least one woman, unless there is no qualified woman.

In addition to consciously including at least one woman in any recommendations, the GEB Policy requires barristers who adopt it to provide a confidential annual report to the local Bar Association, at a time determined by the local Bar Association.

The GEB Policy also highlights the importance of clerks working with barristers who adopt it to develop practices and protocols to assist with their reporting obligations. Clerks have an important role in ensuring gender equity, not only on their floors but also at the bar as a whole.

Why barristers should adopt the GEB Policy

The existence of the GEB Policy is an important signal to the legal profession and all those who use the services of the legal profession that it is no longer sufficient to merely identify gender equity as an issue at the bar. Reading the GEB Policy broadly, it serves to ensure that those who adopt the GEB Policy examine their practices in briefing, selecting or recommending barristers and turn their minds consciously to whether a woman barrister, relevantly qualified and experienced, could be briefed on a matter at the time the briefing, selecting or recommending is undertaken.

This allows some redress of unconscious bias. It is important to recognise that the GEB Policy does not require the briefing, selection or recommendation of a woman barrister merely because she is a woman. Rather, by requiring the person making the recommendation to turn their mind to the question, it ensures a more fulsome consideration of the qualifications and experience of available barristers and so assists in promoting truly meritocratic briefing.

Many barristers already practice in accordance with the GEB Policy and meet the targets set out in it. It is important that those barristers also consider adopting the GEB Policy to show their support for its aims and purpose, and to ensure that a more complete and reliable cross-section of data can be collated.

Finally, adoption of the GEB Policy by barristers provides a clear indication to briefing entities that gender equity is recognised as an important issue to the bar, and will encourage adoption and implementation of the GEB Policy by those briefing entities. If barristers are not prepared to support strategies such as the GEB Policy which are designed principally for the future of the bar, why should they expect that solicitors and clients will do so?

What is the NSW Bar doing to implement the GEB Policy?

The NSW Bar Association's Diversity and Equality Committee, in conjunction with the Women Barristers' Forum (WBF), have formed an Equitable Briefing Working Group to promote adoption and implementation of the GEB Policy.

So far, the Equitable Briefing Working Group has organised seminars for barristers at each of the Commercial Bar and the Criminal Bar entitled 'Implementing the Gender Equitable Briefing Policy – what does it mean for you and your practice?'. The Commercial Bar seminar was chaired by Advocate for Change, Steven Finch SC, with the other panelists being John Sheahan QC, Andrew Bell SC and Elizabeth Cheeseman SC. The Criminal Bar seminar was chaired by Tim Game SC, with the other panelists being Chrissa Loukas SC and Kara Shead SC.

These seminars provided opportunities for frank and open discussion about the GEB Policy, the issues it addresses, the commitments made within it and how it could be implemented in practice, as well as raising other questions of practice, such as women's experiences in dealing with fellow legal practitioners, the bench and clients.

A seminar on equitable briefing involving a panel of solicitors from firms that frequently brief the bar will be held in the Bar Association Common Room on 9 March 2017. In addition, WBF will present a series of seminars entitled 'Be seen. Be heard. Be briefed' aimed at practice management and development for barristers. These seminars will be open to women barristers and men barristers.

In addition to raising awareness of the GEB Policy amongst members of the bar, the Equitable Briefing Working Group is developing a reporting template to assist barristers who adopt

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the GEB Policy to collect and report the data required for reporting. Once approved by Bar Council, this template will be made available to members of the bar to enable barristers who have adopted the GEB Policy to comply more easily with their reporting obligations.

The Bar Association has adopted the GEB Policy and will in the course of the next six months review its briefing practices and how it collects relevant data.

If you require more information about the GEB Policy and its implementation at the NSW Bar, or if you have ideas on its implementation or would like to be involved, please contact Ms Ting Lim, policy lawyer, at the NSW Bar Association.

Endnotes

1. [http://www.lawcouncil.asn.au/lawcouncil/index.php/current-issues/equitable-briefing-GEB Policy](http://www.lawcouncil.asn.au/lawcouncil/index.php/current-issues/equitable-briefing-GEB%20Policy)
2. <http://www.nswbar.asn.au/the-bar-association/statistics>

Four readers share their experiences starting out at the bar

Greg Antipas and Ingrid King of the New Barristers Committee recently caught up with Linton Teoh, Danielle Woods, Glenn Fredericks and Uche Okereke-Fisher about their experiences starting out at the bar. All of them were from the same intake, but had very different backgrounds. They were each asked the same series of questions and their responses below provide an insight into the diversity and similarity in how readers are finding their first year at the bar.



Glenn Fredericks

What did you do before coming to the bar?

I was an in-house lawyer at the Commonwealth Bank of Australia specialising in employment law, but also leading the major disputes team (among other things). Prior to joining the bank, I was a partner at Freehills (as it then was) in the Employee Relations

Group. Before Freehills, I had been an industrial officer with the NSW Nurses Association.

Has your reading year so far been what you had expected?

I didn't know what to expect, but the experience has been good. I've received work from where I never would have expected it, including many more new relationships with solicitors rather than just re-kindling older relationships (which has also been important). I had done quite a bit of advocacy work prior to going in-house. I'd enjoyed that and have continued to enjoy it. I enjoyed the Bar Practice Course, but would have like more time on my feet, and fewer lectures.

Where does your work mainly come from?

Some of my work has come through chambers. I've have also been fortunate to have had referrals and recommendations from more senior barristers. I've had a lot of cups of coffee, and would not underestimate the power of a cup of coffee.

What have you found to be the biggest change since coming to the bar?

The uncertainty of income takes some getting used to. I like being my own boss, and being in charge of my own destiny. I've spent a lot of time outside my comfort zone, but I am learning all the time and enjoying it.

What would you say to others considering coming to the bar?

I'd recommend giving it a go. You need to be prepared to back yourself – and know that the experience will make you a better lawyer. Even if it doesn't work out, you'll be a better litigator and have insights in how to handle Counsel. As far as finances are concerned, I recommend having enough cash to live for six months. Cash flow will be a real problem, and if you don't have a cushion you will put real pressure on yourself.

'Four readers share their experiences starting out at the bar'



Uche Okereke-Fisher

What did you do before coming to the bar?

I was the senior corporate counsel for Salesforce.com. I had also been a Wall Street trader.

Has your reading year so far been what you had expected?

I found the Bar Practice Course quite daunting – and during it I felt very alone. I did not have court experience and was obviously the one with the least experience in court. Having said that, I really learnt a lot from all of the speakers – I would have paid to listen to the speakers.

Where does your work mainly come from?

When I arrived in chambers, I told everyone that I was eager to help. I would say 'I have a wig, I have a car, and I can go'. I did a lot of work for barristers on my floor, both mentions and running cases when the original barrister was not available. I also sent letters of introduction. I'm a registered migration agent and have also found that to be a significant source of work.

What have you found to be the biggest change since coming to the bar?

I've been really grateful for the support from my tutors – I didn't know any barristers when I came to the bar! My outlook has changed from being in the corporate world. In corporate life, appearances really mattered. At the bar, I've had to be 'out there' getting work. I'm not so concerned about what I am wearing or the bag that I am carrying. I work harder than I did in the corporate world, but with greater flexibility.

What would you say to others considering coming to the bar?

If you are thinking of coming to the bar, you need to know why you want to do it. For me, it was the intellectual stimulation of being a barrister. I'd warn you that there are much easier ways to earn a buck! You need to look at yourself as a business as well as a professional and be resourceful, ready, willing and able. I'd recommend a six month 'cushion' for your expenses.



Linton Teoh

What did you do before coming to the bar?

I was working as a practice manager at a medical practice.

Has your reading year so far been what you had expected?

For the most part, yes. Having come to the bar in the way I did, I knew that I had a steep climb. Fortunately, I have been lucky enough to have been supported by my tutors, members of my floor and even other barristers not on my floor, not only in providing me

advice and guidance, but also getting me involved in matters. While I knew about the open door policy at the bar, what I had not expected was the extent very senior members of the profession are willing to go out of their way to help the most junior of barristers. That has been a pleasant surprise.

Where does your work mainly come from?

I suspect that my experience is not unusual. Initially, a lot of my work came from my tutors or other members of the floor, either as being a junior to them, doing devilling for them, or their

'Four readers share their experiences starting out at the bar'

referring work to me. Through those introductions and being in court more frequently, solicitors have gotten to know me and are starting to brief me directly.

What have you found to be the biggest change since coming to the bar?

I think the biggest change has been to

my lifestyle. Personally, it has been a big change in career which has brought with it new pressures. I have tried to balance that out by taking up new social activities and hobbies, like bushwalking.

What would you say to others considering coming to the bar?

I think for most, uncertainty is part and parcel of one's early years at the

bar. I think it is desirable to have a mid-term plan, perhaps a five-year plan. 'With whom would I like to read?' and 'Where will I spend my reader's year?' should be only the very first questions you ask yourself. Even if you alter your plan, having a plan ensures you are least partially prepared for the uncertainties and have a general idea of where you are going.



Danielle Woods

What did you do before coming to the bar?

I worked as a litigation and insolvency consultant to Australian Pharmaceutical Industries Limited. Prior to that I was a senior associate in the Dispute Resolutions team at Minter Ellison.

Has your reading year so far been what you had expected?

Yes and no. Yes, in the sense that my Readers year (completed in September 2016) offered very varied and new challenges as I had expected (and hoped for). No, in the sense that, not knowing (and still not knowing) where my work was going to come from, I was pleasantly surprised to find how busy my first year was. I had kept my expectations pretty low on that front. It has been more fun than I expected – it is never dull.

Where does your work mainly come from?

Most of my work has come from my floor (Ground Floor Wentworth) and my tutors. The members of the Ground Floor have been extremely supportive during my readers year with work, guidance and introductions to their solicitors etc.

What have you found to be the biggest change since coming to the bar?

The administration entailed with being a sole trader. Being able to take all of January off, no questions asked, was a nice change.

What would you say to others considering coming to the bar?

It's not an easy career option. You've got to love the work and be prepared for the unexpected directions it takes you. It certainly helps if you have a partner/spouse that has a regular income or some 'nest egg' that takes some of the financial pressure off in the early days so you can focus on learning and developing skills by watching others, volunteering etc, which can only provide good foundations going forward.

Lawyers and politics

Bret Walker SC delivered the 2016 Hal Wootten lecture on 'Lawyers and Politics' at UNSW Law on 4 August. The Hal Wootten Lecture is the highlight of the Faculty's year and commemorates Hal Wootten's founding vision for the UNSW Law School.

I am privileged to have been asked to speak this evening. Actually, we are all privileged (in a different sense) to be gathered together for an address on a topic involving politics: as I speak, many lawyers in Turkey and prominent lawyers in China are in dire straits because of their actual, presumed or alleged involvement as lawyers in politics. Australian lawyers need not acknowledge other customs and cultures by setting out to lower our own ideal standards of political participation. We could perhaps reflect more frequently on how high those standards really are by comparison with many other jurisdictions (or countries, as real people call them). That slightly globalized view might even moderate the Australian habit, by no means itself wholly bad, of exaggerating how terrible things are here, how we'll all be rooned, etc.

Unfortunately, this occasion is not privileged (in yet another sense). Not all my thoughts have been rosy or kind as I have reflected on my own experiences as a lawyer in politics. And so, because federal subsidies of universities unaccountably have omitted to fund indemnities in favour of those who deliver defamatory invited speeches, the miscellany of observations I am about to make is not quite so complete or rhetorically frank as it might have been. I feel no duty to add civil defendant to my CV, if I can help it.

Conflicting myths have long driven the profession's, and its critics', stances about lawyers and politics. They are equally pointed in their stock caricatures of elected politicians and appointed judges, which I think are far too often framed in stark opposition, whether favouring one or the other. The disdain sometimes affected and other times, I am sorry to say, genuine, of some judges (and their admirers) for the popular or populist character of elected representatives of the people has produced an amusing fallacy.

Those showing such disdain too often cast the judges as appointments reflecting professional merit, by contrast it is obliquely implied, with the hit-or-miss by which the electors choose members of parliament. How odd, then, that these merit selections for the bench are made by ministers thrown up by the electoral process. Beware disdain for the caste whose decisions to select judges are desirably aimed at merit selection. Its members may well react by living down to over-generalized pessimistic expectations. I will return to the matter of judicial appointments.

As to lawyer-politicians, little need be added by way of my comment to what the public record shows. Historically, David Marr on Barwick and Ian Hancock on Tom Hughes lead me, and I hope others, regardless of voting preferences, to be glad as

citizens that some lawyers attempt to contend in the front rank of politics, that is by standing for public offices as legislators or ministers. I believe New South Wales is fortunate to have a very good silk in the present state Cabinet.

Let others deplore too many lawyers in parliament: for my part, I do not estimate that this country has ever had quite enough skilled and experienced practitioners in that office. The formation of the early American republic, and its pale imitation about a century later in this country, was not merely accidentally a labour of considerable lawyers, some with more history of practice than others. It would be a great pity if the current generation of lawyers in this country lost any sense of professional connexion and social attachment to the examples of Alfred Deakin, H B Higgins, Isaac Isaacs, Samuel Griffith and Edmund Barton – or indeed of James Madison, John Jay, John Marshall, Alexander Hamilton, John Adams and latterly Abraham Lincoln.

Of course, the lamb does not lie down with the lion, or not without soon being set down for dinner. There are observable if not inevitable characteristics of lawyers and politicians, and of law and politics, that do provide warnings to lawyers minded to engage in politics in what they may regard as a properly lawyerly way. The parliamentary chambers have their own decorum, even if it be that of the bearpit. The arguments, to use a polite term, usual in politics are more robust, less testable and certainly much less controlled than is appropriate in lawyers' professional dealings, whether in contentious or non-contentious business. Lawyers might mislead themselves if they were to think they might not be lambs when stepping up to the conflicts of politics.

Lawyers might mislead themselves if they were to think they might not be lambs when stepping up to the conflicts of politics.

This warning is balanced by two important habits of thought that may lend confidence to the legal profession in relation to its members venturing into the political arena. (Not that the profession should be encouraged to preen – among its many splendid achievements, is its unsurpassed talent for self-congratulation.)

The first is the definitive way we claim to mark off the territory that lawyers should not be required to contest or adjudicate, as lawyers. It still goes by the label 'political questions' in US

Bret Walker SC, 'Lawyers and politics: the 2016 Hal Wootten Lecture'

Constitutional practice. It stems from the prescient cunning of the late 18th century Jay Supreme Court. These were no political know-nothings, those early US judges: they were congressmen, ministers, ambassadors from time to time, and intriguers in between. In this tradition, the courts continue – rightly in my view – to disclaim institutional competence to adjudicate matters of raw policy or realpolitik, such as foreign relations. This seeming modesty is essential, I think, to the cogency of lawyers' insistence that the discipline and doctrines we espouse are essentially non-partisan. I turn later to the expediency, in a social sense, of this cardinal value of disinterestedness.

At this point, we can see that one effect, or maybe purpose, of lawyers' ceding obviously partisan contests to elected politicians and unprofessional pundits is that lawyers and courts thereby get clearer water to decide, as lawyers, intensely political issues. From my practice, I would instance successful challenges to special laws for organised criminals, regulation of political donations and the executive funding of religion in schools. It helps, I think, for those Constitutional cases to have been argued and decided in an atmosphere devoid of party political labels or populist attachments. I do not recall any public discussion in relation to the *Totani*, *Unions NSW* or *Williams* litigation fastening on the supposed voting preferences or ideological bents of the judges or counsel. Nor, I hasten to say, would such information, even if accurate, have been at all predictive of our actual conduct in arguing or deciding those cases.

The second factor that may help to overcome lawyers' natural diffidence to put themselves forward is (seriously now) displayed in a few High Court utterances that I found and find quite inspiring. They are calm and clear statements of a principled approach to social conflict, especially about the power of the state and the rights and dignity of individuals in face of it. I appreciate that these dicta describe decision-making at the apex of our judicature, in the High Court. But all of us participating in the administration of justice should feel imbued with the same ideal that these judges have advanced.

In *Fardon* (in 2004), Gleeson CJ disposed of an argument against the judiciary deciding whether certain criminals should be detained after serving their sentences by noting, with typically effective understatement, the professional commitment to independence and impartiality that would more likely enhance than detract from the respect that such fraught decisions desirably attract. The real test of that respectability is whether respect is felt by those who nonetheless disagree with the particular outcome of a case.

The fact of, and eloquent argument in, the dissent of Hayne J in *Thomas v Mowbray* (in 2007), a later decision on a related

...society is well served by judges taking pains to justify their acceptance or rejection of the various poisoned chalices that governments of all colours seek to press on them.

question concerning counter-terrorist control orders, caused me real pause in my consideration of such laws in my role as the first independent national security legislation monitor. His Honour's exhortation, politely it goes without saying, of vague standards with inherently contestable social content is an example of the first habit of thought I have described, in action.

Interestingly if mysteriously, these opposite judicial conclusions about the suitability of courts to address these latter day political questions turn on reasoning – clear, firm and contrary – that conveys, I think, the important message that society is well served by judges taking pains to justify their acceptance or rejection of the various poisoned chalices that governments of all colours seek to press on them.

Thomas v Mowbray, as it happens, contains one of the most felicitous and evocative phrases, for me, in the CLR. It is not witty or dismissive. It does not propound any axiom. Rather, Gummow and Crennan JJ wrote of the plan laid out in the Constitution for the development of a free and confident society. They proceeded to measure the validity of control orders against that value. Their words, calm and clear, are statements by consummate lawyers, if I may say so, of a profoundly political position. Political but, because articulated in legal reasoning, decidedly not party aligned, partisan or a passing fashion. And note the word 'development', meaning this is not a state of affairs where we are trapped in the amber of Constitutional pre-history: the freedom involves escaping the tyranny of the generation of Constitutional founders and looks forward to appropriately gradual change and altered appreciation of the content of the perennial value.

My last High Court anthology piece is the somewhat disparate reasons severally by Gleeson CJ, Gummow J and Kirby J in *Al-Kateb* (in 2004), dissenting against the validity of the detention of unauthorized migrants indefinitely and potentially forever. I think these reasons are compelling, but the law of numbers, counting to four out of seven, says I must be wrong. Black letter technique dominates all three judgements – so much the better. But they all essentially use the premise that disturbingly harsh laws require commensurately plain enactment. This is a bias in the best and political sense against statutory infringements of personal liberty. I respectfully suggest that Gleeson CJ's

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exposition of that principle of legality, in *Al-Kateb*, is currently the most important dissent in the CLR. I have several times lectured on this case for a UN programme to aid the reconstruction of Iraqi civil society to an audience of Iraqi government lawyers. Their disappointment when I finished by revealing how the other four judgements decided that case, that I had used to explain to them our concept of the rule of law, was instructive if lowering for an Australian lawyer. It was also of no comfort whatever to the unfortunate appellant.

My last commendation of a member of the High Court in relation to lawyers and politics is to urge students, at least, to study Murray Gleeson's Boyer Lectures. Their analysis, synthesis and defence with respect to the administration of justice are unmissable. They are all the more profoundly political for being, stylistically, models of disinterested exposition.

Speaking of disinterestedness, as I said I would, I confess a weakness born of my father's relish for 18th century English. It left me believing I understood the endangered distinction (and great difference) between 'disinterested' and 'uninterested'. I soon learned, from 1992 onwards when first drafting the Barristers' Rules, adjusting them and then promoting their eventual national adoption, that the word 'disinterested' could leave some readers and listeners affronted by a proposal to require lawyers to be bored, unconcerned or lazy. I tried to explain by a tag to the effect that we all want disinterested lawyers but none of us wants uninterested lawyers.

My linguistic out-of-touchness aside, that project with The New South Wales Bar Association, the Australian Bar Association and the Law Council of Australia showed me the seriously political quality of professional governance including of, for and by lawyers. Rejection of the guild approach, that had been easily if sometimes unfairly called a conspiracy against the public, proceeded rapidly to near completion by the end of last century. (I know I have just made an arguable political comment.) In that political arena, I felt the pressing influence of a sceptical Graeme Samuel at the National Competition Council and the dogged Professor Fels and his colleagues at the Trade Practices Commission and Australian Competition and Consumer Commission. We were engaged in overt policy work, and so much the better.

Lawyers may dislike but cannot avoid taking part in the political dealings with governments at the elected and bureaucratic levels concerning the rights, privileges and obligations of our profession. Its accountability, institutionally, by discipline and ethically, is from beginning to end a truly political exercise. The very unpleasant episode Ruth McColl and I had as presidents of the bar in relation to tax-evading colleagues was obviously

political. We attempted to handle it by enunciating explicit principles at the outset to be applied consistently – as one would hope would be the approach of lawyers.

The very unpleasant episode Ruth McColl and I had as presidents of the bar in relation to tax-evading colleagues was obviously political. We attempted to handle it by enunciating explicit principles at the outset to be applied consistently – as one would hope would be the approach of lawyers.

A measure of self-governance might be a good thing for all professions and a wide range of specialized or skilled occupations. But the spirit of the times is stridently against self-regulation, and I see no prospect of unwinding the imposed external policing of standards to guard the public. Anyhow, I do not think external public interest regulation has harmed the quality of the legal profession.

On the other hand, the political science, so to speak, of legal profession governance does involve an aspect not present, say, for doctors or electricians. Lawyers are in a real sense part of the process of government. The title 'officers of court' and the traditions of the bar in its relations with the judiciary are reminders that lawyers are not users of the legal system; we are an integral part of it and indispensable to its operation. Judges are not the only ministers of justice: litigators and counsel are not unnecessary occasional visitors to the process, as for example one may view lobbyists in relation to the legislative arm of government.

The hallmark of the judicial arm of government is impartiality of decision including independence from executive dictation. These are, by historical consensus, at the heart of the rule of law. As actors in that process, it is therefore desirable that lawyers maintain their own independence. A measure of self-governance, albeit mixed as it is at present, is a good thing for the profession which is called on to assist in holding the executive government to account in legal proceedings.

The independence of lawyers is by no means a licence to practise free of restraint or rules. The politics of the legal profession that I have taken part in threw up some suggestive clashes over ethics. I think and hope the suggestion is of something we might call progress. About 25 years ago, I thought commonsense

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decency supported a Bar rule that extended the duty not to mislead a court to a duty not to mislead anyone by expressions of purported opinions. This was the radical notion that if I signed a document headed 'Opinion' or 'Advice' it had better be just that. To my chagrin, there was vigorous if brief dissent requiring a close vote in the Bar Council to overcome it. The opposing argument included a perceived need to permit the kind of benefit some clients undoubtedly liked to obtain, of so-called opinions that were made to measure, that were for sale and that suited. If there is one vital lesson that lawyers should take from the different culture of electoral politics, it is that speaking falsely or with forked tongue would betray the learned independence that is our defining contribution to the administration of justice and thus to government.

Some of us are given opportunities to contribute in more focussed and explicit ways to government and policy formation. I have been asked to help on topics really quite apart from the run of legal practice, such as a better ferry service for Sydney, improved safety in hospitals, post-mortem practices and use of human tissue, probity requirements for gambling establishments and the administration of landholdings within national parks.

Colleagues have between them undertaken a wider range of reports for government by commissions of inquiry, royal commissions and the like. I will return to the possibility that the detachment that is part of lawyers' disinterestedness, as well as our supposed and related skills in fact finding and the giving of reasons for decisions, provide a continuing justification for society to call on lawyers to engage in this form of political action.

At the risk of revealing for instance a cramped legalism or other personal defect in the way I carried out my functions, let me briefly recall some aspects of the approach I took when from 2011–2014 I was the independent national security legislation monitor (INSLM). Please do not hear these comments as self-praise, but forgive my subjectivity. The role requires reporting through the prime minister to the houses of parliament on the efficacy, appropriateness and necessity of Australia's counter-terrorism laws. I think such a task is unique.

The legislation creating the role expressly provided for the monitor to assess whether the laws and their implementation were in accordance with Australia's international obligations, which calls up public international law for the constant attention of the monitor. The matter of a law's efficacy, appropriateness and necessity is preternaturally political. Not even a Constitutional lawyer can pretend that our Chapter III tools of trade can render reports of the INSLM a form of

lawyering as such. Rather, and I believe from my understanding of the genesis and evolution of the idea for the office, the role ideally takes the skills and inclinations of a lawyer, jumps him or her out of the legal track (or rut) and inserts the monitor into the balances of legality, expediency and logistics, that is all the political trade-offs, which are themselves at the heart of parliamentary and cabinet deliberations.

For a start, I pity any non-lawyer trying to read let alone schematically understand Australia's counter-terrorism laws. I have often described them as sophisticated and prolix to the point of showing legislation to be Australia's favourite national pastime. The international law includes the UN Charter, the ICCPR and a cascade of Security Council resolutions in the aftermath of 9/11. The foreign relations setting includes wars in Afghanistan, Iraq and bordering zones of malignancy. I do not believe that this political task could be well performed by a person who had to pretend to be a lawyer, who became a self-taught lawyer, who had never practised law or who subcontracted the lawyering to someone not appointed to the office of monitor. For this and other manifest reasons, I applaud the willingness of Roger Gyles to add this office to his formidable record of public service.

I pity any non-lawyer trying to read let alone schematically understand Australia's counter-terrorism laws. I have often described them as sophisticated and prolix to the point of showing legislation to be Australia's favourite national pastime.

The more I stress the political character of the INSLM, the more important become the attributes and safeguards wisely enacted in its constating statute. There is, for the three-year term of appointment, the equivalent of Act of Settlement security of tenure as for judges. There are powers to compel evidence and information as ample as a royal commission, with the extension of that reach to restricted material by reason of security clearance. There is the protection of privilege at all stages of hearing and reporting.

The tenure in particular is necessary for the requisite independence of the monitor who may report that counter-terrorism laws are not what their parliamentary promoters boasted. Laws that are bereft of any empirical foundation to predict their capacity to prevent any atrocity, laws that go beyond

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...some lawyers sought to justify outrageous practices said to enhance, as the disgusting parlance has it, the interrogation of terrorist suspects. The opinions were not in themselves of sufficient legal calibre to deserve the dignity of professional critique, but their political resonance was loud and dangerous.

Constitutional or treaty restrictions, laws that only complicate or multiply the undergrowth of criminal offences where murder is the cardinal target. I am so sure of this critical independence for the INSLM that one of my last recommendations was to remove the present provision permitting one renewal of a term of office. The likely distance not to say frostiness that an adverse report on a government's counter-terrorism laws would engender makes it most problematic for the monitor to have any prospect let alone hope of being re-appointed, especially if he or she wanted to be. I therefore suggested extending the three-year maximum somewhat, while also recognizing that move may rather cruel the market of practitioners willing to take on the job.

The express intention of the INSLM statute is for the monitor's reports to assist the government and the houses of parliament in their respective considerations of Australia's legislative efforts to counter terrorism. Thus I chose to make recommendations for the repeal, amendment or enactment of legislation for various reasons. Some of those recommendations have been acted on, although none promptly so. Some of the implied acceptance of my reasoning by acting in accordance with a recommendation has been acknowledged by government, but not by any means always. This is not a matter of grave complaint, more a grumble. In any event it is no bad thing for a lawyer to be spared deference in such dealings. These are, after all, political matters where a lawyer is trying to help, not matters of state being decided by a lawyer, thank goodness.

The elephant in the room in considering counter-terrorism is the fading hegemony of the United States of America, on several fronts. The hasty enactment of their first legislative response to 9/11 managed to include a special effort to achieve the fatuous titling of the statute in order to produce the initialised acronym USA PATRIOT. A sour element that would confuse criminal law with the laws of war, and that would compromise the defence of liberty by detractions from it, has continued to dominate a political arena in which American example displays a decidedly mixed quality.

As my esteemed counter-terrorism colleague, this school's Professor George Williams, can corroborate, scholarship and advocacy, principle and policy, in the Australian debate about, and practice of, counter-terrorism through legislation has heavy echoes of the contending camps in the USA. One spectacular

clash of those camps arose because of the use of torture, actual, alleged or mooted. By and large, to my observation, the military lawyers in the US stoutly resisted weakening the standards in question. No doubt their concern for consistency with international law governing the conduct of war and warlike activities informed their approach.

On the other side, scandalously illustrated by so-called opinions written for the [Bush] Administration by John Yoo and Jay Bybee, some lawyers sought to justify outrageous practices said to enhance, as the disgusting parlance has it, the interrogation of terrorist suspects. The opinions were not in themselves of sufficient legal calibre to deserve the dignity of professional critique, but their political resonance was loud and dangerous.

It was a credit to lawyers in the USA, the UK and this country that serious and eloquent demolitions were made of these infamous memos. I am not the only lawyer with experience in counter-terrorism to regret that efforts to discipline the authors for professional shortcomings did not proceed under the Obama Administration.

The nature of my practice before I became the monitor had involved only fleeting and narrow recourse to international law. I probably read in the area more for interest than for work. As George Williams knows, all that changed when the Security Council began issuing Chapter VII resolutions under the UN Charter compelling Australia and the other members of the United Nations to have and to enforce effective counter-terrorist régimes. Those of us in the field simply had to catch up with our colleagues in the rarified world of public international law.

Personally, this was not quite as splendid as pushing through the wardrobe into Narnia, but there was a similar feeling of strange familiarity and familiar strangeness. I soon found that there was long trench warfare in the USA between proponents of international order and security through law and sceptics who saw nothing more compelling than armed force. Lawyers past and present in the American academy and in American government have shown themselves for nearly a century to be the heavy hitters in this intellectual stoush, on both sides.

In essence, I think this is a question we Australian lawyers should also care about. It does not matter that for most of us and for most of the time our clients, our cases or our problems

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at work will not involve any concern with international law. What I hope will matter for the profession is an abiding engagement in favour of the rule of law, and the inclusion of international law as part of that tremendous value. It simply will not do to emulate the faux tough-guy pose that sneers at the term 'international law' as a manifest oxymoron. The obvious, indeed elementary, fact that international law is deficient in its enforcement is a challenge for it and the peoples who benefit from it, rather than a refutation of its reality.

I am reminded of an interesting discussion with an official of the Chinese legal bureaucracy when I visited Beijing as president of the Law Council. We were told of ongoing efforts to improve the quality and discipline of the subordinate courts below the supreme organs that sit in the administrative centre of that vast city, itself just one in a vast country. The efforts were described by one official as demonstrably less effective literally the further one went as a matter of distance, even within Beijing itself, from the seat of the supreme organs of justice. (I wonder whether such frankness, especially with Western foreigners, would now be regarded as a criminal offence – quite seriously, in light of the news this morning about colleagues in China in terrible trouble.) The point of my recollection is that it would not be true or sensible to say that those laws in China did not exist because their enforcement was scarcely effective. That situation called for more strenuous effort and professional commitment.

Why not the same for the more worthy project of international law including its concern with the prohibition of aggressive war, punishment of war crimes and crimes against humanity, the protection of human rights, the promotion of social and economic rights and the principled resolution of such wicked problems as irregular migration of people trying to save or better themselves and their families?

Reflection on the mixed signals about lawyers and politics coming to us across the Pacific must also mention a significant difference about which it is hard not to sound smug. The routine party-political labelling of lawyers, especially when judicial appointment is mooted and always after they become important judges, in the US is not something I would like ever to see in this country. I am glad to say that it strikes me as strange, as an Australian advocate bound within reason to accept briefs regardless of my personal views, for such fuss and wonder as there was about Messrs Boies and Olson appearing together in the equality of marriage case. It was thought a marvel for them to work together as advocates in the Supreme Court, after they had opposed each other in *Bush v Gore*. I would like to think that forensic dream teams in this country would never be regarded as remarkable because their members

I know nothing about how the chief justice has cast his votes, although I infer that he voted for himself when he stood for election.

had previously appeared against each, let alone were known to have different political or ideological allegiances.

I appreciate that a view can be seriously advanced that it is better that we know the political allegiances of judges and candidates for judicial appointment, rather than it being a secret or information confined to a cosy inner circle. I profoundly disagree. If analysis of voting records in the US Supreme Court showed merely coincidental alignment of outcome and red or blue colours, perhaps I might change my opinion. But it does not. By contrast, even Professor Williams in his periodical analyses of our High Court could not show any such pattern, and I guess he would regard the enquiry as presently too trivial to justify even a modest ARC grant.

There could not be a more open and attached allegiance to a political party than to have once stood as its candidate in a parliamentary election and to have held high office in its organization. That was true, in relation to the Liberal Party, of Robert French at the time of his judicial appointments. His judicial appointments were made by Labor governments. I know nothing about how the chief justice has cast his votes, although I infer that he voted for himself when he stood for election. I do not think the Australian community cares how he has voted and how his colleagues have voted. Judges are required to vote, and are assured of a secret ballot, like the rest of us. And for the sake of democracy, every elector's holding of political opinions could only be a good thing.

The admonition over the millennia of which the most famous delivery was by Pericles in his funeral oration for the Athenian war dead, that citizens must not be uninterested in politics, surely dispels any notion that disinterested lawyers should either not have or, worse, pretend not to have any interest as voting citizens in politics. In my dreams, I see ranks of attorneys-general nodding in sage agreement with the eminently reasonable proposition I have just ventured.

In my dreams. A fly in the ointment of the superiority we are tempted to feel about our system of judicial appointment compared to the systems our American colleagues suffer is, I am afraid, a perception not easily dispelled. It is that if a lawyer were to entertain hopes of judicial appointment, he or she ought not take part in, or publish opinions about, matters of political concern to the government of the day, unless the conduct

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and views would please those who compile names and advise ministers on suitability for appointment. I stress this is a matter of perception, and not demonstrably a matter of historical decision-making. But that is because insufficient information is known outside particular government circles about matters that may either validate or falsify the perception. It means, I fear, that some of the best contributions by lawyers in politics may not be available to society. It is an honourable ambition to become a judge and a prudent course to act on the perception. There are not enough of us who feel an anti-vocation against judicial appointment, to assure the community that nothing much is being missed if my fears are well founded.

The contribution that would most be missed were knowledgeable and leading lawyers to be muted in, say, debate about proposed legislation is their championing of the rule of law. Emphatically, the executive government cannot be left as the only or most powerful voice in favour of the rule of law or observance of individual liberties, let alone human rights. What lawyers can do in this realm of political discourse, in exercising the Constitutionally protected political communication vital for good government, is to push back against executive proposals and legislative schemes that need justification because they entrench on liberties, restrict rights and cramp the rule of law. Or arguably so.

By push back, I certainly do not mean reflex nay-saying of a kind that many of us are sick and tired of in parliamentary politics – opposition for its own sake in the hope of adventitious stumbles by the other side. Far from it. I mean the lawyers' way of testing a proposal by understanding the arguments that can be marshalled for and against it. Like the scientific method with which it is intellectually cognate, this lawyerly testing of a proposal is best done by examining the weight that can be pushed back against the arguments in favour of the proposal.

I know that the adversarial or accusatorial nature of civil and criminal justice respectively is disapproved by those who superficially prefer co-operative models of consensus. One of the unfavourable stereotypes of lawyers by those who praise parliamentary politics by comparison, is that lawyers fight to get a win and politicians, at least the good ones, have discussions to craft an acceptable solution. This overlooks the importance of lawyers being disinterested in the adversarial litigation

they conduct: one's best efforts must be made regardless of personal opinion let alone approval of the client's case. That disinterestedness focuses the systemic attention of lawyers on the merits or otherwise of arguments for and against the point in question. It is a habit of thought that more readily permits principle, as opposed to personal preference, to take its proper place as the foundation of social decision-making. I think that habit of thought would be sorely missed if it were to disappear from political argument about important laws.

That reminds me of a case I argued 34 years ago, in the Equity Division of the Supreme Court, before Wootten J. My client had been committed for criminal trial on charges involving misappropriation of company funds, and meantime the liquidator sought civil remedies to compel my client to provide information about the company's affairs. I relied on a supposed requirement that civil cases await the outcome of criminal cases, broadly for reasons that do not need elaboration. The argument concerned the so-called rule in *Smith v Selwyn*, one of those legal jokes because it was not a rule and it was not really to be found in *Smith v Selwyn*. I put some teeth-gritting arguments, and lost. The civil proceedings could continue. I doubt that this was because of arguments on the part of either party.

It was, as I still remember my abashed reading of Hal's reasons, that he had himself analysed and justified soundly on principle the approach by which his judicial discretion should be exercised in favour of the civil proceedings going on. That was a decision in an area of law involving important human rights possessed by those accused of crime. The dispassionate and principled approach by the judge was an example I have remembered.*

I need not catalogue the passionate and also principled engagements and achievements of this evening's eponym. Higher education, indigenous issues, environmental protection and displaced persons are nonetheless matters in which I wish to praise Hal Wootten because he has been, and is, in them a real exemplar of my hopes for lawyers and politics.

* My recollection of *McMahon v Gould* (1982) 7 ACLR 202 was wrong as presented in the speech, and is here corrected, thanks to Hal Wootten's own superior recall.

Let him have it: the short, sad life of Derek Bentley

By Geoffrey Watson SC

In 1953 Derek William Bentley was executed for the murder of a policeman. He was only 19 years old. Did he deserve to die?

The background

Bentley had a deeply troubled life. He was born in 1933 in the East End of London. His family was decent and stable, but Bentley had his own problems. He suffered a serious head injury when young, was intellectually impaired, and he struggled at school. He fell into a pattern of truancy and petty crime and at 15 was sent to a juvenile detention home. His work record was poor, and in 1952 he was rejected from National Service because he was 'mentally substandard'.

He fell into bad company, mixing with a boy named Christopher Craig. Craig was only 16 years old, but came from a family with criminal connexions and was knowing in the ways of the underworld. Even though Craig was the younger of the two, Bentley, who had a mental age of around 11 years, fell completely under the spell of the cocksure, streetwise Craig.

The murder

On the evening of Sunday 2 November 1952 Bentley met with Craig. There was no forward planning – they met by accident. They agreed to attempt to burgle some local businesses. Craig was armed – he carried a Colt 45 revolver and a knife. He also provided Bentley with a knife and a spiked knuckle-duster.

Their target was a warehouse in Croydon in South London. But they were spotted climbing over the fence and the police were called. The police cornered Bentley and Craig on the roof of the warehouse. Detective Sergeant Frederick Fairfax took hold of Bentley and arrested him. Meanwhile, Craig remained free and was taunting the police. What happened next was the subject of controversy. According to the police, Bentley broke free of his grasp and called out 'Let him have it, Chris', immediately following which Craig pulled out his pistol and fired, superficially wounding DS Fairfax.

It was common ground that, although he was at this time free of police control, Bentley did nothing to flee nor did he take out his own weapons – instead he simply remained alongside the police as though he remained under arrest.

Over the next 20 to 30 minutes Craig and the police exchanged fire. One bullet struck Police Constable Sidney Miles between the eyes, killing him instantly. It is important to note that the shooting of PC Miles occurred about 15 minutes *after* Bentley had been arrested.



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Craig eventually ran out of ammunition and dived from the roof, fracturing his pelvis. Bentley and Craig were taken into custody and questioned.

The charges

Craig and Bentley were indicted for the wilful murder of PC Miles.

The two cases were, of course, quite different. The case against the shooter Craig was clear, and was later described as 'very strong' and that 'any verdict other than guilty of murder ... would have been perverse'.

The murder case against the non-shooter Bentley was much more difficult. To succeed the Crown had to prove that Bentley was a party to a common purpose – an agreement with Craig that they would use any violence necessary to avoid arrest. But the Crown had also to prove, as part of this arrangement, that Bentley *knew* that Craig had a gun. The Crown case was that Bentley had incited Craig to shoot PC Miles, and relied heavily upon the words – 'Let him have it, Chris'.

Bentley's defence was that he did not incite Craig, and he did not even know that Craig had a gun until the first shot was fired. Specifically, Bentley denied using the words 'Let him have it, Chris'. He also relied upon the inferences available from the fact that he had remained alongside DS Fairfax, making no effort to escape or to use his weapons.

The trial

The murder of a policeman was such a serious event that the lord chief justice, Rayner Goddard, appointed himself to preside at the trial.¹ This was very bad news for the accused. Goddard already had a strong preliminary view of this case: Sir Charles Hardie, gave a statement that during the trial Goddard had told him that Craig and Bentley had to be found guilty '*at all costs*'.

The trial was opened and conducted with heavy reliance upon – 'Let him have it, Chris'. In addition, the Crown relied upon a voluntary statement signed by Bentley. Bentley could not write, so his words were transcribed by one of the police officers. That statement contained this very damning sentence – 'I did not know he was going to use the gun' – which, it was said, demonstrated that Bentley *knew* Craig had gone to the scene of the crime with a gun.

Diverting for a moment, it is worth reflecting upon the centrepiece of the Crown case – those critical words 'Let him have it, Chris'. Each of the police witnesses swore that these precise words were used. Both Bentley and Craig denied it. But even if the words were said by Bentley they are obviously ambiguous. They could convey a sinister meaning – 'Let him have it' is the language of cinema gangsters. On the other hand, it could mean quite the opposite – a request by Bentley that Craig let the police have his weapon.

The evidence was short (the whole trial was over in three days). The parties addressed. Goddard summed up. The summing up – as I will discuss later – was very slanted against the accused.

On 11 December 1952, after only 75 minutes of deliberation, the jury returned two guilty verdicts. The jury made a recommendation for mercy in the case of Bentley.

In those days a murder conviction carried a mandatory death sentence and Goddard sentenced Bentley to be hanged (no doubt enjoying himself in his customary fashion while he did so). The shooter Craig was only ordered to be detained during Her Majesty's pleasure because he was only 16 years old.² Goddard forwarded the jury's recommendation for mercy to the Home Secretary, but he added his own observation that he 'could find no mitigating circumstances'. An appeal to the Court of Appeal was dismissed.

An application for clemency fails

In controversial circumstances, the plea for mercy to the home secretary, Sir David Maxwell Fyfe QC³, was declined. Many were frankly amazed that, in the circumstances of this particular case, the plea of mercy failed. More than 200 Labour MPs signed a petition opposing carrying out the sentence, but on the night before the execution, in a raucous session, the speaker of the House of Commons refused to allow a debate on the issue. There were protests around London, in Whitehall, and outside the Wandsworth Prison.

The execution

The evil day arrived. The hangman, Albert Pierrepoint, recounted a chilling story. He arrived at Bentley's cell to collect the condemned – but Pierrepoint did not wear a uniform; he was in an ordinary day suit. This created the wrong impression, and Pierrepoint said that when he entered the cell Bentley 'thought, at that moment, we had come with his reprieve'.

Derek William Bentley was executed at 9.00 am on 28 January 1953. He was old enough to be hanged; he wasn't old enough to vote.

Did Bentley deserve to die?

We now know the answer to this frightful question – Derek Bentley should not have been executed: We know that he did not receive a fair trial, and we also know that crucial evidence was either manufactured or concealed.

At the time the public recognised a number of disturbing issues surrounding the conviction and execution of Bentley. And over time that public concern never went away. Derek's family fought and fought. Slowly steps were taken to rectify the injustice. In 1966 Bentley's remains were released from the grounds at Wandsworth, and he was reinterred in his family grave. In 1993 his family were able to secure a royal pardon from the sentence – but, of course, a pardon leaves the underlying conviction untouched.

The real breakthrough came in 1998 when the UK Criminal Cases Review Commission referred the matter to the Court of Appeal for review. Another lord chief justice presided over this second appeal – the great Tom Bingham.⁴ The review was conducted applying the same substantive law which applied in 1952. It involved a thorough examination of the evidence which was presented to the jury. A limited amount of fresh evidence was admitted and relied upon.

This second Court of Appeal found that the result in Bentley's case was unsafe and unanimously quashed the conviction. In

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arriving at that result the Court of Appeal exposed the truth – Derek Bentley had suffered a terrible string of injustices: see *R v Bentley (deceased)* [1998] EWCA Crim 2516.

A fundamental question was whether or not Bentley was even fit to plead. Earlier I had mentioned his diminished mental capacity. His impairment was partly congenital, worsened by the childhood head injury, and complicated by uncontrolled epilepsy. The combination was very serious. A review of Bentley's school and medical records showed that at the time he had been assessed as 'borderline feeble-minded' and 'educationally very retarded' and 'quite illiterate'. Bentley was unable to recognise all of the letters of the alphabet. There remains a real doubt about whether this material about Bentley's mental capacity was made available to the defence. Whatever be the case, this material was not disclosed to the jury. Even if Bentley was fit to plead, these were matters clearly relevant to his complicity and his ability to enter into the necessary agreement with Craig.

Another problem was related to Bentley's mental capacity. Remember Bentley's statement and his crucial admission – 'I did not know he was going to use the gun'? At the trial the police witnesses were adamant that the statement was merely a verbatim transcript of Bentley's *unprompted* words. The second Court of Appeal admitted fresh expert opinion that the language contained in the statement did not fit with other samples of Bentley's speech patterns – Bentley's way of speaking was, no doubt due to his mental impairment, very simple. The same experts described the terms of the statement as containing phrases which were 'redolent of police usage'. I have read the material and you do not need to have expert qualifications to arrive at this conclusion. It is inherently unlikely that a boy with a mental age of 11 years would say – unprompted – 'I have been cautioned that I need not say anything unless I wish to do so, but whatever I do say will be taken down in writing and may be given in evidence'.

There were other concerns as to the accuracy, and even the honesty, of the police evidence. Those critical words – 'Let him have it, Chris' – are a little too good to be true. The phrase was one well-known to UK police. In 1940 it was held that a call to 'Let him have it' was sufficient to justify a common purpose case against a non-shooter in the murder of a police officer: *R v Appleby* (1940) 28 CR App R 1. And there was plausible evidence that Bentley never even called Craig 'Chris' – instead, he only ever called Craig by his nicknames 'Kid' or 'Kiddo'.

There were also problems with the ballistics evidence. The pathologist said, at least at first, that PC Miles' wound was consistent with a bullet of .32 calibre (the actual bullet was



Bentley memorial flyer. PA Images / Alamy Stock Photo.

never produced). Craig's revolver could not fire a bullet of that calibre. The police weapons, however, were .32 calibre. So there is a reasonable chance that PC Miles was accidentally shot by one of his fellow police officers.

The Court of Appeal was scathing of the performance of Lord Goddard.⁵ Some of Goddard's '*mistakes*' are truly breathtaking.

Let's start with the standard of proof. Bear in mind the need for proof beyond a reasonable doubt had been repeatedly described as the 'golden thread' in the criminal law since Viscount Sankey's famous speech in *Woolmington v DPP* in 1935. Incredibly, Goddard failed to draw that to the jury's attention. Instead, Goddard instructed the jury – 'if you find good ground for convicting them, it is your duty to do it if you are satisfied with the evidence for the prosecution'. That sounds to me like something even less than the burden of a balance of probabilities.

The second Court of Appeal also said Goddard had reversed the onus of proof, describing the directions in this respect as such that the jury 'could well have been left with the impression that the case against [Bentley] was proved and that they should convict him unless he had satisfied them of his innocence'.

The summing up was seriously imbalanced. Goddard referred to the 'highest gallantry', the 'conspicuous bravery', and the 'devotion to duty' of the police. He said that the police deserved the 'thanks of the community'. Compare that with his references to Bentley's 'wickedness', his 'horrible' and 'dreadful' knuckle-duster, and his 'dagger' (in reality, it was a steak knife). The second Court of Appeal described the summing up as prejudicial and unfair and constituted a 'highly rhetorical and strongly-worded denunciation of both defendants and of their defences. The language used was not that of a judge, but of an advocate'.

Each of the 19 years of Derek Bentley's short life were hard, and his future was unpromising. But he still deserved to have that future.

I have read a great deal of material about this case and I can no longer believe that these errors were unintended mistakes by Goddard. They are just too gross, and there were too many of them. In instructing the jury in the way he did, Goddard had even failed to follow some of his own judgments. Goddard's behaviour is entirely consistent with the statement he made to Sir Charles Hardie – that a conviction must be secured '*at all costs*'. Goddard rode that jury to a conviction – which he knew would lead to the imposition of a death penalty on Bentley.

The second Court of Appeal said this: 'The summing up in this case was such as to deny [Bentley] that fair trial which is the birthright of every British citizen'.

The aftermath

Each of the 19 years of Derek Bentley's short life were hard, and his future was unpromising. But he still deserved to have that future.

Was there some bright side to this dark mess? Maybe – although it depends on your views about the death penalty. The lingering sense of injustice surrounding Derek Bentley's execution greatly strengthened opposition to the death penalty, eventually leading to its abolition in the UK in 1965.



Derek Bentley's niece, Maria holds aloft the draft Court of Appeal judgment in *R v Derek William Bentley*. PA Images / Alamy Stock Photo.

Endnotes

1. Rayner Goddard: b 1877; d 1971. Called to the bar 1899; KC 1923; King's Bench 1932; Court of Appeal 1938; House of Lords 1944; lord chief justice 1946–1958. In 1957 he had acquired the nickname 'Justice-in-a-jiffy' when he heard and dismissed six appeals in one hour. As a Conservative peer he spoke ardently in favour of the reintroduction of flogging, and against decriminalisation of homosexuality.
2. This discrepancy in punishment was one of the grounds for public disquiet at the time. On any view, the culpability of Bentley was far less than that of the shooter. Craig was released after ten years and qualified as a plumber and led a good life. I believe he is still alive.
3. David Patrick Maxwell Fyfe, first earl of Kilmuir: b 1900; d 1967; called to the bar 1922; KC 1934; solicitor-general 1942; attorney-general 1945; lord chancellor 1954–1962. Maxwell Fyfe was an accomplished practising barrister, who took the role of second counsel to Hartley Shawcross QC at Nuremberg. His cross-examination of Göring remains famous. His brother-in-law was the actor, Rex Harrison.
4. Thomas Henry Bingham, Baron Bingham of Cornhill: b 1933; d 2010; called to the bar 1959; QC 1972; Queen's Bench Division 1980; Court of Appeal 1986; master of the rolls 1992; lord chief justice of England and Wales 1996–2000; senior law lord 2000–2008. Widely regarded as one of the greatest of the English judges in the last century. The other judges on the Court of Appeal were not slouches either – Lord Justice Kennedy and Justice Collins (later Lord Collins of Mapesbury).
5. And not just Lord Goddard: the second Court of Appeal was critical of the decision of the original appeal court decision, and the way in which the original appeal was argued.

Innocence and life without parole in Louisiana

By Bernadette O'Reilly



The Louisiana State Penitentiary, commonly known as 'Angola'.

What began as discussions, sharing reviews and books between myself and another lawyer over the years about the 'West Memphis 3'¹, 'Central Park 5'², Darryl Hunt³ and other famous cases eventually culminated in a decision to volunteer at the Innocence Project in New Orleans. From January to March 2016 myself and Angela Jones⁴ worked with staff at the project on various cases.

We chose New Orleans as Louisiana has the highest rate of incarceration, not only the USA, but the world. So, just to compare with NSW, our population is approximately 7.7 million⁵ and the approximate prison population is 12,600 people⁶. Louisiana has a population of 4.5 million⁷ and yet has 38,000 in jail.⁸ This incredible number is best illustrated by per head of population with other countries.

Compare Louisiana's incarceration rate of 816 people per 100,000 people with the following countries:

- Russia 492,
- Australia 196,
- China 119,
- France 100,
- Germany 78.⁹

In Louisiana, not only do the courts frequently sentence people to life without parole, they also have the three strikes law¹⁰, which means the third time a person commits a felony they generally receive a life sentence.¹¹ What this means is that an

enormous number of people are serving lengthy jail terms, some for crimes they did not commit. Angola Penitentiary remains the largest maximum security prison in the United States.¹² It houses over 6,000 prisoners. The average sentence for prisoners there is 93 years. About 75 percent of people serving time at Angola will die there under current laws.¹³

Once a person has exhausted all their direct appeals (conviction and severity), they then have to be able to establish factual innocence to be exonerated, that means essentially establishing that the defendant did not commit the crime. There is no funding for representation for these cases, and prisoners who cannot afford a lawyer (the vast majority) are then dependent on groups such as Innocence Projects.

Innocence Project New Orleans (IPNO) is a non-profit law office with full time staff attorneys working cases from start to finish, supported by investigators, paralegals and volunteers. Since 1991, there have been 43 exonerations in Louisiana and at least nine in Mississippi.

Since 2001, IPNO has won the freedom or exoneration of 28 wrongfully convicted prisoners who served a total of 573 years in Louisiana and Mississippi's prisons between them. Sixteen of the 28 cases had no DNA evidence. Ten of these clients were teenagers when they were arrested. They use their clients' cases to ask for changes in laws and policies that cause indigent prisoners to be wrongly convicted.¹⁴

Wrongful convictions occur. While there is no way to accurately

determine how many people are serving time in prisons and jails across the USA for crimes they did not commit, experts estimate that for people sentenced to death:

...if all death-sentenced defendants remained under sentence of death indefinitely at least 4.1 per cent would be exonerated. We conclude that this is a conservative estimate of the proportion of false conviction among death sentences in the United States.¹⁵

In Australia there is no reliable data on how many wrongful convictions there are. There has been over the years a number of high profile cases:

- Lindy Chamberlain, who was wrongfully convicted of murdering baby Azaria in 1982.
- Andrew Mallard, who was wrongfully convicted of murdering Pamela Lawrence, served 12 years in jail.
- Alexander McLeod-Lindsay, who served a nine-year jail term for the attempted murder of his wife before he was eventually exonerated.
- Ray, Peter and Brian Mickelberg, who were exonerated after a detective confessed to framing them for the Perth Mint swindle.
- Roseanne Beckett (Catt), who served 10 years for planning to kill her husband, was exonerated in 2001.
- Darryl Beamish, was convicted in December 1961 of murdering Jillian Macpherson Brewer and John Button was convicted of manslaughter, following the death of Rosemary Anderson, Button's girlfriend. Beamish served 15 years, while Button was sentenced to ten years and served five, both had their convictions quashed as it was considered that the murders had probably been committed by Edgar Cooke the 'Night Caller', an Australian serial killer who from 1959 to 1963, terrorised Perth by committing 22 violent crimes, eight of which resulted in deaths.

How do wrongful convictions occur in Louisiana in the first place?

There are a number of reasons and causes. Below is a chart prepared by the National Registry of Exonerations.¹⁶ The Registry has registered 1905 exonerations between 1989 and 2016.

Exonerations by contributing factor	
As at 10/27/2016 Total = 1905	
Factor	Percentage
Mistaken witness ID	30
Perjury or false accusation	56
False confession	12
False or misleading forensic evidence	24
Official misconduct	51

1. Mistaken witness identification evidence

During a trial the prosecutor may call evidence from eye witnesses to identify the defendant. Prosecutors and juries alike see this evidence as powerful and convincing, however, as research has shown over the years (including in Australian jurisdictions), identification evidence is notoriously unreliable. More than 48 per cent of Louisiana and Mississippi's exonerations have involved some sort of error by eyewitnesses.¹⁷

IPNO client Kia Stewart was exonerated in 2015.

Kia was mistakenly identified as the man who shot Bryant 'BJ' Craig on a public street in broad daylight on July 31, 2005, just a month before Hurricane Katrina.

Within hours of the shooting, police developed Kia as a suspect in the case. This was based on a factually inaccurate anonymous tip. By the end of the day, without canvassing the scene for witnesses or doing anything else to develop leads, police included Kia's photograph in an array for BJ's distraught friend to identify. This single eyewitness (BJ's friend) identification was the only evidence against Kia.

At the time of his arrest, Kia was just 17 years old. Four years after his arrest, Kia was wrongly convicted after a short trial at which the state presented one eyewitness.¹⁸

2. Perjury or false accusation - 'Snitches' and Rewards

In 46 per cent of Louisiana and Mississippi's exonerations, defendants have been wrongly convicted based, at least in part, on the testimony of witnesses who lied, including witnesses who had an incentive to testify against the defendant.¹⁹ 'Incentives' to testify range from financial reward for information / testimony, to reduced jail time for a 'snitch', to the real perpetrator testifying to conceal his own guilt.

In 2011, Louisiana passed HB 305, which provides for the reduction of a defendant's sentence for substantial assistance in an investigation. IPNO was opposed to this bill, but worked

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with legislators to help ensure that when a snitch witnesses testifies, the content of their deal and the substance of their testimony is disclosed to the defence.

Other incentives include being offered a reduced sentence in exchange for giving testimony or claiming reward money from Crime Stoppers. A report in 2005 by the Chicago Center on Wrongful Convictions found that 38 innocent death row prisoners were convicted because of 'snitches'.²⁰

3.False confessions

In many wrongful conviction cases, suspects have confessed to crimes. You may be asking why would an innocent person admit to a crime he or she didn't do?

False confessions often follow interrogations which can be very intense and coercive. Examples include aggressive violent behaviour by interrogators, being misled or lied to, such as being told that there is already irrefutable evidence of their guilt, in order to obtain a confession, access to food, or toilet breaks may be restricted, sleep may be denied for extended periods. These tactics are surprisingly effective at producing a false confession.

In approximately 16 per cent of Louisiana and Mississippi's exonerations, the defendant has either made allegedly incriminating statements, confessed to the crime or pleaded guilty, in spite of their innocence.²¹

Nationally, one quarter of the defendants, who were later exonerated by DNA testing, gave a false confession. Not surprisingly juveniles and people with intellectual disability, or mental illness, are particularly vulnerable to falsely confessing when interrogated, and yet, virtually no protections exist for these groups.²²

A recent example were the confessions of the child Brendan Dassey in 'Making of a Murderer'.²³ At the time of the interview, Dassey was 16, and did not have an attorney or a parent present. According to court records, Dassey has an IQ of somewhere between 69 and 73 and the tape shows police putting detailed questions to Dassey, who replies with short, often one-word, answers.

Brendan's statements were involuntary, his lawyer Dean Strang said:²⁴

His statements were also wholly unreliable and flatly wrong on essential details, which is one of the obvious risks of coercing a statement from someone in custody. Our federal courts are often the last protectors of our liberties and justice. We are thankful and proud that a federal court fulfilled its fundamental role for Brendan Dassey today. In doing so, this federal court served all Americans.'

He was bullied by investigators, and the Milwaukee Federal Court Judge William E. Duffin found Dassey's confession to be involuntary under the Fifth Amendment, and overturned the conviction after granting his petition for a writ of habeas corpus.

4.False or misleading forensic evidence

Forensic science may seem infallible, given its glamorisation in TV crime dramas such as CSI. Juries are often seduced, or persuaded, by the expert evidence, and give it undue weight. Not only is much of it still in its infancy, but some methods rely on 'junk science' to produce evidence. Shoe print comparison, bite mark analysis, firearm tool mark analysis and hair analysis, among other methods, are commonly presented at trial, but often fail to meet scientific standards expected in other fields, and have not been subjected to sufficient scientific evaluation.

Meanwhile, forensics techniques that have been properly validated, such as serology, commonly known as blood typing, are sometimes improperly conducted, or inaccurately conveyed, in trial testimony. In some cases, forensic analysts has fabricated results or engaged in other misconduct.

All of these problems constitute invalid or improper forensic science, which is the second greatest contributor to wrongful convictions that have been overturned with DNA testing. In about half of DNA exonerations, invalidated or improper forensic science contributed to the wrongful conviction.²⁵

5.Official Misconduct

Incompetent counsel

Errors, negligence and deliberate misconduct by prosecutors and criminal defence lawyers are the most pervasive cause of wrongful convictions in Louisiana. This type of conduct caused, at least in part, 77 per cent of the wrongful convictions of Louisiana and Mississippi cases.²⁶

Many of IPNO's clients were represented either by incompetent counsel or by overworked and under-resourced public defenders. In many cases, the lawyers represented a client at trial without investigating the state's case or preparing a defence. Often defence lawyers have failed in the most basic of investigation tasks, such as interviewing alibi witnesses.

In 1984, the local bar had divided all of Shreveport's lawyers alphabetically, to represent the indigent. In one murder case, a man named Glenn Ford was randomly assigned to be defended by an oil and gas attorney and a slip-and-fall insurance attorney. They failed to challenge prosecutors' selection of an all-white



Bernadette O'Reilly (L) and Angela Jones (R) at the Innocence Project, New Orleans.

jury, which then found Ford guilty after deliberating for only three hours. He spent the last three decades of his life on death row, before being exonerated in March 2014. More on his case later.

This is not an isolated case, and the practice of assigning cases to inexperienced and inappropriate counsel continues. In Caddo Parish, Louisiana, due to a state-wide funding crisis and lack of funds for public defenders, judges have assigned cases to all the lawyers in Shreveport, including those specialising in real estate, personal injury, taxes and adoption - anyone admitted to practise and with a professional address in the parish.

Insurance attorney Ryan Goodwin found himself in a visiting area of the Caddo correctional center in Shreveport, Louisiana, bracing for an awkward conversation. He had to make an admission to his new client – a 16-year-old who was facing life in prison for stealing someone's wallet and cell phone at gunpoint.

'I don't do criminal defense,' he told the teenager, Norman Williams Jr. 'But I promise you, I'll definitely try my best.'

Goodwin typically represents insurance companies in litigation following car accidents. His job involves finding out what injuries the victim claims to have and whether they were caused by the crash. He has no criminal law experience.²⁷

Misconduct by Police and Prosecutors

Wilful misconduct committed by either police or the prosecution can play a significant role in producing wrongful convictions. Ultimately, it is the prosecutor who determines what evidence is presented during a trial and what is withheld. With this power, prosecutorial misconduct can occur when evidence is either deliberately misrepresented at trial or altogether withheld.

In the US, prosecutors have a great deal of influence over the jury selection process. In some cases, this can result in a jury assembled with a bias. Often, this can be seen through a racial lens, as in the case of former Louisiana death row inmate Glenn Ford.

Ford, a black man, was convicted of a 1983 murder and spent 30 years on death row. In 2014, he was released following new testimony proving his innocence. A.M. 'Marty' Stroud III, one of the prosecutors who sent Mr. Ford to prison, wrote [an article](#) for the *Shreveport Times*, apologising for his role in the case, after he had helped assemble an all-white jury and presented questionable evidence at trial.²⁸

Reginald Adams, an IPNO client, was exonerated in 2014 after spending nearly 34 years in prison for a murder he did not commit. His case illustrates both a false confession and withholding evidence resulting in a conviction.

Patterns and profile of exonerees and their cases.³¹

The National Registry of Exonerations has analysed the patterns and profile of the national data it collects. To date, there have been 1905 exonerations across the US.

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Basic patterns of exonerees

As of October 2016, the Registry included 1,905 exonerees:

- Sex: 90 per cent men; 10 per cent women.
- Race: 47 per cent black; 40 per cent white; 12 per cent Hispanic; 2 per cent Native American, Asian or Other.
- Trials and Guilty Pleas: 77 per cent convicted by juries; 7 per cent convicted by judges; 17 per cent pleaded guilty.
- Crimes: 42 per cent falsely convicted of homicide; 27 per cent of sexual assault (includes 11 per cent convicted of child sex abuse); 13 per cent of other violent crimes; 17 per cent of non-violent crimes.
- DNA: 23 per cent were exonerated at least in part by DNA evidence; 77 per cent without DNA evidence.
- Time served: All told, these exonerees spent nearly 16,618 years in prison—on average nine years each. Almost all (80 per cent) were imprisoned for more than one year; 38 per cent for 10 years or more; 57 per cent for at least five years.

Contributing factors that led to their wrongful convictions (many cases have multiple factors):

- Among exonerations in specific crime categories:
- The rate of perjury or false accusations is highest in child sex abuse cases (84 per cent) and homicide cases (68 per cent).
- The rate of official misconduct is highest in homicide cases (68 per cent).
- The rate of mistaken identifications is highest in sexual assault cases (69 per cent).
- The rate of false or misleading forensic evidence is highest in homicide cases (23 per cent) and non-violent crime (such as drug possession) cases (30 per cent).
- The rate of false confessions is highest in homicide cases (22 per cent).

National Registry of Exonerations

IPNO was successful in exonerating Jerome Morgan in 2016.

In 2014, Jerome Morgan's murder conviction was overturned, he walked out of prison after spending 20 years incarcerated for a crime he didn't commit. However, he remained accused of that crime, and lived in a state of pre-trial limbo with restrictions on his freedom until May 27, 2016, when the state finally dismissed the charges and he was fully exonerated.

Reform to Louisiana criminal justice system³³

Case study

In 1980, after being interrogated for five hours by the police, Reginald confessed to the crime. This confession, riddled with errors and getting nearly every fact about the crime wrong, was the only evidence used against him at trial. Reginald's first trial in 1983 was for first-degree murder, and prosecutors sought the death penalty. He was convicted and sentenced to life in prison. The Louisiana Supreme Court reversed his conviction, and he was retried for second-degree murder in 1990. He was again convicted and sentenced to mandatory life without parole.

At both of Reginald's trials, the NOPD homicide detectives assigned to the case testified that, despite a thorough investigation into the murder, they were unable to develop any real leads until he confessed. The detectives testified that they never located the gun used to kill the victim, or any of the property stolen from the victim's home, and never had any other real suspects in the crime.

During IPNO's investigation, they discovered an NOPD supplementary report located in an unrelated file in the district attorney's office. The report revealed that the homicide detectives had discovered the murder weapon, traced it to a pair of siblings who had access to the gun shortly before the murder, and had subsequently arrested one of the siblings, on whom they found a bracelet stolen from the victim's home, for accessory to first degree murder, all within one month of the crime. This report was intentionally suppressed by the prosecutors at Reginald's first trial, and made it clear that the NOPD detectives had perjured themselves on the stand.

Days later, the conviction and sentence were formally dismissed. Reginald Adams was freed the same day and went home with his family.

District Attorney Leon Cannizzaro apologized to Mr. Adams,²⁹ saying the 'handling of this case was shameful. Not only did the police and prosecutors' intentional acts harm Reginald Adams, who was wrongfully incarcerated for more than three decades, but also it denied this community any opportunity to hold the real perpetrator criminally responsible for this violent crime.'³⁰

There are many basic reforms that Louisiana could implement that would help guard against wrongful convictions in the first place.

- Eyewitness identification procedure reforms and corroboration requirements
- Specialised discovery rules and evidentiary restrictions in single witness cases
- Recording custodial interrogations of suspects and special protections for juvenile arrestees
- Higher standards for admissibility of forensic testimony in criminal cases and independence / increased oversight of crime labs
- Improving ethical compliance and performance standards of prosecutors and defence lawyers

The following policies and procedures would ensure that wrongfully convicted prisoners are exonerated and helped back into the world outside prison.

- Access to DNA and other forensic testing
- Proper evidence preservation and cataloguing
- Access to public records
- Proper public record preservation
- Access to legal assistance and the courts
- Adequate and prompt compensation after exoneration and immediate access to services

Current NSW profile

In NSW, the Exoneration Project at the University of Sydney was established in 2015 by Dr C van Golde. Specially selected students from the university's psychology and laws schools are scrutinising prisoner's cases to see if there really has been a miscarriage of justice. To date, they have had around 30 applications.

Some of the problems and issues we encountered in Louisiana just don't arise in NSW. What we observed led us to be thankful for our system that is comparatively fair. Although mistakes do occur, we at least have a funded Legal Aid and Aboriginal Legal Service.

We have procedures and policies, such as recording a suspect's interviews, recording ID parades, children's independent person present when interviewed, and recording of forensic procedures, that provide some safeguards against many of the issues we observed in Louisiana. However, our legal system continues to struggle with funding cuts to Legal Aid and the Aboriginal Legal Services. Properly funded legal representation

Case study

In 1993, Jerome was wrongly arrested at age 17 and prosecuted for the murder of Clarence Landry, III at a sweet sixteen birthday party held in the ballroom of a New Orleans hotel. A fight broke out between two groups of boys at the party. Shots were fired and three teens were hit—two survived, but 16-year-old Clarence Landry died on the scene. By all accounts, the gunman fled the ballroom immediately after the shooting and was chased down the street to an alley, where he jumped over a fence. When the police arrived, they sealed the room, and the detectives took down the names of everyone in the room, including Jerome, whose name was listed by the detectives in their report.

Jerome was prosecuted, based upon the identification testimony of two teenaged witnesses, one of whom had previously told the police it was definitely not Jerome. Post-conviction investigation by Innocence Project New Orleans revealed that the prosecutors had in their file a complaint history that proved that it took police a mere six minutes to arrive after the shooting, not 30 to 45 minutes as the jury heard. This made the already questionable theory that the gunman, after successfully fleeing from the crime scene, returned to a room of over 80 witnesses, even less likely—there simply was not enough time for the gunman to flee, run down the street to an alley, jump over a fence, hide the murder weapon, and return to the scene of the crime unnoticed before the police arrived and sealed the room. The teenaged witnesses also admitted in 2013 that the detectives had told them to name Jerome Morgan; one of several people about whom rumours were circulated among high school students in the months after the shooting.

Based on both the discovery of the complaint history and the recantation of the two teenaged witnesses, Jerome was freed on bond February 4, 2014 and granted a new trial. For two years after his conviction was overturned, IPNO fought to clear Jerome's name, while the district attorney first fought the ruling overturning his conviction, and when unsuccessful, fought to re-prosecute Jerome in spite of the clear evidence of his innocence. Meanwhile, since his release in 2014, Jerome has worked full time, mentored high school students at McDonough 35 and won a Propeller grant to help his effort to set up a barbershop through which he mentors teens. On May 27, 2016, the Orleans Parish district attorney dismissed the second degree murder charges against Jerome, and he was finally exonerated.³²

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greatly reduces the risks associated with wrongful convictions. We need to monitor and be vigilant to the increased pressure accused persons face to plead guilty to avoid lengthy jail terms applying standard non parole periods. We need to be alive to the alarming increased imprisonment rates never seen before in NSW, and the enormous backlog in criminal trials. We need to be on guard to ensure that shortcuts throughout the criminal justice system are not taken, and that mistakes made in other countries, failed policy and procedures are not replicated or adopted here. Finally there needs to be consideration given to a model and procedure for reviewing convictions in NSW.

Endnotes

1. West Memphis 3, Damien Echols, Jessie Misskelley, and Jason Baldwin were convicted in the deaths of three local boys. The prosecution alleged it was part of a satanic ritual. The case was documented in the film *Paradise Lost: The Child Murders at Robin Hood Hills* as well as two sequels and gained a large following, including many celebrities, who believed in the innocence of the defendants. In 2011, they entered Alford pleas in exchange for having their sentences reduced to time served. While their convictions stand legally, they are widely considered to have been wrongfully convicted.
2. Central Park 5, Yusef Salaam, Antron McCray, Raymond Santana, Kevin Richardson, Kharey Wise, who were between the ages of 14–16 at the time, were convicted of the assault and rape of Meili, who was jogging in Central Park. They were convicted on the basis of coerced confessions and faulty scientific evidence. The convictions were vacated in 2002 when Matias Reyes, a convicted rapist and murderer serving a life sentence for other crimes, confessed to committing the crime alone and DNA evidence confirmed his involvement in the rape.
3. Darryl Hunt, Hunt was convicted of murder on the basis of eyewitness testimony. He was later cleared by DNA testing.
4. Solicitor, Legal Aid NSW.
5. Australian Bureau of statistics. 3101.0 - Australian Demographic Statistics, Mar 2016.
6. NSW Bureau of Crime Statistics and Research, custody statistics: quarterly update sept 2016. www.bocsar.nsw.gov.au
7. U.S. Census Bureau. The state's estimated population on July 1 2015 was 4,670,724.
8. National Institute of Corrections. As of December 31, 2014, the Louisiana prison population was 38,030.
9. The World Prison Brief. Institute for Criminal Policy Research. University of London data compiled by Roy Walmsley, Director .
10. Three strikes legislation mandate [courts](#) to impose harsher sentences on those convicted of an offence if they have been previously convicted of two prior serious criminal offences (a felony). Introduced to Louisiana in 1994. As an example see 'Louisiana Man May Face Life For Shoplifting Snickers Bars' Huffington Post 19 April 2016.
11. A felony may be punishable with imprisonment for two or more years.
12. Angola for Life. Sep 09, 2015. Video by *The Atlantic*. 'There are more than 6,000 men currently imprisoned at the Louisiana State Penitentiary at Angola—three-quarters of them are there for life, and nearly 80 percent are African American. In this *Atlantic* original documentary, national correspondent Jeffrey Goldberg goes inside Angola to speak with inmates and with warden Burl Cain, who has managed the prison for two decades. www.theatlantic.com/video/index/404305/angola-prison-documentary/
13. As above at 12.
14. IPNO www.ip-no.org
15. Samuel R. Gross. Proceedings of the National academy of sciences of the United States of America. Rate of false conviction of criminal defendants who are sentenced to death. vol. 111 no. 20
16. National Registry of Exonerations, a project of the University of California Irvine Newkirk Centre for Science and Society and University of Michigan Law School and the Michigan State University College of Law. www.law.umich.edu/special/exoneration/Pages/mission.aspx
17. IPNO www.ip-no.org
18. IPNO www.ip-no.org
19. IPNO www.ip-no.org
20. The Center on Wrongful Convictions in Chicago 'The Snitch System: How Incentivized Witnesses Put 38 Innocent Americans on Death Row.' 2005 The study provides a comprehensive look at the problem of informant testimony, and describes in detail how the use of informant testimony contributed to the conviction of specific innocent defendants.
21. IPNO www.ip-no.org
22. Innocence Project New York. www.innocenceproject.org/
23. Making a Murderer is an American documentary television series that premiered on Netflix on December 18, 2015. Written and directed by Laura Ricciardi and Moira Demos, explores the story of Steven Avery, a man from Manitowoc County, Wisconsin, who served 18 years in prison for the wrongful conviction of sexual assault and attempted murder, before being fully exonerated in 2003 by DNA evidence. He filed a suit against the county on this case. In 2005, Avery was arrested on charges of murdering Teresa Halbach, a local photographer, and convicted in 2007. The series also covers the arrest, prosecution, and conviction of Avery's nephew, Brendan Dassey, who was also charged in the murder, largely based on his confession under interrogation. Netflix 18/12/13.
24. Statement to The Huffington Post 13/08/2016.
25. Innocence Project New York. www.innocenceproject.org/
26. IPNO www.ip-no.org
27. 'Louisiana a lawyer with a pulse with do.' The Guardian September 2016
28. Shreveport Times 3/8/15
29. Press conference on 12 May 2014
30. IPNO www.ip-no.org
31. National Registry of Exonerations, a project of the University of California Irvine Newkirk Centre for Science and Society and University of Michigan Law School and the Michigan State University college of law
32. IPNO www.ip-no.org
33. Summary list of reforms that IPNO seeks IPNO www.ip-no.org
34. A special thanks to the Innocence Project New Orleans staff and exonerees for allowing us to be part of your organisation.

Her Honour Judge Nicole Noman SC

Judge Nicole Noman SC was sworn in as a judge of the District Court of New South Wales on 8 August 2016. Arthur Moses SC spoke on behalf of the bar.

Mr Moses stated that her Honour comes to court with a deserved reputation as a learned and highly respected advocate.

Her Honour studied at Sydney Girls High and then Sydney University, graduating from the University of Sydney with a Bachelor of Laws (and later a Masters of Law) and was admitted as a solicitor of the Supreme Court of New South Wales. Her Honour is the first person in her family to practise law.

Her Honour joined the New South Wales Office of the Director of Public Prosecutions (DPP) in 1988 and remained there, first as a solicitor, then as a barrister, until her Honour's appointment to the bench.

As a solicitor, her Honour, initially served in what was then known in the DPP as 'the special crime unit', which was then managed by Justice RA Hulme. Her Honour served as a solicitor advocate in Local Court prosecutions and in progressing to a solicitor advocate in District Court trials, both in Sydney West Region and the Sydney Region.

Her Honour was called to the bar in November 1999 and thereafter became a Crown prosecutor. Her Honour took silk in 2012. As Crown prosecutor, her Honour prosecuted more than 200 trials and appeared in 200 appeal cases.

Among her Honour's important cases are two recent prominent and successful Crown appeals against the leniency of a sentence *Nguyen v The Queen* (2016) 90 ALJR 595 and *R v Loveridge* (2014) 243 A Crim R 31.

Mr Moses observed that those who briefed her Honour, as well as those who appear against her, credit her Honour with having a concise delivery and commanding presence in the courtroom. Mr Moses noted that there was widespread confidence that her Honour's decisions would be delivered in a timely manner.

Her Honour noted that the day of her swearing in would have been the 28th anniversary of her time at the DPP. Her Honour observed that she knew immediately upon commencing employment at the DPP that it suited her well. Her Honour noted that it was, for the most part, a wonderfully supportive and stimulating job surrounded by professional and inspiring



colleagues, and provided her with an opportunity to be involved in some interesting and challenging cases.

Her Honour noted the many mentors and advisers who had assisted her in her career, and acknowledged, in particular, the role of now Judge Frearson in her Honour's career as an advocate in the Court of Criminal Appeal, whose encouragement was very important to her Honour's confidence and preparedness to undertake that work. Her Honour also acknowledged and thanked her family and friends for their support and friendship.

Her Honour will sit predominantly in the District Court's busy criminal jurisdiction, which deal with the majority of serious criminal offences in NSW.

His Honour Jeffrey McLennan SC

Judge Jeffery McLennan was sworn in as a judge of the District Court of New South Wales on 22 August 2016. Chrissa Loukas SC spoke on behalf of the bar.

Ms Loukas noted that his Honour comes to the court with a deserved reputation as a learned and highly respected Crown Prosecutor with over 35 years of experience in the practice of the law.

His Honour grew up in Queensland and graduated from the University of Queensland with a Bachelors of Laws in 1980. His Honour first practised as a solicitor, predominantly in criminal law, first at the firm of Robertson O’Gorman, and from 1991 to 1999 as a Crown prosecutor, eventually heading the major crime section of the Brisbane Committals Project. During this time, his Honour was also seconded to the parliamentary Criminal Justice Commissioner’s Office as a principal legal officer. Immediately before coming to New South Wales his Honour was senior counsel for the Queensland Legal Aid Commission.

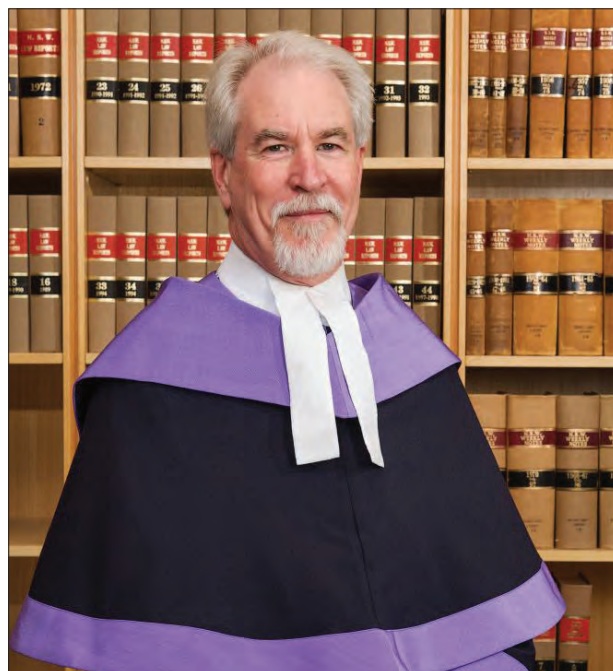
His Honour was admitted to the New South Wales Bar in 2002 and appointed as a Crown Prosecutor in Lismore. Since then his Honour has been a much-respected feature of the justice system in the Northern Rivers area. His Honour’s colleagues in the Lismore office of the DPP credit his Honour with being a great mentor to young up and coming solicitors and counsel.

His Honour prosecuted many serious criminal trials before the District Court and the Supreme Courts and took silk in New South Wales in 2014.

Ms Loukas noted his Honour’s widely held reputation as a measured, sincere and humble advocate. His Honour was also reputed, to defence counsel, to always be a tough, determined and efficient opponent, being thoroughly well prepared. That preparation included laminated maps and photographs, together with a rainbow of colour-coded tabs. Ms Loukas also noted his Honour’s deep interest in Zen Buddhism and Taoism and that the benefits of mindfulness and meditation are as appropriate for advocacy, as they will be for judging.

Aside from the law, it was noted his Honour loves all things to do with trees, music and cycling.

His Honour thanked and paid tribute to the many people in his professional personal life who had assisted him, including then Lismore resident judge, Tom Ducker, and the two directors of public prosecutions with whom his Honour worked, Nick Cowdery and Lloyd Babb, each of whom his Honour remarked 'have a deep commitment to the criminal justice system in New South Wales and a deep commitment to public service and that deep commitment has been an inspiration'.



His Honour observed of his 36 years practising law, quoting Jerry Garcia, the lead guitarist with the Grateful Dead about his time with the band, that 'It's been a long, strange trip'.

His Honour concluded:

Sitting here wearing purple for the first time, I am acutely aware of what an immense honour this is. It also feels a bit weird. However, as Hunter S Thompson famously said, 'When the going gets weird, the weird turn professional'. I promise then to do my professional best to serve the people of New South Wales and to do justice according to law.

His Honour will sit in the court’s criminal jurisdiction. From July 2017, his Honour will be the New England region’s first permanent District Court judge.

His Honour Judge Warwick Hunt

Judge Warwick Hunt was sworn in as a judge of the District Court of New South Wales on 8 August 2016. Arthur Moses SC spoke on behalf of the bar.

His Honour graduated from the University of Sydney with a Bachelor of Laws in 1980 and was admitted as a solicitor of the Supreme Court of New South Wales in 1982. His Honour is the first in his family to practise law, although his grandfather, a dairy farmer in northern NSW, was involved in the law as a JP. His Honour practised as a solicitor for 13 years, including working, at the New South Wales Legal Aid Commission as both a duty solicitor as well the solicitor in charge of the Prisoners' Legal Service.

His Honour left Legal Aid and trained as a massage therapist. Later, between 1989 and 1995, his Honour practised as a sole practitioner and accredited criminal law specialist. In that year his Honour was appointed as a member of the Consumer Claims Tribunal, the Residential Tenancies Tribunal and the Residential Building Disputes Tribunal.

In 2000 his Honour was appointed as a magistrate of the Local Court, serving for five years in the most difficult Local Courts of Burwood, Liverpool, Wollongong and Campbelltown. Importantly, his Honour later came to serve as the children's magistrate in Campbelltown and Illawarra where in that capacity his Honour was held in high regard by the profession.

His Honour also served as a coroner, and was well known in that role for his ability to manage multi-party inquests and to manage interpersonal dynamics arising from such complex cases.

His Honour was called to bar in 2007. His Honour read with now Justice Anthony Payne and Hament Dhanji, now of senior counsel. Mr Moses SC noted that when contacted in connection with his speech, Dhanji confessed that his Honour was really much more useful to him than he was to his Honour.

His Honour took a room in Forbes Chambers and remained there for nine years until his most recent appointment to the court. His Honour practised principally in criminal law but also appeared in commissions of inquiry and coronial inquests, as well as a significant amount of work in child protection and adoption law. His Honour was one of three counsel assisting the Special Commission of Inquiry into Police Investigations of Child Sexual Abuse in the Catholic Diocese of Maitland and Newcastle.

His Honour appeared in many trials, as well as appeals before the Court of Criminal Appeal.



Mr Moses also noted that his Honour had contributed significantly to life at the bar through work on many committees, and most memorably, delivering his Honour's speech, as Mr Junior, at the 2015 Bench and Bar Dinner while impersonating Dame Edna.

Mr Moses noted that his Honour comes to the court with a deserved reputation as learned and highly respected advocate.

His Honour stated that he was very honoured to be appointed as a judge of the court and particularly to be replacing retired Judge Brian Knox, who himself replaced the late great Judge Bob Bellear, a proud Noonuccal, Jarowair and Ni Vanuatu man, and the first Aboriginal judge appointed in Australia. His Honour also noted another important lineage of which he was part, namely, practitioners called to serve in judicial office having learned the ropes of the criminal justice system on the ropes at the Legal Aid Commission, the Public Defender's Office or in community legal centres, each of which is enormously relevant grounding for his Honour's new role.

His Honour will sit predominantly in the court's criminal jurisdiction, which deals with the majority of serious criminal offences in NSW.

APPOINTMENTS

Life memberships

At a meeting of Bar Council on 6 October 2016 Philip Selth OAM, Michael Fordham SC and Penny Johnston were made life members for 'exceptional service to the Bar Association and to the profession of the law'



Michael Fordham SC

In October, the Bar Council resolved that Michael John Fordham SC be appointed a life member of the Bar Association for exceptional service to the Bar Association and to the profession of the law. This appointment is recognition for the outstanding contribution Fordo, as he is otherwise known, has made to the bar over many years, principally in his role as convenor of the Bar Practice Course.

The Bar Practice Course sets the standard of conduct expected of practitioners at the bar and emphasises the values which should underlie and form the basis of each barrister's approach to practise at the bar. Among these are honesty and integrity and the highest standards of professionalism both in one's practice and in dealings with colleagues. The convenor of the Bar Practice Course is integral to encouraging these values and the success of the course generally.

Fordo was successful in instilling these values in a generation of readers embarking on their careers at the bar. Through his hard work and commitment to the role, he has offered a lasting guide to countless new barristers as to how to conduct themselves professionally, ethically and with humility.

I was fortunate enough to be a reader in one of the first Bar Practice Courses under Fordo's stewardship. He imbued the course with a strong sense of collegiality and it has become

apparent over the years I have come to know Fordo that he practices the values he preached at the Bar Practice Course.

Michael Fordham came to the bar in 1992 and was appointed senior counsel in 2012. He joined 12th Floor Wentworth Selborne Chambers and practices in personal indemnity and medical law and regularly appears at inquests and before commissions of inquiry. Beyond the Bar Practice Course, Fordo has been involved as an advocacy coach and has always been solid in defence for the NSW Bar football team.

Fordo joins a select group of professionals who have been appointed as life members of the bar, including his predecessor as convenor of the Bar Practice Course, Phillip Greenwood SC. Commenting on Michael's appointment, Phillip said 'Michael brought his own approach and personality to the role and it was his energy and leadership which meant that he was a success in that role.'

The role of convenor of the Bar Practice Course is not limited to cajoling the readers to turn up on time and introducing other speakers (although these are important aspects). Rather, each course requires months of preparation developing the course content and ensuring that appropriate and skilled speakers are selected who themselves reflect the values that the course aims to instil. This involves a significant commitment of time and occasionally adept skills in diplomacy.

APPOINTMENTS

'Life memberships'

Over the years, Fordo has worked closely with the staff of the Bar Association preparing for and running each of the Bar Practice Courses. Chris D'Aeth, former Director of Professional Development at the Bar Association, said 'His recent appointment as a life member is recognition of his embodiment of the finest ideals of the bar and his decade long contribution to the bar, in particular his influence and direct involvement with hundreds of new barristers as they enter the profession and complete the Bar Practice Course.'

Chris D'Aeth added 'Fordo has always sought out opportunities to develop and advance others. And his characteristic parsimonious style – always doing what is necessary but without lengthy engagement and redundant argument – is greatly admired but hard to emulate.'

It is clear that Michael Fordham SC's appointment as a life member is well deserved recognition of his commitment to the profession.

By Daniel Tynan

Philip Alan Selth OAM

Philip Selth was conferred with a life membership of the NSW Bar on 6 October 2016 for a remarkable contribution as executive director of the New South Wales Bar Association over the last 20 years.

Philip, the quintessential administrator, replaced Babette Smith in 1997. He was an experienced in politics, higher education and government departments. He had been pro-vice chancellor (Planning and Administration) at the Australian National University (1992–97); director of the Department of Social Security in Queensland Director of Review for the Queensland Public Sector Management and the Northern Territory (1987–1990); as well as holding various roles at the Department of the Prime Minister and the Cabinet (1981–1987) during the Fraser and Hawke years. He also worked in the Commonwealth Attorney General's Department (1973–1977).

Philip was instrumental in drawing the Barristers Rules as a regulatory standard for barristers. Those years were key to allowing a greater transparency and public accountability of barristers. The harmonizing effect of the Rules has given rise to a professional body known as the Australian Bar in which he has been a key player. He brought the bar into the 21st century.

Philip was successful in perpetuating throughout NSW a sense of unity amongst counsel, of one inclusive Bar - town and country. For years, Philip was the chief interpreter of the collective will of Bar Councils. His presence was felt everywhere – he was striving for a gold standard for the bar.



In the last 20 years, the NSW Bar developed a strong headquarters in Sydney. The current chief justice of NSW observed, Philip had an incomparable dedication to the job. In 2006 Philip was awarded the OAM in recognition to his services to the Law, the NSW Bar Association and to the community.

Philip retires to the world of writing and research on soldier silks of the old profession and lesser known chapters of Australian Indigenous history.

By Kevin Tang

APPOINTMENTS

‘Life memberships’

Penny Johnston BarCare

Penny Johnston was awarded life membership of the NSW Bar on 6 October 2016, for outstanding service as inaugural director of BarCare.

Penny was engaged as Director of BarCare when it was a pilot program only. Her brief was as a helping hand to members of the bar in emotional or psychological difficulties. Penny was available at all hours, at almost any time, at short notice, almost anywhere. She earned the moniker ‘the lady in the red jacket’ as candidates sought Penny out, secretly, by that description in cafes in the city. Those who sought her help presented with anything from minor crises of confidence to the worst depths of clinical depression. She was literally ready for anything and dealt with it all in the strict confidence.

With a career in public health and psychology, she was well-suited to care for a profession which prides itself on looking for

weaknesses and often labels them anathema. Before 2008, the impact of depression in the profession was not well appreciated. Barristers are known for their apparent steely confidence and strong will, but that is not enough to protect them from the vicissitudes of life. Attitudes changed as time ticked on. Penny’s contribution was her assiduous attention to the emotional and psychological health of members of the NSW Bar, including during the sad spike in consultations after the Lindt Café tragedy.

The hours that Penny worked face-to-face with persons in trouble over nine years is testament to her professionalism. Her commitment and devotion to BarCare, no doubt, helped many and saved many lives.

By Kevin Tang

The 2017 Bar Council

Office bearers

President:	Noel Hutley SC
Senior Vice-President:	Arthur Moses SC
Junior Vice-President:	Tim Game SC
Treasurer:	Chrissa Loukas SC
Honorary Secretary:	Sophie Callan

In order of seniority

Mr T A Game SC
Mr N C Hutley SC
Mr W Terracini SC
Dr A S Bell SC
Mr A R Moses SC
Mr R H Weinstein SC
Ms J Lonergan SC
Ms C Loukas SC
Mr M McHugh SC
Ms M Walker
Miss E Welsh
Mr P N Khandhar
Mr B F Katekar
Ms A Mitchelmore
Mr M A Izzo
Dr Ruth C A Higgins
Ms S Callan
Ms Catherine Gleeson
Mr G Antipas
Ms J L Roy
Ms L C Hutchinson

Senior counsel appointments for 2016

President Noel Hutley SC announced the appointment of 15 senior counsel on 30 September 2016. Chief Justice T F Bathurst AC presented the new silks with their appointment scrolls at a ceremony in the Bar Common Room on 25 October.



Back row, L to R: Doran Cook SC, Nicholas Owens SC, Scott Goodman SC, Scott Nixon SC, Jason Potts SC, Roger Marshall SC, David Kell SC, Sandy Dawson SC. **Front row, L to R:** Victor Kerr SC, Chris O'Donnell SC, Kate Williams SC, Katherine Richardson SC, Kara Shead SC, Nicholas Chen SC, Adam Casselden SC.

Christopher Peter O'Donnell

Frederick Jordan Chambers

Christopher O'Donnell began practising at the New South Wales Bar in October 1993. His principal areas of practice involve criminal trials and appeals, professional discipline matters, inquests and inquiries. Christopher has published academic articles and reviews for a range of publications including the *Australian Bar Review*, the *Australian Taxation Review* and the *Criminal Law Journal*. He has been a member of the Bar Association's Bar News Committee and a Legal Aid Review Committee. [BA LLB (Sydney); MA (UTS)]

Roger David Marshall

Ground Floor Wentworth Chambers

Roger Marshall came to the NSW Bar in September 1994. His principal areas of practice are commercial law and equity, including appellate matters, particularly in insolvency and bankruptcy. [BA (Sydney); LLB (UTS)]

Victor Fraser Kerr

11th Floor St James Hall

Victor Kerr began practising at the New South Wales Bar in August 1995. His principal areas of practice are commercial law and equity, including appellate matters, and alternative dispute resolution. [B Sc LLB (Sydney)]

Nicholas Edward Chen

Tenth Floor Selborne/Wentworth Chambers

Nicholas Chen began practising at the NSW Bar in February 1998. His principal areas of practice are commercial law, common law/personal injury, inquests and inquiries and alternative dispute resolution. [LLM SJD (Sydney)]

Adam Craig Casselden

Greenway Chambers

Adam Casselden commenced at the NSW Bar in August 1998. His principal areas of practice are commercial law, equity, common law/personal injury and alternative dispute resolution. Adam also has a background in sports law and has served as a judicial officer at the 2015 Rugby World Cup and on various Olympic Appeals Tribunals. He has served on a number of Bar Association committees and is currently a member of the Association's Diversity and Equality Committee and Health and Wellbeing Committee. [B Sc LLM (Sydney)]

David Kell

Crown Advocate's Chambers

Dr David Kell commenced practice at the NSW Bar in February 1999. He is the NSW Crown Advocate. His areas of practice have included criminal law, commercial law, administrative law, common law/personal injury and inquests and inquiries. David has appeared in many high profile inquiries, including as Counsel Assisting the Special Commission of Inquiry into the Greyhound Racing Industry in NSW. [BA LLB (NSW); DPhil (Oxford)]

APPOINTMENTS

‘Senior counsel appointments for 2016’

Scott Anthony Goodman

7 Wentworth Selborne

Scott Goodman commenced at the NSW Bar in February 2001. He practices in commercial law, equity and alternative dispute resolution. Scott is a member of the NSW Bar FC soccer team and has served on the Committee of the former NSW Barristers Superannuation Fund. [B Sc LLB (Hons) (ANU); LLM (Sydney)]

Kate Jane Williams

Eleven Wentworth

Kate Williams commenced practice at the NSW Bar in February 2001. Kate practices in commercial law, equity and alternative dispute resolution. She is a current member of a Professional Conduct Committee. [BA LLB (NSW)]

Katherine Richardson

Banco Chambers

Katherine began practising at the New South Wales Bar on 9 August 2002 after receiving the Blashki Award for the highest mark in the Bar Exams. Her principal areas of practice are public / administrative, environment, planning and health law, as well as inquests and inquiries. Before she was called to the New South Wales Bar, Katherine was admitted to the New York Bar in 2000. [BEc LLB, DipEd (Sydney) LLM (Harvard)]

Alexander Tamerlane Sinclair (Sandy) Dawson

Banco Chambers

Sandy Dawson began practising at the New South Wales Bar on 3 February 2003. His principal areas of practice include defamation, alternative dispute resolution, public / administrative law, inquests and inquiries. He has appeared in numerous defamation, non-publication and suppression matters involving prominent media organisations. [BA LLB (Sydney)]

Jason Anthony Christian Potts

8th Floor Selborne Chambers

Jason began practising at the New South Wales Bar on 10 February 2003. His principal areas of practice are commercial and equity. [LLB (Hons) BComm (ANU)]

Scott Michael Nixon

Sixth Floor Selborne/Wentworth Chambers

Scott began practising at the New South Wales Bar on 16 February 2004. His principal areas of practice are alternative dispute resolution, equity, commercial and public / administrative law. Scott was awarded the Blashki Prize for the highest mark in the Bar Exams in 2003. [BA (Hons), LLB (Hons) (Sydney) M Jur; DPhil (Oxford)]

Nicholas James Owens

Fifth Floor St James' Hall

Nicholas began practising at the New South Wales Bar on 16 February 2004. His principal areas of practice are appellate, commercial and public / administrative law. Nicholas was admitted to the New York Bar and practised as an attorney there between 2001 and 2003. [BA LLB (Hons) (Adelaide) LLM (Harvard)]

Kara Natalie Shead

Director's Chambers

Kara began practising at the New South Wales Bar on 5 May 2005. Her principal areas of practice are appellate and criminal law. Kara is currently the Deputy Director of Public Prosecutions at the NSW Office of the DPP. Prior to that, she was a Deputy Senior Public Defender. Kara has served on the NSW Bar Council since 2015 and a Professional Conduct Committee since 2015. [BA LLB (Macquarie)]

Doran Lane Cook

9th Floor Wentworth Chambers

Doran began practising at the New South Wales Bar on 1 September 2005. His principal areas of practice are appellate, equity and commercial law. Doran migrated to Australia from South Africa in 2004. Between 1994 and 2004 he practised at the Johannesburg Bar. [BCom LLB (Witwatersrand)]

George Gurney Masterman QC (1929–2016)



George Masterman QC died on 2 October 2016, aged 87. He was an outstandingly individual member of the bar – hugely intelligent, energetic, fearless, always elegantly dressed and fit-looking, patrician in manner but generous and open in spirit. He knew many people in high places, but would never let fear of displeasing someone with power interfere with his doing what he decided was right. He leaves behind a great legacy of contribution not only to his clients but also to the law, to the barristers who were fortunate enough to have crossed his path, and to the Australian public. For nearly all of his time at the bar he was a member of the Eleventh Floor, where he will be particularly missed.

After secondary schooling at The King's School he was awarded the Broughton Scholarship, and studied at Oxford University from 1949 to 1952, receiving an MA. During his time at Oxford he travelled in the Middle East with Rupert Murdoch. Upon returning to Sydney he studied at Sydney University Law School. As was the practice then, he served articles of clerkship concurrently with the last years of his degree, at Allen

He knew many people in high places, but would never let fear of displeasing someone with power interfere with his doing what he decided was right.

Allen & Hemsley, under the formidable Sir Norman Cowper. It was there that he became friends with another articulated clerk, James Wolfenson, later head of the World Bank.

He was admitted as a solicitor in March 1956, went to the bar in August 1957, and took silk in 1972. At the bar he developed a practice that covered an impressively broad range of fields of law. He had a deep knowledge of the law – not just of one or two areas of the law but of the law as an entire operating system. He had the creative intelligence to identify principles that could bear on a case in a way that was not at first obvious, and use them to test conventional understandings. Just one small example is that at a time when the *Trade Practices Act 1974* was still novel he realised, in the short time available to prepare a defence to an interlocutory injunction application, that even though the Federal Court had been given exclusive jurisdiction to hear actions under Pt IV of the Trade Practices Act, it was possible to raise a defence in an action in the Supreme Court that a contract being sued on was contrary to s 45 of the Act¹. He argued many cases that have been of lasting significance – though, inevitably for any barrister, not always on the winning side. They included *Trade Practices Commission v Tooth & Co Ltd*² (which brought an end to the system of brewers owning pubs and leasing them subject to a tie that required that only the beer of that brewer be sold there), *R v Judges of the Federal Court*³ (which decided that the provision in the Trade Practices Act that says that 'any other person' can bring an action to seek an injunction enforce the

Act means what it says, so that a trader has standing to require its competitor to observe the Act), and *University of New South Wales v Moorhouse*⁴ (which held that universities had been aiding and abetting breaches of copyright by having photocopying machines in their libraries for students to use unsupervised – a decision which led to legislative change to provide for compulsory copyright licensing to educational institutions)⁵. He appeared in many of the cases and tribunal inquiries that tested the limits of the *Trade Practices Act 1974* in the decade or so after its introduction.

His practice at the bar was not just a matter of receiving briefs and appearing. The NSW Government appointed him as an inspector to inquire into the collapse in 1975 of the stockbroking firm Patrick Partners. He acted pro bono in many cases that raised public interest questions, civil liberties or consumer rights – as varied as defending the publisher of *Portnoy's Complaint*, defending nude sunbathers, and seeking leave (unsuccessfully) to appear for the International Commission of Jurists as an intervener or an *amicus curiae* in the Stolen Generations case⁶. They included advising a student filmmaker who had liberated a copy of her exposé of what went on in a chicken-processing factory when her film school decided the film was not suitable for public viewing⁷. His opinion to the International Commission of Jurists, that the NSW Coroner might have jurisdiction to investigate the death of one of the Australian journalists killed by Indonesian troops in East Timor in 1975 was one of the causes of a coronial inquest eventually being held in 2007

‘George Gurney Masterman QC (1929–2016)’

into the death of the Balibo Five.⁸

He was particularly generous and helpful to young barristers, encouraging solicitors to brief promising young juniors, and being very willing to share his knowledge and experience. I remember practical advice like ‘Get an expert involved early – then it becomes his case’. He was the co-author, with Zeke Solomon, of a textbook on the *Trade Practices Act 1965*⁹, described by Ninian Stephen QC as ‘from a practitioner’s viewpoint quite the most useful of the several Australian texts now available which examine and comment upon the Commonwealth Trade Practices Act.’¹⁰ While running his practice he also was a visiting professor at the University of NSW in the 1970s. The courses he taught showed the range of his interests and abilities – he taught the technical and detailed subject of patent law, and also a course advising students on the techniques of representing public interest groups¹¹.

But his interests and energy were not confined to practise as a barrister. He was a director of the Australian Institute of Political Science, its chairman for two years, editor of its magazine *Australian Quarterly*, and editor of books of its proceedings.¹² He was a member of the NSW Writers’ Centre Management Committee in the 1970s, and a member of the Australian Society of Authors. He played hockey for many decades, first with the Legal Eagles (a team started in 1956)¹³. He was an instigator of the re-formation of a Bar hockey team in 1990¹⁴. In 1995, when George was in his mid-60s, *Bar News* referred to his ‘enthusiastic and vigorous play’ for the bar hockey team¹⁵. For a while in 1989 – 1991 he was ‘reader’s editor’ of the *Sydney Morning Herald* – a position intended to allow him to adjudicate independently on readers’ complaints

He reported to parliament that such a system was ‘a dangerous charade likely to deceive the public into believing that there is a public watchdog or guardian when there is not’...

about stories, and possibly expose broader issues about newsgathering or newspaper production. However after producing a number of reports with findings adverse to journalists, journalists blackbanned co-operating with him. The position became untenable, and he terminated his contract¹⁶. He provided practical assistance when his wife Joan established ecotourism ventures in Tasmania.¹⁷

His single greatest contribution was the period he spent as ombudsman of NSW, from April 1981 until he resigned effective in early 1988. The position of ombudsman was created by the *Ombudsman Act 1974*, with some powers to investigate and report on complaints about the conduct of a public authority. Some additional powers of oversight of the police were conferred on the ombudsman by the *Police Regulation (Allegations of Misconduct) Act 1978*. George was the second ombudsman appointed in NSW, and the only silk to have ever filled the office. A front-page story on his appointment in the *Sydney Morning Herald* referred to him as ‘dashing and unconventional’.¹⁸ He certainly proved to be unconventional, as he transformed the office totally – to such an extent that he is sometimes mistakenly referred to as having been the first ombudsman. He applied his energy, intelligence, imagination and courage to turning it into as effective a questioner of the legality and fairness of administrative action as the legislation permitted. Under the Ombudsman Act he used to the full the powers of a royal commissioner to investigate complaints, the power to conduct an investigation of his own motion, and the power to

make special reports to parliament. He was well aware that a complaint that was not particularly significant in itself could be the result of a systemic weakness in administrative procedure, that should be corrected. He developed a procedure for according natural justice to people involved in an investigation, under which if any adverse comment on a person was being considered that person was provided with a draft of the parts of the report that bore upon his or her conduct, and given the opportunity to make submissions.

When he became ombudsman, the powers he had concerning complaints against the police were confined to reviewing a file of papers that emerged from the police’s own internal investigation of the complaint. He reported to parliament that such a system was ‘a dangerous charade likely to deceive the public into believing that there is a public watchdog or guardian when there is not’¹⁹, and ultimately the Court of Appeal upheld his view that he was entitled to decide that he was neither satisfied that a complaint was sustained, nor satisfied that it was not sustained²⁰. This led to a legislative change, which allowed the ombudsman to conduct his own investigation once the police had finished theirs. In consequence police were seconded to the ombudsman’s office to assist in these re-investigations²¹.

He was so effective in investigating and exposing deficiencies in administration that many public servants, police and ministers resented his effectiveness. After his period as ombudsman he was never offered the judicial position for which his intellectual ability and knowledge

'George Gurney Masterman QC (1929–2016)'

undoubtedly qualified him. But his public contribution both as a barrister and as an involved citizen was enormous.

By the Hon JC Campbell QC

Endnotes

1. *Hollywood Premiere Sales Pty Ltd v Faberge Australia (Pty) Ltd* [1976] 2 NSWLR 144
2. (1979) 142 CLR 397
3. (1978) 142 CLR 113
4. (1975) 133 CLR 1
5. Others – by no means a complete list – were *Interlogo AG v Toltoys Pty Ltd* (1973) 130 CLR 461 (construction of patent specification concerning Lego); *R v Trade Practices Tribunal; ex parte St George County Council* (construction of 'trading corporation' in s 51 (xx) constitution); *Pigram v A-G (NSW)* (1975) 132 CLR 216 (whether terms of schoolteacher's bond constituted a penalty); *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107 (when the Crown is bound by statute – in particular, application of the *Trade Practices Act* to the Queensland Commissioner of Railways); *Minnesota Mining and Manufacturing Co v Biersdorf (Aust) Ltd* (1980) 144 CLR 253 (validity of patent for breathable surgical tape); *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 (what is federal jurisdiction) and *Wacando v The Commonwealth* (1981) 148 CLR 1 (a predecessor of the *Mabo* land rights recognition cases)
6. *Kruger v Commonwealth* (1997) 190 CLR 1
7. *Sydney Morning Herald* 11 October 1977 p 8
8. http://www.nationalprobono.org.au/ssl/CMS/files_cms/BaliboInquestandProBono.pdf
9. Masterman G & Solomon, E *Australian Trade Practices Law* (Butterworths Australia 1967)
10. Stephen, N M 'Australian Trade Practices Law' 6 *Melbourne University Law Review* 453
11. *Sydney Morning Herald* 29 April 1981 p 1
12. Eg *Poverty In Australia* (Angus & Robertson 1969), *Big Business in Australia* (Angus & Robertson 1971)
13. *Bar News* Summer 2006/7 p 118
14. *Bar News* Spring 1990 p 40
15. *Bar News*, 1995, p 53
16. Finkelstein, R Report of the *Independent Inquiry into the Media and Media Regulation* (Canberra, Australian Government 2012) p 202 –3 para 7.44; Muller, D 'Media Accountability in a Liberal Democracy. An examination of the harlot's perspective' (Melbourne, Centre for Public Policy Department of Political Science University of Melbourne) <http://www.denismuller.com.au/documents/MullerPhD.pdf> Chapter 9
17. 'Forget David Walsh: Joan Masterman gave birth to Tasmania's tourism boom' *Australian Financial Review* 26 April 2016
18. *Sydney Morning Herald* 29 April 1981 p 1
19. Special report to parliament March 1982
20. *The Ombudsman v Moroney* [1983] 1 NSWLR 317
21. The history is more fully set out in Landa, D & Dillon, H 'Public Accountability & External Review of Police Conduct' in *Police Leadership in Australia* (B Etter & M Palmer eds) 122 – 136 and Masterman G 1988 'External Review: the New South Wales Experience' in Freckleton, I & Selby, H (eds) *Police in Our Society*, Butterworths, Sydney 1988

John Barrington Bishop (1937–2016)

Dr John Bishop, barrister at Third Floor Wentworth Chambers, died on Saturday, 3 September 2016. His funeral was held at St Andrews Cathedral in Sydney. The following is an extract from the eulogy delivered by Kanishka Raffel, dean of the Parish of Sydney.

John Bishop was born on 22 April 1937 to Bruce and Lena Bishop. He was the youngest of two boys. John attended Canterbury Boys High School, a selective public school with many prominent alumni, including former prime minister John Howard, who was at the school at the same time as John. John excelled in literary subjects, such as Latin.

From his youth, John was a life-long fan of rugby league and was an avid follower of the St George Dragons. He attended the University of Sydney and attained a Bachelor of Arts degree with first class honours. He majored in Hebrew, as he had a deep love of the Old Testament. He also undertook theological studies and joked that, if ever ordained, he could end up as Bishop Bishop. After undertaking studies in economics he

settled into the study of law. He was awarded a Bachelor of Laws degree with first class honours and then a Master of Laws degree with first class honours, both from the University of Sydney. John also undertook doctoral studies through the London School of Economics and Political Science. This entailed many visits to London to see his supervisor. He was awarded his PhD in law in 1988.

He worked as a lecturer in law at Macquarie University from 1978 to 1984. He lectured in the administration of criminal justice and in evidence and procedure. He enjoyed setting examination questions which entailed hypotheticals featuring the St George Dragons, much to the amusement of students.

He began practising at the New South Wales Bar in February 1978. He practised mainly in common law, criminal law and administrative law. In 2001 he was appointed as counsel assisting the Royal Commission into the Building and Construction Industry in Melbourne. He maintained a thriving practice until his death at the age of 79.

Arguably his major contribution to law was as an author. He wrote *Criminal Procedure*, first published by Butterworths in 1983 and which went to five reprints. A second edition was published in 1998. The book remains a seminal authority on criminal procedure from a national perspective and an important practical resource for judges and practitioners in the field of criminal law.

Terence Fenwick Marely Naughton (1941 – 2016)

Queen's Counsel, Judge of the District Court of NSW



Former District Court Judge Terry Naughton QC died peacefully at the Sydney Adventist Hospital on 15 August 2016, after a brief illness. He was farewelled on 22 August 2016 at St James King Street.

His Honour was educated at Drummoyne High School for the first three years of secondary school and for the last two years at Sydney Boys' High School, where he was a prefect and debating captain. He read law at the University of Sydney and was also captain of the debating team. He completed articles of clerkship at Clayton Utz & Co and was later an employed solicitor at Blake Dawson.

He read and then established himself in 1968 on Twelfth Floor Wentworth Chambers Waddell QC was his Pupil

Naughton QC took his family and his manual Linhoff 4x5 camera to small towns with beautiful old courthouses in regional NSW, Victoria and Tasmania. He captured their essence in beautiful light.

Master. He was led by Forbes Officer QC, Deane QC and Lockhart QC. Finlay QC, Sully QC and Rolfe QC were fellow floor members and friends, together with friends on other floors such as Tamberlin QC, Handley QC and Malcolm McLelland QC. He accompanied Sir Maurice Byers QC to the Privy Council in the 1970s.

He held a long-term brief, led by Jenkins QC and Morling QC, in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, concerning the eastern suburbs railway. Shortly after its conclusion, he was appointed queen's counsel.

He was briefed widely, but with a large practice in the Land and Environment Court. He authored the eminent practice work *Naughton – Land and Environment Court of New South Wales; Law and Practice*, first published in 1993 which still bears his name.

He was a fastidious and meticulous counsel, placing emphasis on the factual details of the case. Colleagues and friends knew of his legendary reverence for the written and printed word. A magnificent library of calf-bound reports graced the shelves of his spacious chambers. In 1987, inspired by the photography exhibition 'American County

Courthouses' of William Clift, an American photographer, Naughton QC took his family and his manual Linhoff 4x5 camera to small towns with beautiful old courthouses in regional NSW, Victoria and Tasmania. He captured their essence in beautiful light. He had the eye for detail, an appreciation for subtlety and the patience of Job to wait for the best shot.

Naughton QC's exhibition at the SH Ervin Gallery 'Places of Judgment New South Wales' was critically acclaimed. Dupain reviewed the exhibition in the *Sydney Morning Herald* and described the chronicle of images as '...immaculate and beautiful'. Both Dupain and Clift became friends as well as mentors.

Naughton was appointed a judge of the District Court in 1997. With characteristic care and attention, he heard both civil and criminal cases. No judgment was long-reserved despite a significant workload. He retired in 1997 to continue his involvement with his family and his interest in photography and ancient coins.

By Kevin Tang

Greg Anthony Farmer (1959–2016)



Gregory Anthony Farmer passed away on Monday 22 August 2016. He was surrounded by his family and several close friends. It was his 57th birthday.

Less than a year earlier he had been sworn in as a Judge of the District Court of New South Wales.

But even after such a short period on the bench, Greg had carved out a reputation amongst practitioners as being fair and even handed in the dispensation of justice in both civil and criminal matters which came before him. It was a fitting and well-deserved reputation; in all my years of practice and from the time we first met in 1983 I had never met a man who was so in control of his feelings and his sense of purpose.

Many people would share this view that I had about Greg and it is a terrible shame that he had such a short time to use his qualities for the greater good; the administration of justice.

Greg graduated from Macquarie University in 1983 and was admitted as a solicitor in December of that year. He had been studying part time whilst working full time in Magistrates Courts Administration, where he soon carved

out a reputation as a handy all-rounder on the cricket field.

After his admission he was employed as a legal officer, first with Corrective Services and then later, when he switched rolls and became in house counsel with the Commonwealth DPP. The experience he gained in these positions provided the foundation for Greg to develop and extensive criminal practice at the bar for the next 20 years.

Greg was appointed as senior counsel in 2011 and as both junior and senior counsel, he appeared in a number of prominent cases for both the defence and the Crown. In doing so he obtained invaluable experience at both ends of the bar table.

At his swearing in on 15 September 2015, the Attorney General of NSW, the Honourable Gabrielle Upton spoke of Greg's achievements at the bar, including his many appearances at public enquiries and his position as lead counsel at the Villawood Detention Centre riot cases, in which he was charged with running 14 separate prosecutions. The Attorney noted that Greg maintained 'constant composure in dealing with the demands of all those legal representatives.'

There is no doubt that Greg was a fine lawyer who had all the qualities which would equip him for a long and distinguished career on the bench. Everyone in the law who knew him shares that view.

Greg was a tremendous husband, father, son and brother and he had an endless affection and admiration for his wonderful mother Pat, who took on the role as a single mother to Greg, his brother Brian and their three sisters Helen, Susan and Stella (all of whom were aged between 5 and 11 years) following the sudden and untimely death of his own father Brian.

He was a loving and devoted husband to his wife Jane and a fine and caring father to his two young children, Aiden and Prue. He adored them both and often spoke about them with great pride. And in all his years as a Barrister and Judge he always managed to keep a keen and active interest in all the activities in which they were involved.

But, and as I sit here preparing these words about Greg I know, as do so many other people, that he was so much more than just a great lawyer and a good and loving family man.

When a person is taken from us so suddenly and in such tragic circumstances it is natural that people will be stunned and will have some trouble dealing with the loss of their friend. With Greg's tragic and premature passing there was an outpouring of sorrow from so many people from so many different walks of life.

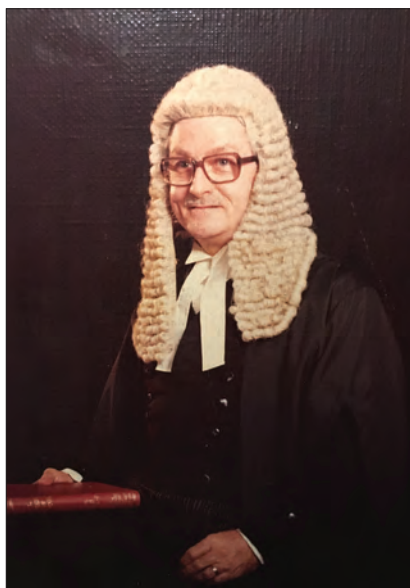
Was it his natural warmth and kindness or was it his dry sense of humour that those of us who are left will remember most? Or was it some other aspect of his personality which so attracted people to him?

It's now just over two months since Greg's passing and, over that time, so many people have spoken to me about times that they had with Greg and how much they have been saddened by his death.

Greg is survived by his wife Jane and by his two children Aiden and Prudence. I know that I and so many of Greg's friends and associates will be there for them if ever and whenever they might need us. It's the least that any of us can do for such a fine man. We will all miss him.

By Mark Gilbert

Eric John Shields QC (1926–2016)



Eric John Shields QC passed away on 14 September 2016. He was the son of Wollongong school teacher and later headmaster, Eric William Shields. In order to avoid confusion, or to avoid unwanted monikers like 'Little Eric', he adopted the name John Shields.

The family moved around New South Wales spending time in various school locations at Granville Central, Forster Public School, Ashfield Public School, Molong Public School, St Peters Public School, Lidcombe, Belmore, Canterbury and Campsie.

John Shields excelled at school from an early age, being dux of Molong Public School in December 1938 and learning the piano. He attended Canterbury Boys High School and soon after set his sights on a career in the law. He graduated from the University of Sydney with a Bachelor of Laws in 1948.

On leaving University John worked in the New South Wales Public Trust Office for two years as a clerk and then moved on to become an article clerk,

in which he served for three years. On 9 February 1951 he was admitted as a solicitor and moved to Condobolin in western NSW where he practised in the firm of DGC Driffeld, Hodby and Shields for 11 years. In 1954 he married Margaret Dorothy Ludowici and had four children: Dimity Margaret (1956), Earle William John (1958), Merrillee Anne (1960) and Kylie Rhonda in (1964, deceased).

On 10 March 1961 John was admitted as a barrister and the family returned to Sydney and set up home in Pymble. He continued in private practise until October 1971, when he was appointed the fourth public defender for NSW. In 1973 John Shields became the country public defender.

On 20 December 1974 he married Beryl Muriel Gapes at Holtermann Uniting Church in Crows Nest.

On 1 December 1976 John was commissioned as a queen's counsel and subsequently became deputy senior public defender (country). He was appointed senior public defender for NSW in 1982 until 1986, when he retired from this position.

In 1977 John was appointed the legal member of the Public Accountants Registration Board and remained in this position until 1985. About 1980 he was appointed a member of the Helsham Inquiry into the Appointment of Liquidators.

From 1982 until his retirement John was a member of, and at times, on the Council of Australian Academy of Forensic Sciences.

John's funeral was held at St Andrew's Presbyterian Church, Wentworth Falls

on Saturday, 24 September 2016. One of the eulogies was delivered by his second daughter, Merrillee Chignell. She spoke of John's love of the law.

First and foremost he loved the law- This is what drove him, inspired him and fired him. It kept his mind sharp and he was tenacious in a battle. He would fight a legal cause or injustice to the end. He also had the skills to argue black was white. I believe he was known as 'fine-tooth comb Shields'.

...

Dad's other great love was his car. His Citroen C5 was his pride and joy. He regularly took friends on the drive to Wollongong citroen where he had it serviced and he kept it immaculate. He also kept a camera in the car for the procuring of evidence in the case that some other person illegally infringed his rights as a driver. No accident was dad's fault and he was always able to prove it. Unfortunately AAMI did not agree. This led to an extensive battle with AAMI.

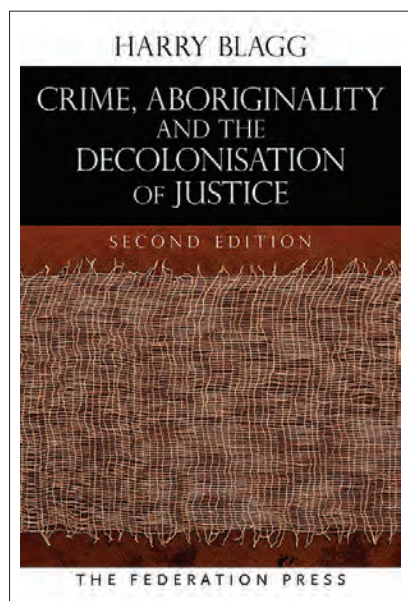
You may be shocked and stunned to know that our father was stubborn and single minded. Not a little bit but extremely.

...

I can say that I am so proud of the strength of this great man, I admire and respect the way dad conducted himself for his steely resilience. I have whispered to him at a quiet moment that he has not let himself or anyone else down. Most importantly he remained in control of all the decisions in his life to the end and we can be well proud of this wise and just man.

Crime, Aboriginality and the Decolonisation of Justice

By Harry Blagg | 2016



Aboriginal people are massively over-represented in the criminal justice system. They are among the most imprisoned people in the world. The rate of imprisonment of Aboriginal people continues to rise, increasing by 52 per cent in the last decade. Aboriginal prisoners comprised 27 per cent of the prison population last year. At the 2011 census, Indigenous people comprised just 3 per cent of the population.¹ The rate of imprisonment of Aboriginal people is up to fifteen times that of non-indigenous people.

We have been confronted by the recent revelations of the treatment of Indigenous youth in juvenile justice facilities in the Northern Territory, revelations which have resulted in the establishment of a royal commission.

Harry Blagg is a recognised authority in this field. He is professor of criminology and associate dean of research at the Law School of Western Australia. He has undertaken extensive research into the issues surrounding Indigenous people and criminal justice.

The first edition of this book was published in 2008. This second edition

has been updated to discuss emerging issues such as Foetal Alcohol Spectrum Disorder and the Commonwealth Government's 2007 intervention in remote Northern Territory communities.

The subject is approached from an academic perspective. The opening chapters carefully set the work within academic traditions in criminology, sociology and anthropology. The discussion of ontology, epistemology, teleology and liminal spaces may prove heavy going for readers unaccustomed to such scholarly discourse. It is, however, necessary to understand the theoretical framework behind Blagg's views and recommendations.

One concept that emerges from the book is that colonisation is not a finite historical event. Rather it is an ongoing phenomenon. The 'colonial' processes of dispossession, genocide and assimilation are perpetuated by marginalising and denying the legitimacy of Indigenous culture and law. This ongoing colonisation gives rise to the concept of 'decolonisation of justice' referred to in the book's title.

Blagg also views as fundamental a change in perspective from seeing the issue as one of an 'Aboriginal problem' to seeing that there are a range of deep seated problems faced by Aboriginal people. By recasting the issue in these terms, the process of addressing the issue changes. It moves away from the 'colonising' process in which the existing dominant power structures impose solutions, towards a process in which Aboriginal people and traditions themselves play a significant role in resolving the problems.

He suggests that from the perspective of Aboriginal people, the existing structure represents an alien law imposed without their consent and in a manner that denies recognition of their own law.

Blagg makes the obvious, but often overlooked, point that Aboriginal people are also over-represented as victims of crime, acknowledging the often endemic violence in Aboriginal communities. He sees the over-representation both as perpetrators and victims of crime as a consequence of disadvantage and marginalisation experienced by generations of Aboriginal people.

Blagg suggests that there are intrinsic differences between the Western and the Aboriginal view of the world. Acknowledging that difference is fundamental to addressing the causes of the over-representation of Aboriginal people in the criminal justice system. What he refers to as an Aboriginal domain (comprising areas such as ceremony, cosmology, kinship and law) continues to exist alongside the non-Aboriginal domain. He contends that there is a need to generate hybrid initiatives in the space between these two domains. Such hybrids represent a decolonisation of justice precisely because they operate between Aboriginal and non-Aboriginal structures and thereby avoid the risk of assimilating the Aboriginal component of the process. Blagg cites as examples of such structures:

- Circle Sentencing courts;
- Aboriginal or Koori courts;
- healing centres;
- Aboriginal self policing initiatives;
- community justice groups;
- elders groups;
- 'on-country' camps; and
- homelands and outstations.

Issues concerning Aboriginal youth justice are discussed. Blagg points out that in Western Australia, by the age of 18, around 80 per cent of Aboriginal youth have had contact with the justice system. On any day, upwards of 80 per cent of youth in detention in Western

Crime, Aboriginality and the Decolonisation of Justice (The Federation Press, 2016)

Australia are Aboriginal. Youth suicide in Aboriginal Australia has been described as the highest in the world. Many Aboriginal children grow up in highly disturbed environments characterised by alcohol and drug addiction and violence.

Blagg sees child removal strategies as particularly significant in generating this situation. He says that incarceration of Aboriginal youth is another mechanism by which young Aboriginal people are removed from their families. In the case of young people from remote areas, they are frequently taken far from their communities. Incarceration carries with it a further risk that young people will be socialised within an environment that has a distorted view of Aboriginal culture. He suggests that issues of Aboriginal youth justice can be more effectively addressed by shifting the focus from mainstream institutions like courts and detention to hybrid structures (such as 'on-country locations) based in Aboriginal custom.

He examines processes of restorative justice which he characterises as the collective resolution of how to deal with offending and the harm caused by crime. He argues that the time for this approach has passed and that it has been superseded by the re-emergence of Aboriginal customary law. He identifies a particular problem with restorative justice models arising from the manner in which implementation of the process was often controlled by the police. Because these existing power structures within the criminal justice system remain essentially non-Aboriginal, Blagg maintains that 'Aboriginal-owned' community justice mechanisms represent a more effective response.

He notes a problem encountered by attempts to involve Aboriginal elders in community justice mechanisms: while the involvement of elders in improving

justice for indigenous people is crucial, it can be difficult to identify just who should occupy that position. He also cites instances in which elders have exploited their position.

In order to reduce levels of violence in Aboriginal communities, some form of policing is essential. Blagg recommends a partnership between Aboriginal communities and the police, so that the police will be perceived as serving the community rather than exerting force over it. He notes a perception within Aboriginal communities that police focus on minor infringements of the law. He asserts that the Northern Territory 'Intervention' resulted in a massive increase in Indigenous prison rates (including many prosecutions for driving-related offences) with no increase in prosecutions for intimate partner violence or notifications for child abuse.

He sees the potential for Aboriginal community patrols to address social disadvantage without involving the criminal justice system. Such patrols currently operate in urban, rural and remote areas. They act both as a link and a buffer between Aboriginal people and government agencies. In New South Wales, the Aboriginal Justice Council supports 15 community patrols operating in Sydney and in rural areas.

Blagg notes that the court system has been effective in adopting a flexible approach. Many jurisdictions have established Aboriginal courts and Circle Sentencing courts which allow Aboriginal elders to participate in the court process. They include in the sentencing phase of proceedings an examination of the issues underlying the offending and the needs of victims. One shortcoming is the fact that they are only available after a plea of guilty.

Blagg addresses the issue of family violence noting that Aboriginal people

identify family violence as the main issue in their communities. He identifies a tension between the typical depiction of and response to domestic violence in the general community and the issues surrounding family violence in an Aboriginal context. Blagg questions whether the criminal law is necessarily the most effective response to the issue of family violence in Aboriginal society, advocating an approach that leans toward finding pathways to family healing.

Blagg argues that Aboriginal society is a distinctive, functioning social system, not just an ethnic subset of society. Consistent with the findings of the 1986 Australian Law Reform Commission inquiry, he says that Aboriginal customary law is practised and maintained in daily life: not only in remote areas but also in urban areas.

Blagg maintains instead that our refusal to enter into a dialogue about Aboriginal law is at the centre of the problem. In his view, the violence within Aboriginal communities is not a product of Aboriginal culture. Traditional law does not condone physical or sexual violence. Rather he sees the violence within Aboriginal communities as a result of the impact of the negative and destructive aspects of non-Aboriginal culture imposed through the process of colonisation. Blagg concludes with this observation:

We urgently require a new, decolonised version of justice, founded upon respect for, and recognition of, the Aboriginal domain and its laws and cultures, and we need to do it now.

Endnotes

1. 'Aboriginal jail rates increase by 50 per cent, but rehab fails to reduce offending' Bianca Hall, SMH 23 August 2016

Contract Law: Text and Cases (2nd ed)

By D Thampapillai, C Bozzi & A Bruce | LexisNexis Butterworths | 2016

There was a time when life seemed much simpler – legal research consisted of identifying the right key word in the case citator volumes and then consulting the appropriate law report. I did have a small bundle of unreported cases that I had collected from colleagues and opponents over time, but they never seemed to be quite on point to deliver that knock-out blow.

Now, the first half hour or so of my working day is taken up with reviewing the case alerts from the previous day and updating my card system by subject index; and even then there are several providers of such alerts (Jade, LexisNexis, Benchmark...). The man on the moon might be forgiven for thinking that the most important skill of a barrister is the ability to search and retain information from multiple electronic databases rather than the traditional art of advocacy and persuasion.

When I am briefed in a case that may give rise to, for instance, an equitable estoppel, it is to my card index and a recent case that I first turn. Textbooks still have their place and, for me, it is usually in areas with which I am less familiar: an advice in a less familiar area easily justifies purchasing a text book to get started before searching for recent cases that may not have made it into my card index.

In an area such as contract, there is a plethora of textbooks, but from a practitioner's point of view it is difficult to get past the status of texts such as Carter's Contract Law in Australia and Cheshire and Fifoot's Law of Contract (Australian edition) (Full disclosure requires me to state that I have not yet traced any common ancestor relevant to the latter, but I am ever hopeful).

The authors of Thampapillai, Bozzi and Bruce's Contract Law Text and Cases (2nd Edition) are not, however, trying to

break into the practitioner market – the introduction makes it clear that the book is aimed at law students and indeed the first chapter is headed An Introduction to Law School. Judged by its stated targets and aims, I think it is a success.

I still recall my tutor at college advising me that I would pass my degree as long as I could regurgitate the main cases in each area and identify the relevant principles and strands, but I would get a good degree if I could then add to that some independent thought, such as by identifying inconsistencies or gaps in particular areas. Her advice was helpful in an academic context and is helpful now in considering this book.

Applying that standard, this book has all the Chapter headings that one would expect: Offer, Acceptance, Consideration... The Doctrine of Frustration, Misrepresentation, Misleading or Deceptive Conduct... Termination for Breach, Remedies for Breach of Contract; there are useful headings within each chapter: The traditional model and alternative views [to offers], The global view of contract formation... A framework for invitations to treat, Mere puffery...; many of those headings have useful text boxes containing summary propositions: By puffery, we mean statements that induce a contract but that do not of themselves constitute binding offers. These are statements that are so far-fetched that no reasonable person would believe them; and there are useful extracts from many of the main cases, both from this and overseas jurisdictions. It also has a Key Points for Revision at the end of each Chapter that provide a useful checklist of useful propositions.

There are Review Questions, but I must admit to a reticence about answering them without being formally briefed and having signed a costs agreement!

So is there anything in this book that may give rise to independent, or at least useful, thought? I would say yes. To give one example, there is a useful discussion of what is described as 'The ambiguity gateway and the construction debate', which includes reference not only to the High Court dicta from *Jireh International Pty Ltd v Western Exports Services Inc*, *Electricity Generation Corp v Woodside Energy Ltd* and *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*, but also extracts from recent decisions of the Court of Appeal in Western Australia in *McCourt v Cranston* and of Sackar J in this state in *Campbelltown City Council v WSN Environmental Solution Pty Ltd*; and an extensive extract from *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd*, a decision of the Supreme Court of Singapore, Court of Appeal that includes a comparative review of the relevant jurisprudence.

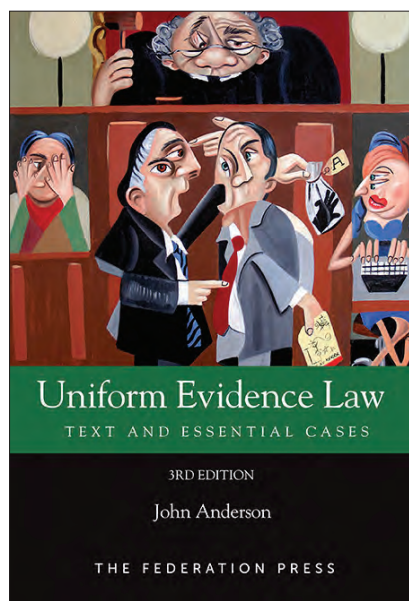
The chapter on estoppel is similarly extensive, although there is no reference to the current debate as to whether equitable promissory estoppel may be available as a sword or only a shield (see for example the discussion in the Court of Appeal of this state in *Ashton v Pratt*).

Overall, this is a sophisticated student text, incorporating jurisprudence not only from across Australia but also in other common law jurisdictions; and there is much that will prompt independent thought rather than simple regurgitation. It incorporates much that would be useful to a practitioner, particularly in its summary of recent authorities, and it will now be on my shelf (by virtue of preparing this review) as an early port of call before resorting to the text of the relevant recent authorities.

Anthony Cheshire SC

Uniform Evidence Law: Text and Essential Cases

By John Anderson | The Federation Press | 2016



This is an excellent textbook, which actually reads more like a novel than a text book!

The laws of evidence are perhaps some of the most complex laws that practitioners will face and this book provides the basics and up to date cases on the main areas of evidence law.

Although the Introduction to the book states that 'The book is designed primarily as a tool for teaching and learning the principles of the law of evidence in the context of a tertiary level course', it is still a useful book for practitioners who may wish to have a further text book setting out the main cases. The book starts with perhaps the most important aspect of the law of evidence - relevance - and includes a section entitled 'The fact finder's

knowledge of the world', which sets out what juries can take into account when making a decision. There is then a chapter about the basics of trials and appeals, more relevant for students but which provides a quick summary of some of the main issues in a jury trial, and some key sections dealing with appeals in criminal cases. There is then a chapter entitled 'Resolving Factual Uncertainty' which deals with the various burdens and standards of proof.

Chapter 4 is perhaps the next most important chapter as it deals with the laws surrounding the final exclusion of evidence (ie Part 3.11 of the Evidence Act NSW). Chapter 5 is entitled 'Witnesses and Privileges' and deals with competence and compellability of children and spouses as well as all the privileges under the Evidence Act. Chapter 6 is entitled 'The Course of the Trial' and deals with leading questions, reviving memory of witnesses, unfavourable witnesses, cross examination, re examination, reopening cases and arguing a case in reply. There is also a summary of some of the main warnings given by a judge in a criminal trial.

Chapter 7 is also important as it deals with some of the most important sections of the Evidence Act which deal with how documents can be used as evidence and the difference between documents and 'real evidence' ie a witness recollection or a particular item that is relevant.

Chapters 8, 9 and 10 deal with the law of hearsay, opinion evidence and admissions. Again, these are some of the most important sections of the Evidence Act and must be understood by any advocate.

Chapter 11 deals with 'Estoppels and Convictions and Judgments as Evidence'. This of course deals with sections 91–93 of the Evidence Act which are important to understand especially how evidence of judgments and convictions can or cannot be used as evidence.

Chapters 12 and 13 deal with the laws in relation to credibility of a witness and character evidence of an accused. Chapter 14 deals with tendency and coincidence evidence and chapter 15 deals with identification evidence.

As stated above, this book deals with the most important sections of the Evidence Act. The format is easy to follow with a clear analysis of the basic laws, usually followed by a summary of the standard, 'older' more well known cases which have explained the basic principles. However, the author also provides analysis of some more recent cases.

This is a very useful book for practitioners.

By Caroline Dobraszczyk

Criminal Law: Pre-Trial Practice and Procedure

By Michael Francis Lillas | Lillas Legal Publishing Pty Ltd | 2016

This is an excellent book because there are so few like it.

The book provides a very comprehensive summary of many if not all of the issues that may arise before a committal hearing and prior to trial. The author also considers legislation relevant to committals and trials in the various states of Australia and legislation which applies to Commonwealth matters.

I note that although the committal hearing largely doesn't happen any more in NSW, there are a few, and practitioners may need a reminder as to what to do!

Importantly, in relation to committal hearings the author deals with defects in charge sheets, service of the charges, arrest warrants, failure to appear and the particular state law which applies to determine the outcome of the hearing.

The author also deals with the important issue of cross examination at committal hearings which of course is associated with particular rules. The author also deals with the perhaps less controversial issue of costs in committal proceedings and also advocacy at committal and trials. He provides a useful and detailed summary of the law in relation to opening and closing addresses by prosecutors.

Another very interesting and rare issue that the author deals with is witnesses. That is, a prosecutor's duty regarding what witnesses to call, the Crown as a 'model litigant', and the 'Powers of a cross examiner', so this book also provides some important law relevant to advocacy. He also provides useful information about proofing witnesses, preparing a witness generally and for cross examination, and understanding

what 'type' of witness you have or need to deal with.

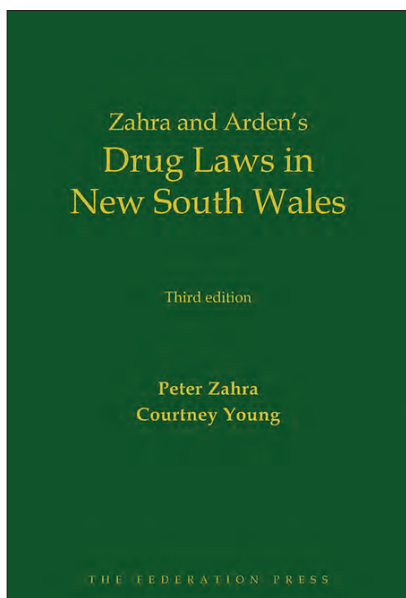
The book also provides the law in relation to many pre trial issues, which now are almost always part of doing a criminal trial. For example, he deals with separate trial applications, disclosure, nolle prosequi, joinder and severance of counts, duplicity, Judge alone trials, amendment of indictments, how many indictments you should have, particulars, demurrer and stay of proceedings. There is also a brief summary of the law relating to 'accessories' and an interesting summary on jury selection.

This book is a very useful addition to any criminal practitioner's library.

By Caroline Dobraszcyk

Zahra and Arden's Drug Laws in NSW

By Peter Zahra & Courtney Young | The Federation Press | 2016



This book, which is now in its third edition, is a very comprehensive account of all the issues that may arise in a drug matter.

The book is appropriately divided into three main sections and it is very easy to find what you are looking for. Part A is entitled 'Substantive offences' and includes all the main laws in relation to drug matters including Commonwealth drug matters. Part B is entitled 'Evidence and Procedure' and includes all the main evidentiary issues that may apply more often in drug matters. Part C is entitled 'Sentencing' and of course deals with the NSW and Commonwealth laws in relation to sentencing in drug matters.

Part A deals with the offences and penalties under the *Drug Misuse and Trafficking Act 1985* (NSW), issues in relation to summary prosecutions, including prosecutions in relation to forging and obtaining by false representation, prescriptions. It also provides an up to date summary of the law in relation to 'possession'. There is then a detailed examination of the law surrounding indictable offences including cultivation, manufacture and production of prohibited drugs, supply and deemed supply. There is then a very useful summary of the law in relation to the admissibility of circumstantial evidence-eg money found in the possession of the accused, evidence of an

BOOK REVIEWS

Zahra and Arden's Drug Laws in New South Wales (The Federation Press, 2016)

accused's wealth and lifestyle, intercepted telephone calls relating to the purchase of drugs, expert evidence on drug 'code' words, the finding of multiple mobile phones and evidence of the possession of firearms. There is also a summary of the penalty provisions relating to NSW drug laws.

The authors then deal quite extensively with the law of Conspiracy, always difficult to deal with in practice, including the relevant state and federal laws as they apply to conspiracy offences. There is then detailed sections dealing with all the Commonwealth

narcotic offences, the main one being importation and offences under the *Poisons and Therapeutic Goods Act 1966* (NSW).

Part B deals with the law of evidence on admissions particularly as they apply in drug matters as well as laws in relation to search, seizure and investigation of drug matters, both in relation to NSW and Commonwealth drug matters. There is also detailed consideration of evidentiary issues in drug prosecutions such as analyst certificates, weighing and sampling of drugs.

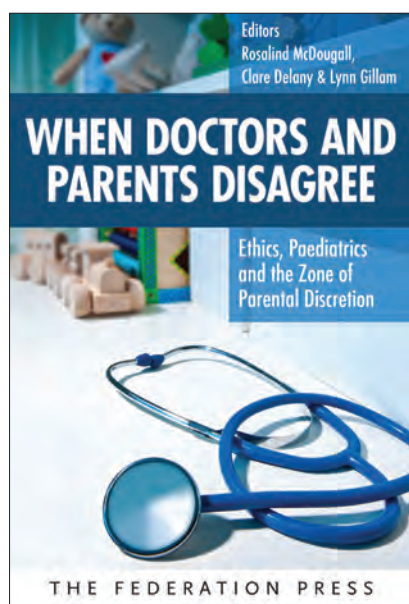
Part C deals with sentencing in both NSW and Commonwealth drug matters and helpfully includes recent NSWCCA decisions.

This is one of the best books in relation to drug matters, which every criminal law practitioner should have.

By Caroline Dobraszczyk

When Doctors and Parents Disagree: Ethics, Paediatrics and the Zone of Parental Discretion

By Rosalind McDougall, Clare Delany & Lynn Gilliam (eds) | The Federation Press | 2016



This small volume contains thirteen articles by medical professionals practising in various paediatric specialties. Its intended audience is the community of medical practitioners generally, and its stated aim is to raise an important ethical issue – in what instances should a medical practitioner override a parent's decision about their child's medical care – and to provide an ethical tool to doctors faced with such situations.

As the title of the book suggests, the editors and authors focus on a concept of the 'zone of parental discretion' acronymised as ZPD throughout the book. Two of the thirteen chapters attempt a definition of the concept, which is probably best described as

being situations of serious disagreement between clinicians and parents with respect to the treatment of a child, in which clinicians can accept parental decisions which they believe to be suboptimal, but which do not likely involve causing harm to the child.

The volume is said to be designed to perform four functions. The first is to provide the reader with an accessible theoretical foundation to be used as a tool for balancing a child's wellbeing with a parent's right to make medical decisions for his or her child. Indeed, the first two chapters of the book helpfully discuss the concept of ZPD in detail in an effort to educate readers about the complexity of that theory.

The second stated function is to provide

When Doctors and Parents Disagree (The Federation Press, 2016)

examples of disagreements between treating doctors and patients, which are subdivided into several categories. The book sets out twenty-six short case studies in which the issue as to whether or not a doctor ought to override a parent's decision with respect to a child's medical care becomes contentious and results in disagreement. For lawyers, likely the most familiar of these situations is that of the Jehovah Witness parents who refuse treatment involving a blood product for their child, in circumstances where that treatment is likely to be life saving.

The third stated function of the book is to critically analyse the above-mentioned scenarios. Each scenario is materially different, and an important distinction is made by the authors about the content and nature of the disagreements, and the possible different responses in each set of circumstances. The disagreement may be about whether or not surgery should be performed, whether or not a (heroic) treatment ought to be commenced, whether or not a diagnostic test ought to be conducted, whether or not an optimal management plan ought to be instituted or the extent of information which ought to be conveyed to parents to ensure compliance with treatment so as to ensure a desired (or desirable) health outcome. It is an understatement to say that the editors present concise factual scenarios to which, like almost all ethical dilemmas, there is no easy or correct answer.

The fourth and final stated function is to contribute to the ethics education of the medical community. In this the editors and authors easily succeed. The

While the book is no doubt useful for those in medical practice, its utility for those in legal practice is less certain.

discussion in the volume contributes much to the emerging literature on ethical practice in the professions generally.

While the book is no doubt useful for those in medical practice, its utility for those in legal practice is less certain. Most lawyers have been trained at law school to recognize ethical issues as they arise in their practice as part of their formal legal education, and in particular as they arise with respect to what are sometimes conflicting duties they owe to their clients and the court. As was suggested to me many years ago by a wise senior counsel, it would be unusual if the average barrister did not encounter an ethical issue that required serious consideration once or twice a year in the course of their everyday practice.

The variety of dilemmas of which the authors write often sound differently in the practice of law. In addition to power under statute, the Supreme Court has inherent *parens patriae* jurisdiction which might be invoked in many of the circumstances described by the authors. As is well known to barristers, a judge sitting in the Protective Division of the Supreme Court of New South Wales is frequently called upon to act as Solomon in situations similar to those that are described in this volume.

As Gzell J succinctly said in *Re Bernard* [2009] NSWSC 11, a case in which *parens patriae* jurisdiction was exercised in a dispute between parents and medical

practitioners about the administration of blood transfusions to a child of Jehovah Witness parents:

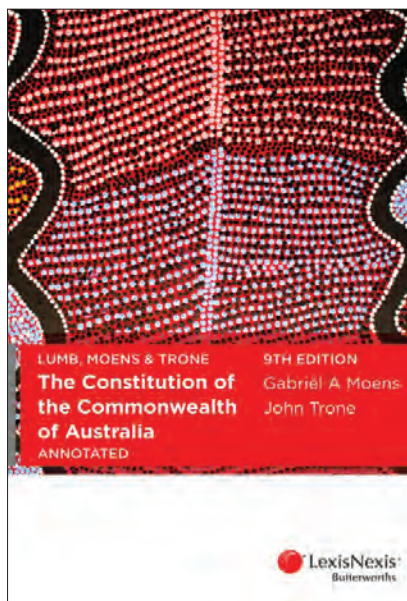
There is ample authority for the proposition that under the *parens patriae* jurisdiction, the court may supplant parental right and authorise hospital staff to perform a transfusion upon a child. What is critical is the welfare and the best interests of the child.

The volume omits to make any mention of the supervisory jurisdiction of the court when there is a deadlock between medical practitioners and parents with respect to medical treatment thought to be in the best interests of a child. It may be that the authors purposefully left out this avenue of ultimate determination, so as to concentrate on the resolution of conflict at the clinical level. This is, of course, understandable, as an approach to the Supreme Court should be made only in exceptional cases. However, perhaps a doctor's formal ethical education ought to include the knowledge that should an intractable dispute occur, the institutional dispute resolution mechanism provided by the courts is available, and will absolve medical practitioners from making decisions in the most difficult and challenging medical contexts where they find it impossible to accede to decisions they perceive to be outside the zone of parental discretion.

By Richard Weinstein

Lumb, Moens & Trone The Constitution of the Commonwealth of Australia Annotated (9th ed)

By G Moens & J Trone | LexisNexis Butterworths | 2016



The authors, Gabriel Moëns and John Trone, did not set out on a grand project to examine the shifting jurisprudence of Constitutional law.

The book, by any measure, is relatively small and compact, weighing in at some 600 odd pages. It is not a heavyweight text on Constitutional jurisprudence and neither is it supposed to be.

It is a neat, annotated explanation of the Commonwealth Constitution. It charts the Constitution section by section and contains relevant commentary and materials. It also contains important High Court decisions up until April 2016.

It is designed for a wide audience (including non-lawyers) however it should not be dismissed as a book reserved for students and non-legal professionals only.

Indeed, the foreword to the eighth edition, written by the Chief Justice Robert French AC, notes that the book is accessible enough to the student or non-specialist practitioner yet it also acts as a useful starting point for a deeper inquiry.

Practitioners will find it useful for its quick and accessible explanations of all the various sections of the Constitution and it may prove useful to those who find themselves in various state and federal tribunals.

Structure

As with the Constitution the book is also divided into 8 Chapters with every corresponding section set out in the relevant chapter.

Each section of the Constitution is set out in a highlighted area followed by commentary and a synopsis of major High Court decisions on the section. Important passages from some High Court decisions are also extracted.

It is not a heavyweight text on Constitutional jurisprudence and neither is it supposed to be.

Well-known sections of the Constitution have more detailed commentary and contain numerous High Court decisions that go into considerable depth. For example, the commentary relating to section 51 is sufficiently detailed to capture the historical development in jurisprudence of important High Court decisions.

The book contains a very helpful introduction that explains and gives further context to the Constitution. These include certain themes such as the federal nature of the Constitution, financial and trade relations, legislative, administrative and judicial corporation, separation of powers, judicial power and Constitutional interpretation.

Further topics (titled 'preliminary issues') are also discussed including the acquisition of sovereignty over Australia,

Australia's Constitutional relations with the United Kingdom, the role of precedent in Constitutional cases and the concept of proportionality.

What is helpful, particularly for those who will use this book as a stepping stone for further research is that the book contains references to important secondary texts that further illuminate a section or issue that is being discussed.

Important decisions in the current edition

The 9th edition contains some important recent decisions to note.

Chapter I (the Parliament) has been considerably revised in light of the decision in *Australian Electoral Commission v Johnston* (2014) 251 CLR 463 where the Court of Disputed Returns declared that the Western Australian Senate election in 2013 as void.

This book also discusses the recent High Court decision of *McCloy v New South Wales* (2015) 325 ALR 15 in which the majority of the court re-formulated the implied freedom of political communication test set out in the decision of *Lange*. McCloy's case resulted in a three stage proportionality test. The text also refers to *Unions NSW v New South Wales* (2013) 252 CLR 530, which was about the implied freedom of communication on governmental and political matters within the context of political donations.

Chapter II (Executive Government) also contains extracts of the decision in *Williams v Commonwealth (No 1)* (2012) 248 CLR 156 where the court restricted Commonwealth executive power to contract and spend without parliamentary authorisation.

Chapter III (the Judicature) has been revised to include some important

Lumb, Moens & Trone The Constitution of the Commonwealth of Australia Annotated 9th ed (LexisNexis Butterworths, 2016)

decisions. In *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 317 ALR 279 the court held that the broadcasting authority (ACMA) did not violate the separation of judicial power doctrine when it determined that a Sydney radio station had engaged in criminal conduct. Readers may remember that this case involved radio hosts prank calling a nurse who tragically committed suicide a few days later.

In *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 327 ALR 369 the court held

that Commonwealth participation in the detention of asylum seekers (at the Nauru Regional Processing Centre) did not infringe Chapter III.

The decision in *Kuczborski v Queensland* (2014) 254 CLR 51 examined the Constitutional validity of Queensland's 'anti-bikie' laws. Further, the book also discusses the decision in *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 where the court upheld a Queensland state law which empowered the Supreme Court to declare that an organisation was criminal organisation based on confidential criminal intelligence.

Conclusion

A small and handy annotator that can be surprisingly detailed in parts.

A very useful first port of call for a student or non-specialist practitioner needing a succinct explanation of a particular provision of the Commonwealth Constitution.

It may also serve well for the more experienced advocate or a diligent junior as a starting point in a long and winding enquiry into the depths of Constitutional law.

Reviewed by Ali Cheema

The Law of Tribunals: Annotated Civil and Administrative Tribunal Act 2013 (NSW)

By John Levingston | The Federation Press | 2016

Tribunals are playing an increasingly visible role in the legal system in Australia. Since the NSW Civil and Administrative Tribunal (NCAT) commenced operations in January 2014, there has been a considerable development of case law on tribunal operations, especially the biggest division in NCAT; the Consumer and Commercial Division. The tribunals operating in other states and at federal level are likewise featuring more frequently in the online law reports.

Moreover, there has been, anecdotally, an increasing awareness within the broader community, at least in NSW, of NCAT and its role within the legal system.

In NSW, NCAT administers the dispute and application processes arising under an increasing amount of legislation. It is far more visible than any of its many predecessors.

This book is an invaluable guide for the busy practitioner. While its emphasis is obviously the NSW legislation, it has a

handy overall cover of the other states and the federal tribunals.

The key to any well-written practice, is a good index, a clear paragraphing system, and a coverage of the major issues likely to confront both the experienced lawyer and the novice. The use of relevant case law, both to refine the nuances of the legislation and to set out clearly its full effect, is also vital. I think this book will be of great assistance to the practitioner.

The index is comprehensive, there is a table of cases, a table of statutes, a comparable table of legislation between the state and the Federal AAT. The Introduction covers a wide range of matters of general principle in tribunals and I personally prefer footnotes at the foot of the page, rather than at the end of the chapter or the end of the book.

While its other features are formidable, the book's real strength is the annotated Civil and Administrative Act NSW. The practitioner should find the treatment

of the Act is comprehensive, the relevant provisions are easy to find and the integration of both the legal principles and case-law are helpful.

Whether the questions asked relate to costs or the procedure between the different divisions, the appellate process or the consequences of a settlement which require orders *ultra vires* the tribunal's powers, the answer is easily found.

The development of case law from the Appeal Panel for NCAT is both dynamic and comprehensive. I expect that in a relatively short time, there will be a need for a second edition of this very handy practice. In the meantime, it should be of great assistance to the practitioners who are required to provide advice to clients on the tribunal, its powers and its processes. It would be a valuable resource in any law library.

Reviewed by Frank Holles

NSW Bar FC in 2016: you win some, you lose some

By Anthony Lo Surdo SC and David Stanton



The New South Wales Bar touring squad. (L to R) Hon. Justice Geoff Lindsay, Anthony Lo Surdo SC, Darren Covell, Craig Bolger, Gillian Mahony, Richard di Michiel, Matt Vickers, Colin Magee, Vahan Bedrossian, Ben Kremer, Rohan de Meyrick, Simon Philips (Capt), Justin Hogan-Doran, John Harris, Adrian Canceri, Glenn Fredericks, Geoff O'Shea, Tim Kane and David Stanton (Manager).

Introduction

The NSW Bar Football Club (NSW Bar FC) is open to barristers, members of the judiciary, judge's associates and tipstave, clerks and employees of the Bar Association regardless of gender, level of ability or fitness. It currently consists of some 85 members.

New members

In 2016, due in no small measure to the efforts of Fordham SC reminding readers that there is an easy and a not so easy path through the Readers' Course, NSW Bar FC welcomed a record number of rookies: Megan Batchelor; Ben Kremer; Glenn Fredericks; Patrick Knowles, Amy Knox; Tim Kane, Tim Hackett, Hilary Montieth, Tim Boyle, Philip Santucci and Trent March.

Domain Soccer League – So near but yet so far!

NSW Bar FC competed for the 8th successive year in the DSL competition which was held at lunchtime between April and September in the Domain. A consolidation of the competition (from 5

divisions to 4) saw Bar FC promoted to Division 4.

The competition was fierce over the course of the season. Of the 13 games played, Bar FC won 6, drew 5 and lost 2. With one round left in the regular season, only 4 points separated the top 5 positions. A semi-finals berth hinged on either a win or a draw in the final game of the season against BT Financial Group.

A strong Bar FC took on a quick, youthful and talented BT Financial. BT shot to a 3-0 lead in the first 10 minutes requiring a Herculean effort to stem any further concession of points and to at least grind out a draw. Bar FC fought gallantly to pare back the lead. Those efforts were rewarded in the second half when a nice header from Di Michiel found the back of the net. Bar FC defence spoiled quite a few sorties from BT Financial to keep it scoreless in the second half.

This was by far the tightest contest the lower division of the DSL has seen in quite some time.

6th Annual Sports Law Conference

On 10 September 2016, around 40 barristers convened at the Queensland Bar Association offices in Brisbane to attend the 6th Annual Sports Law Conference chaired by the Honourable Justice Colin Forrest of the Family Court of Australia.

The Honourable Justice Martin Burns of the Supreme Court of Queensland spoke about the disciplinary system based on 'demerit points'. The focus of the address was on the origins and development of the NRL disciplinary system of which his Honour was the architect whilst at the bar. That system, devised in the days of 'Super League', was adopted by the NRL following the 'unification' of the game and has been largely adapted and employed by the AFL as the framework for its disciplinary system.

Mark Martin QC, of the Queensland Bar, then spoke of his experience of appearing for Wallaby and Queensland Reds players who have been cited to appear before 'SANZAR', the South Africa, New Zealand and Australia Rugby, judicial tribunal.

Anthony Lo Surdo SC and David Stanton, 'NSW Bar FC in 2016: you win some, you lose some'



The Sports Law Conference ended with an informative account given by Cassandra Heilbronn, Senior Associate, Minter Ellison, of the issues in the various proceedings arising from the investigation by ASADA and the AFL of the doping activities at the Essendon AFL Club. It was, perhaps, a fitting update to the discussion led by Anthony Nolan QC of the Victoria Bar at the 2015 conference who spoke about the legal issues associated with and arising from, what he referred to, as 'The Blackest Day in Australian Sport'.

Of course, that chapter in Australian sport will not close until the Swiss Federal Tribunal delivers its judgment on the appeal lodged by the players against the CAS determination in which they have argued that the CAS erred in hearing the doping claims de novo.

A special thanks to all the speakers for giving generously of their time, to Justice Forrest for chairing, to David Chesterman of the Queensland Bar for assembling the speakers and to the staff of the Queensland Bar Association without whose organizational talents the conference could not have proceeded.

Bar Football 'State of Origin'

Immediately following the Sports Law Conference, 43 barristers drawn from Queensland, Victoria and NSW met at a heavy pitch at the University of Queensland to take part in the 9th Annual Suncorp NSW Bar v Vic Bar Annual Challenge Cup and the 7th Annual Suncorp NSW Bar v Victoria Bar v Queensland Bar Annual Football Challenge Cup.

The NSW Bar FC touring squad, tasked with the sacred responsibility of defending the clean sweep in 2015 comprised Adrian Canceri, Rohan de Meyrick, John Harris (GK), Geoff O'Shea, Simon Philips (Capt), Craig Bolger, Richard di Michiel, Justin Hogan-Doran, Vahan Bedrossian, Tim Kane, Colin Magee, Gillian Mahony, Ben Kremer, Rohan de Meyrick, Matt Vickers, Darren Covell, Glenn Fredericks and David (Sir Alex) Stanton (Manager). Also in attendance was Justice Geoff Lindsay (Patron) and Anthony Lo Surdo SC (match official).

Game 1: Victoria v Queensland

The first game was between an understrength Victorian team consisting

of Anthony Klotz (Capt), Jim Fitzpatrick, Michael Biviano, Andrew Yuile, Doug James, Daniel Nguyen, Adrian Strauch, Nichola Rhyder (GK), Lionel Wirth, Tim Smurthwaite and Gorjan Nikolovski and the Queensland team comprising of Lee Clark, Andrew Luchich, Andrew Skoien, David Purcell, Michael Hodge, David Chesterman, Johnny Selfridge (Capt), Daniel Favell (GK), Eoin MacGiollaRi, Jens Streit, Scott Hooper, Rick Green, Dom Ferraro, Florence Chen and Daniel Piggott.

The Victorians started strongly, playing an impressive passing game and looking for space on the flanks. The Queenslanders succumbed to early pressure from the Victorians conceding a free-kick well within shooting distance about 3 metres from the corner of the 18 yard box. The kick, taken by Daniel Nguyen with some vehemence, cleared a defensive wall of maroon shirts, wrong-footed the keeper and comfortably sailed into the back of the net.

Thereafter, the Queensland back four lead by veteran Johnny Selfridge proved an impenetrable force. The cane toads were brilliant on the counter-attack with

Anthony Lo Surdo SC and David Stanton, 'NSW Bar FC in 2016: you win some, you lose some'

both speed and skill in plentiful supply up front in the form of Joe Morris and Lee Clark who were ably supported in the centre by Michael Hodge and David Chesterman. The Maroons responded quickly and decisively piling on 3 goals by half-time. The Victorians were tiring and with no substitutes, conceded a further 2 goals in the second term. The score could have been much higher had it not been for some impressive clearing shots by Anthony Klotz playing in central defence and the young Victorian keeper, Nichola Ryder, laying it on the line, earning her the well-deserved recognition (and trophy) as best and fairest for the Victorians in this game.

The best and fairest gong for Queensland went to Joe Morris who scored 2 goals and proved far too strong upfront.

Game 2: New South Wales v Victoria

The Bureau of Meteorology's forecast of 100 per cent rain and thunderstorms from 3 pm proved 100 per cent accurate as NSW and Victoria lined up for the second game of the afternoon. An already soft pitch quickly turned muddy and extensive pooling of water made passing the ball problematic to say the least. (The conditions were reminiscent of those that greeted the participants in the inaugural game between NSW and Victoria in 2008 at St Johns Oval, Sydney).

The Victorians started the game obviously tired and more than a little dejected at the loss to Queensland. Nevertheless, they backed up courageously to meet a NSW squad that had been cooling its heels for an hour. NSW proved too strong for Victoria running in 6 unanswered goals (Di Michiel 3, Hogan-Doran 1, Bedrossian 1, Canceri 1). Special mention must be made of the rock-solid defence provided by Magee, Philips, Vickers and Kane.



NSW v Qld: the winning goal.

Best on ground for NSW was Vahan Bedrossian and for Victoria, Adrian Strauch.

Game 3: Queensland v New South Wales

The last game saw NSW backing up for a second hour of football against a rested Queensland team. By this time, the storms that had lashed the ground over the preceding game had eased but water was evident everywhere. Despite having played an hour of football in atrocious conditions, NSW Bar FC started strongly with di Michiel claiming first blood following a wonderful pass from Phillips in the deep. The Queenslanders responded decisively with attack after attack brilliantly repelled by a back four led by Philips and some inspired keeping by Harris assisted, on one occasion by the pool of water on the goal line which stopped dead a ball that was otherwise heading comfortably for the net.

The pressure proved too strong when an over enthusiastic challenge by NSW inside the box resulted in a penalty to Queensland which was converted to level the score at one a piece leading into the break.

With opportunities at both ends in the second half, Queensland was able to capitalise on its chances and put away the winning goal with about 15 minutes to go.

Best and fairest awards for this game went to Michael Hodge for Queensland and Simon Philips for NSW.

Special mention should be made of Anthony Lo Surdo SC who, it has been said displayed excellent judgment whilst refereeing in trying conditions and did not get a call wrong throughout the Championship. Thanks also to Justice Forrest and Guy Andrews (Qld Bar) for running the lines.

Acknowledgement

NSW Bar FC acknowledges Suncorp for its ongoing and generous support.

The future

The Bar Football 'State of Origin' and Sports Law Conference will be held in Sydney in 2017 at which time we will also be celebrating the 10th anniversary of NSW Bar FC. We hope to get together all members of the Club for this auspicious occasion and, in particular, the foundation members, some of whom are still playing and others who are not.

We look forward to welcoming new members to the squad in 2017. If you are interested in joining the team please email David Stanton (d.stanton@mauricebyers.com) to join the mailing list. If you would like to attend or speak at the 7th Annual Sports Law Conference in 2016 please email Anthony Lo Surdo SC (losurdo@12thfloor.com.au).

Bullfry fights for 'face time'

By Lee Aitken

Virtual courtrooms, smart contracts, PEXA and knowledge base technology will ultimately allow graduate lawyers to use their time more effectively. Graduates will be able to focus their time on more substantial and complex legal work and possibly gain more client face time. Virtual courtrooms will allow the graduate to work from their office on 'stand by' until the court is ready for their appearance.¹

'This is Supreme Court calling, Supreme Court calling. Are you there, Mr Bullfry? Are you receiving me? Are you receiving me?'

'Yes, your Honour, loud and clear. I am here and looking for some face-time. We do not tolerate any Luddites in our chambers although a mishap on Tinder recently caused me a certain amount of matrimonial gene. Grindr and other social applications are banned during business hours. Will your Honour kindly go to Plaintiff's Document 134 in the electronic bundle. It is the PEXA document which was electronically filed recently in the LTI. Unfortunately, due to a fire wall breach someone(!) seems to have altered both the name of the registered proprietor and the mortgagee which, I will argue, attracts the operation of section 43A of the Act. As a result, the EFT settlement, so it would appear, has vastly enriched persons unknown in southern Cebu.'

'I am sorry, Mr Bullfry, the server at this end has gone down and my AustLII version of the Act appears to be out of date. Is the document itself in hard-copy?'

'I am afraid not, your Honour. The chief justice's latest practice direction (No 845(A2) of 2019) specifically states that 'no hard-copy document' shall be prepared for any audio-visual interlocutory application. This is particularly so where the Torrens 'knowledge base' is to be invoked at the hearing'.

'Well, let's proceed. Do we need to encrypt?'

'I don't think so, your Honour. My present venue is blameless, and I am sure that your Technical and Computer Services Tipstaff (TCST) has carried out the daily 'sweep' of your courtroom on Level 7 now required under the Chief Executive's ruling. I trust that the new equipment is no longer causing problems with your pacemaker'.

'All right then. Call the witness'.

'Is she to be pixelated, or not, your Honour? In the latter case I will have trouble leading her because the link with Tamworth is likely to go down at any time, and the NBN (*mirabile dictu*) does not have sufficient bandwidth for the connection to send both images and sound at the same time.'

'But Mr Bullfry, this should all have been worked out with the registrar in the Monday List – I thought that a specific order had been made about pixelation?'

'No, your Honour. The only order made required a complete 'voice disguise' to prevent identification but unfortunately all that could be heard during the virtual training session was a series of harsh, guttural groans. That would undoubtedly have had an effect on your Honour's findings on credit.'

'Mr Bullfry, are you actually in the virtual courtroom? There is a large amount of background noise at this end'.

'Ah, your Honour is too quick for me. I am, in fact, addressing you via the court's iPhone app on my Android 8 from a popular shebeen in Castlereagh Street and the background noise your Honour heard was just my fellow drinkers revelling in the fall of the sixth Sri Lankan wicket. I have of course been on 'stand-by' for some time but the problem with the West Australian time zone made it a matter of

personal imperative for me to get in some face time down here before addressing your Honour.'

'Mr Bullfry, the new protocol was not designed to allow you to 'appear' from any location you may happen to choose at the time. Are you robed? Give me a 'reverse selfie' so that I can make sure that I can 'see' you'.

'I had better not do that, your Honour. I am in what my late father would have called 'mess undress', and although the sarong is rather fetching and culturally appropriate, given that the contract was made in Malaysia, the T-shirt is not'.

We do not tolerate any Luddites in our chambers although a mishap on Tinder recently caused me a certain amount of matrimonial gene. Grindr and other social applications are banned during business hours.

'But that seems to be one of the problems with the 'smart contract', Mr Bullfry. Whoever 'drafted' this one used the old electronic boilerplate so that the choice of law clause has defaulted to North Korea, not Malaysia'.

'Well, your Honour, the High Court has dealt with the question of renvoi recently in a judgment which is, fortunately, available only in electronic form and the copy I have on my Kindle is not compatible with Word 14 which means that I can only send to you my highlighted version'.

'But Mr Bullfry, that would be a gross breach of protocol – particularly if you

have failed to remove the marginal comments in yellow such as those which marred your latest submission'.

'Your Honour, we have apologised to both you and to our opponents for any distress which those inadvertent comments caused. I will not be hitting 'Reply all' again any time soon. Ms Blatly was absent-mindedly typing in my aperçus on various aspects of our opponent's submissions (and some reflections on his personal appearance) and they should not have been retained in the final version. May we simply describe them as pentimento?'

'Well, we had better sort out the further televisual directions for hearing. First, Mr Bullfry, you are not to use any form of avatar whatsoever on any further

occasion during the course of this hearing. Do I make myself clear? Nor will I tolerate any further analogies between the defendant's company and *Game of Thrones* or for there to be any mention of Youtube while you are cross-examining. It does not make any difference that I am a 'friend' of your opponent's junior on Facebook and that is not a ground for disqualification, or for me to recuse myself. Nor, may I repeat, is the fact that I have twice rejected a 'friend' request from you – and that decision is not liable to any form of judicial review. We are now living in an electronic age and these things are to be expected'.

'Six degrees of separation, indeed, your Honour.'

'Mr Bullfry, I am afraid my TCST has just advised me that we are about to lose the link at this end. I had better make some further interlocutory orders ZZZZZZZZZZZZZZZPPPPPTTTT!!!!

(Bullfry's screen went blank and the matter was subsequently adjourned *sine die* when it was found to be impossible to restore the connection to either Castlereagh Street or Tamworth due to the combined failure of the cable, and the broadcast facility).

Endnotes

1. P Melican, A Bell-Rowe, A Patayo and H McDonald, 'The law and the legal profession in the next decade: the student's perspective' (2016) 90 ALJ 434 at 440.

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Non Sequitur

By Advocata

The first barrister I ever briefed was appointed to the High Court. A few years before that elevation, he conferred with me. I don't pretend that our meeting was a milestone along his path but he did appear to take it very seriously. The matter concerned a shareholders' dispute. Everybody involved had the same last name and the amount at stake required the valuation of both cattle and pride.

I prepared over some weeks by fairly constantly sending documents for his clerk to update his brief and preparing an agenda. I was very nervous when we met. Senior counsel was not. No doubt he greeted me politely but I don't recall it. He sat a long way from me at the head of a very grand table and told me directly what he thought of our prospects. He made no small talk. I am sure he didn't refer to me by name. There were a few things that he told me to do. He showed no regard for whether they were possible, or achievable by me. In what seemed like moments after he had finished conveying his view I was back in the gun-metal grey lift. I think that I left without seeing his teeth.

Back at the office my partner cut off my pidgin rendition of the advice with 'not that, what did you think of [senior counsel]'. 'I hated him' I said, 'he was awful'. 'I knew it' my partner slapped the desk - almost aglow with chortling joy. His miniscule attention span snapped back to his file 'Doesn't matter' he mumbled 'he's brilliant'.

Experience has taught me that the partner's pleasure in my abjection was the satisfaction of knowing that some famous senior counsel's poor opinion of you is not personal. Of realising that all kinds of pleasant people are treated in the same offhand way. It belongs with the relief of watching another person being reintroduced to a leader of the

profession for the 13th time without a flicker of recognition on that luminary's face. I also now know that sometimes, at the bar, being brilliant isn't enough.

He sat a long way from me at the head of a very grand table and told me directly what he thought of our prospects. He made no small talk. I am sure he didn't refer to me by name.

There seems to be a cornucopia of reasons why particular solicitors won't brief certain barristers. The explanations given by solicitors for rejecting my recommendations for various first rate silks have included 'he is getting a reputation for being underdone', 'we are having a break from briefing him at the moment because he acted against the firm', 'he charges like a bull', 'he is too busy', 'she makes me feel pressured', 'we had him against us in ... and he was pretty unimpressive', 'he's not aggressive enough for this', 'he never gives anyone coffee', 'he is a complete ^*#%&' and 'I don't think the client will want a woman'.

There seems to be a cornucopia of reasons why particular solicitors won't brief certain barristers.

Enjoying a moment of wilful blindness about the last, these reasons are at least understandable. I suppose it's comforting that no one has suggested to me that a silk was not intelligent or learned enough to run a case. Less soothing is the number of conversations I have endured

about whether a particular judge was sufficiently able to correctly decide it.

It seems that the situation becomes more psychedelic the more junior the barristers being briefed. I know solicitors who will only give junior barristers two chances to accept their work; if you are too busy twice they won't call again. My clerk tells me that the preclusive behaviour identified to him over the years includes: 'over preparing; preparing too late; being a bit of a stick in the mud; refusing to give out a mobile phone number; not being a team player; being too busy; being pompous and doing a bad job'. Conversely he says 'you can get a brief because you are good value, went to the same school, worked together as paralegals, have a good sense of humour and presumably because you come highly recommended or did a good job before'.

There are some lawyers who ooze professional generosity of spirit. They are humble about their own achievements and joke about their failings... These are the people we like to see in the kitchen.

An allowance must be made in all this for *schadenfreude*. There are some lawyers who ooze professional generosity of spirit. They are humble about their own achievements and joke about their failings. Their steady message is the superior ability of others. These are the people we like to see in the kitchen. Most of us though, wearying on with our chip of self-doubt, cannot resist having at least a small go at those we suspect possess a little more engine under the bonnet. There is a skill to damning

with faint praise and the touchstone is 'judgment'. Every time some university medalist is described as brilliant but 'prone to over-complicating', being 'unable to see the wood from the trees' or 'wouldn't know how to get short service' I do wonder.

The highest compliment, according to one of my colleagues, is to be briefed by the opposition's solicitors. The reality she posits is that sometimes you think you did a very good job and never hear from those solicitors again. Other times you come back from court to peruse ads on Seek.com and the next week those same poorly-serviced people call back with more work. The trick she says, whatever you do, is to not make anyone on the team feel bad about themselves. She maintains, for example, that there is minimal personal upside in implementing a radical change of strategy to win a case that was being chugged along a doomed path for years if the solicitors will then be too embarrassed to brief you again. It's akin to people being too shy to call you when they have become aged debtors in other matters.

The highest compliment, according to one of my colleagues, is to be briefed by the opposition's solicitors.

Some barristers must have moved beyond wondering why people brief them and who will continue to do so. They are the barristers who speak of their 'stable' of solicitors. There is a such a barrister on my floor who also does a steady trade in gift receipt. One corner of his desk doubles as a trophy table. There are Ye Olde tributes like bottles of whisky and cigars; there are sincere notes once attached to bridal sized bouquets; there is a knitted lap rug for wintry nights, which I am told came from an opposing litigant in person. 'No particular reason' he relentlessly claims 'the case finished, that's all'.

When my cases finish there are handshakes, fee notes and the occasional celebratory lunch after judgment. There have never been gifts. 'That's because you need some soft skills' said my clerk, 'Most women have that over men'. 'It's all about bedside manner

now' agreed a colleague. 'Nobody is interested in Moses bringing his tablets down from the mountain and handing them over any more. They want you to be consultative, flexible, available and likeable. They want to socialise your advice with the client'.

A silk of impeccable interpersonal skills once identified for me seven fortunate qualities that a barrister may possess. They were something like intellect, industry, charm, availability, pedigree, judgment and tenacity. 'You don't need them all to succeed' he said 'but you need a couple'. I took the man seriously and some years later reminded him of what had become a bit of a mantra to me. He looked at me uncomprehendingly and then said in a kind and measured tone 'That may all be true but mainly you need luck'.