BAR BULLETIN

INSIDE...

Our esteemed Editor (This note has been included without his knowledge)

Purnell SC was appointed as senior counsel 20 years ago he was recently described in in a judgment as "very experienced and distinguished senior counsel" by Refshauge J in The Queen v Papalii [2015] ACTSC 156 [15].

As his photograph depicts he has a nose… for a good red, a weakness in a witness's credibility and a common sense solution. He has appeared in major cases of all types civil and criminal in most courts including the High Court and Courts of Appeal of the Territory and the Federal Court.
In recent years, before the elevation of our current Associate Judge, he often led Mossop. In one case where I appeared against this formidable duo, Mossop's whispered instructions on points of law were so detailed and persistent that I accused the great man of being a marionette. He promptly disproved that by getting my instructing solicitor into the witness box and cross examining him to great effect whilst all the time ignoring his junior's instructions. When Mossop was made a Magistrate he singled out Purnell for praise and one quality he mentioned was his courage.

Purnell SC continues to appear in difficult cases taking no backward step and serving his clients and solicitors with distinction. Our protocol for the appointment of senior counsel requires that the applicant displays ability to provide exceptional service as an advocate and adviser in the administration of justice. For the last 20 years Purnell SC has continued to do this.

Congratulations Purnell and may there be still more years.

The Australian Bar Association
Training Council

Appellate Advocacy

18 - 20 September 2015, Sydney

The Australian Bar Association would like to invite 24 barristers, with a minimum of 8 years' experience at the private Bar, to join 30 Federal Court and Supreme Court judges and senior members of the Australian Bar on a three day Excellence in Appellate Advocacy workshop.

The Australian Bar Association Advocacy Training Council

Patron: The Hon. R. S. French AC, Chief Justice of Australia

APPELLATE ADVOCACY INTENSIVE

18-20 SEPTEMBER 2015, SYDNEY

JUDGES & COACHES

Federal Court judges
The Hon Justice Anna Katzmann
The Hon Justice Alan Robertson
The Hon Justice Michael Wigney
The Hon Justice Melissa Perry
The Hon Justice Jacqueline Gleeson
The Hon Kevin Lindgren AM QC, NSW retired

Family Court judges
The Hon Justice Ann Ainslie-Wallace, Appeals Division
The Hon Justice Murray Aldridge, Appeals Division

Supreme Court judges
The Hon Tom Bathurst AC, Chief Justice of NSW
The Hon Helen Murrell, Chief Justice of the ACT
The Hon Justice Margaret Beazley AO, President of the Court of Appeal, Supreme Court of NSW
The Hon Justice Robert Gotterson AO, Judge of Appeal, Supreme Court of Queensland
The Hon Justice Anthony Meagher, Judge of Appeal, Supreme Court of NSW
The Hon Acting Justice Ronald Sackville AO, Judge of Appeal, Supreme Court of NSW
The Hon Justice Glenn Martin AM, Supreme Court of Queensland
The Hon Justice Geoffrey Bellew, Supreme Court of NSW

Coaches

Wendy Abraham QC, NSW	John Maconachie QC, NSW
Sue Brown QC, Queensland	Paul Menzies QC, NSW
Richard Burbidge QC, NSW	Brian Rayment QC, NSW
Miles Condon SC, NSW	Michael Sexton SC, NSW Solicitor-General
Michael Copley QC, Queensland	Christopher Shanahan SC, WA
Sandra Duggan SC, NSW	Alan Sullivan QC, NSW
Philip Greenwood SC, NSW	Barry Toomey QC, NSW
Donald Grieve QC, NSW	Neil Williams SC, NSW
Larry King SC, NSW	David Williams SC, NSW

Professional Performance Coach
Josephine O'Reilly

Secretariat: Inns of Court, North Quay Brisbane, Queensland 4000

President's Message

This is not a commentary on the merits of appointments

The Bar Association has recently advocated both for change in the appointment arrangements for the Director of Public Prosecutions, and also for transparency in the making of such an appointment. Prompted by recent changes to the manner of appointment of the DPP in Tasmania I wrote to the Attorney in the following terms raising the need for a system whereby a DPP is appointed for a single fixed term, and only able to be dismissed during that term by the Assembly rather than simply by the Attorney:

A system whereby there is a prospect for renewal of the Director of Public Prosecutions is a poor arrangement to protect the office from political influence, and from entering the political fray. The spectre, real or imagined, of a Director being influenced by the prospect of reappointment or non reappointment, is a circumstance that ought be avoided. A single term of tenure would be a significant way of emphasizing that it is an office that is not subject to influence, particularly where that is coupled with a requirement that a Director be removed during tenure only by a motion of the Assembly.

The Attorney has recently signaled his intention to consider such an arrangement. This is a positive move. However, at the same time the current DPP was reappointed without consultation taking place. This stands in sharp contrast with the steps taken by the Attorney to give transparency to the process of the appointment of judges. It is difficult to understand why such transparency was not also extended to the reappointment of the DPP.

Again I emphasise that these comments are directed to the process rather than the merit of the appointment.

The question that naturally arises is why is this of such interest to the Bar?

Firstly, the work of the Director is the work of a barrister. Appropriately, the current Director, Jon White SC is a member of the Bar Association. He is tasked not only with the functions of a barrister in his appearances before the court, but is also tasked with instilling the ethos of a barrister in his many staff who also appear before the courts.

Secondly, it is a proper function of the Association to support and protect the role of the Director of Prosecutions. That does not mean that it is the role of the Association to agree with decisions made by the Director, but rather to support the independence and efficacy of the Office.

Thirdly, and most importantly, the Office is central to the proper administration of criminal justice. In the common law world prosecutors are tasked to be 'ministers of justice', neither pursuing convictions at any cost nor pursuing maximum penalties, but rather pursuing fair prosecutions and fair penalties. The reality of the inequality of position between the state and an accused means that if they stray from this discipline, incalculable damage is done to the administration of justice.

The controversy surrounding this appointment process means that it is also timely to raise the thornier issue of appointment approaches in respect of the judiciary.

If a single fixed term for a DPP assists in inoculating the Office from perceptions of political pressure, then a lower standard ought not be acceptable in respect of the judiciary. Whilst acting appointments have always been a feature

of our Supreme Court, the appointments were generally sourced from judges sitting on other courts. No possible advantage could be seen as accruing to such a judge by reason of their pre existing status as a judge in another court. More frequently of late it appears that acting appointments are conferred upon persons not otherwise sitting as judges (eg having retired). These appointments turn into repeated appointments. Without commenting on the merits of such appointments, the process does not support the independence of the judiciary.

Serious consideration ought be given as to whether entrenched systems of appointment and reappointment of acting judicial officers detracts from the independence of the judiciary that is otherwise supported by fixed retirement age and security of tenure.

If courts (Magistrates and Supreme) bear a workload that requires additional funding to have permanently appointed judicial officers, then, in the interests of the independence of the judiciary, those resources ought be allocated in preference to allocating resources for ad hoc appointments. To this end it is positive that a further permanent appointment is to be made to the Supreme Court. However, that is not enough.

FAREWELL SIMON

The Attorney will leave the ACT politics at the next election, after almost 20 years. His influence on the ACT has been immense. The fact that Simon Corbell has no legal qualifications has not been a factor in his genuine interest and intelligent participation in the legal life of the ACT. Every current member of the ACT Supreme Court owes their tenure to him. Almost every member of the Magistrates Court and all the Presidential members of ACAT were appointed by him.

The Attorney has participated in legal policy and legislation with the last four Chief Justices and the last three Chief Magistrates, as well as the ever changing Presidents of the Bar and the Law Society.

Not a pabulum performance. The Courts and the profession have not always seen eye to eye with the Attorney, but that is normal. His portfolio's in Health and Planning and of course the Light Rail Project have been far more controversial.

Few can doubt his genuine enthusiasm, dedication and hard work for the people of Canberra. The Bar wishes him well in his retirement and hopes he finds contentment in his new life.

EDITORIAL

Let's Have 6 Supreme Court Judges in ACT

The ACT Government now has a unique opportunity to give the Supreme Court of the ACT 6 judges in 2015 and provide the greatest flexibility for efficient judicial work load since the initial appointment of a 3rd judge years ago. This is simply achieved by getting rid of the position of Master, which is now obsolete and unnecessary. Master Mossop is now doing all the work of a judge except for criminal trials, but is paid less and has an inferior superannuation package. This is clearly unfair. Master Mossop should be made a permanent ACT Supreme Court Judge and a new sixth judge appointed. This will cost the ACT Government a little bit more and will require some amendment of the legislation, but the benefits to the administration of justice in the ACT far outweigh these small irritations.

The Terror of Domestic Violence versus IS

The Federal Government should be putting more money into combating the evil of domestic violence and less into combating the evil of IS. Two women are killed in Australia by domestic violence each week. IS have not killed anyone in Australia as yet and, as evil and disgusting as IS is, domestic violence is much more of a threat to the fabric and values of Australian society. Whether we have a special court, which has been mooted for the ACT by the opposition, or not is not the point - that idea should be assessed on a cost benefit basis - but more money should be put into education, police intervention, prevention, financial assistance and legal services to assist the victims of domestic violence. We should have a national scheme with State and Territory participation. We should have the Federal Attorney and the Prime Minister showing leadership initiatives in this area.

Increasing Imprisonment Rate

The rate of imprisonment in Australia and the ACT is dramatically increasing, as is the rate of remand imprisonment. The AMC is being dramatically expanded, not long after it was built, to cater for our own prison population. The question as to why our imprisonment rate is rising so much, when at the same time our crime rate is decreasing, is passing strange. Are we "processing" more people through the criminal justice system? Is the length of jail terms for some or all crimes dramatically increasing and, if so, why? If crime rates are decreasing, is the rate of recidivism increasing? Is jail now not the option of last resort, but increasingly the option of first choice? Is the rate of rehabilitation increasing or decreasing? Are increasing rates of imprisonment deterring and protecting society or having no or little effect? It must be time to carry out some assessment of where we are going and IF it is in the right and most effective direction.

Are the Proposed Citizenship Stripping Laws Flawed?

There can be no question that we have lost a considerable amount of our liberties in the last decade. Are we safer because of this loss? The Law Council of Australia has expressed considerable concern over the proposed legislation that will allow dual nationals to be stripped of their Australian citizenship on national security grounds and want amendments to the proposals. Duncan McConnel, the President, has made written submissions outlining the following problems as seen by the Law Council, namely:

a. The mechanism for revocation of citizenship is clumsy
b. The conduct or behaviour that leads to automatic loss of citizenship is very broad and imprecise
c. There is only very limited review
d. The Court should supervise the loss of such a fundamental and important privilege
e. A proper decision-making process would provide a means for safeguarding children who would be rendered stateless by such a decision
f. The laws should not apply to past conduct except where it relates to a conviction obtained after commencement

Collaborating with the executioners

In the days prior to the execution of Andrew Chan and Myuran Sukumaran the Australian Government and Opposition were united in their condemnation of the sentences and their pleas for clemency. Even the inveterately cynical were struck by the obvious sincerity of those who spoke movingly in Parliament of the extraordinary reformation of these still young men and the cruel fate that awaited them. There was no cynical posturing, no derisive interjections or point scoring. The Opposition supported the Government as it exerted what diplomatic pressure it could, suppressed its anger at repeated snubs and tried to reason with an unresponsive Indonesian president. It seemed that our often maligned political leaders had found a common bedrock of human decency from which they would not be moved.

Then news broke that Andrew and Myuran had been strapped onto wooden crosses on the killing field of Nusakambangan, arms outstretched as if being crucified, and had led the other prisoners in singing hymns until volleys of shots brutally silenced their voices. We were spared the sight of the bloodied bodies, but the reactions of those who been with them only minutes earlier were transported into our living rooms with excruciating clarity. We heard the screams and saw the shocking agony of grief etched into the faces of their mothers and of others like Andrew's new bride who had loved them. Of course, there are always some who find a macabre satisfaction in killing like this, but even many who normally supported the death penalty flinched as their suffering was nakedly revealed.

Our government had assured us that there would be consequences and it initially responded decisively; our ambassador was recalled and ministerial contact was curtailed. Now, we thought, firm action will surely be taken to protect other Australians from a similar fate. Unfortunately, we were wrong.

It soon became clear that the government had no intention of taking any action to restrict the flow of information likely to send more Australians to the gallows or firing squads. Our policy of collaborating with the executioners will be maintained.

In May 2014 the Justice Minister, Michael Keenan, issued a new ministerial direction which revoked a previous requirement for the AustralianFederal Police (AFP) to 'take Australia's opposition to the death penalty into account when co-operating with overseas law enforcement agencies.' On the day after Andrew and Myuran were killed he was asked why this requirement had been removed. He reacted with indignation, but refused to provide any explanation and did not suggest that the requirement would be reinstated. Instead, he took refuge in the existence of AFP guidelines, which he described as 'very explicit'.

This was a wholly inadequate response. Ministerial directions express the policy of the government and the AFP is legally bound to comply with them. The Commissioner, Andrew Colvin, subsequently suggested that such directions were 'largely irrelevant',

presumably because he though his own guidelines were sufficient, but Australia's opposition to the death penalty is an important public policy that had been affirmed and enforced by the earlier ministerial direction. An unelected police force should not be free to form its own policy on such a crucial matter.

Furthermore, the AFP guidelines are by no means 'very explicit'. They provide that when information is sought that may expose someone to the death penalty, the relevant decision must be made by an officer with the rank of commander on a case by case basis. This is an onerous responsibility. The officers are asked to make a decision that may ultimately determine whether some people live or die. One might have thought that decisions of this kind would have been governed by statutory provisions enacted after public consultation and Parliamentary debate, but in fact the AFP has been left to make its own rules. The guidelines require the officers to consider a number of factors, including 'the purpose of providing the information, reliability, seriousness of the crime, nationality, age and personal circumstances of the people involved, risks to people providing information and likelihood of whether the death penalty may be imposed.' In short, the likelihood of other Australians being executed is merely one factor to be weighed in the balance with others.

So how does this work out in practice? The AFP have explained that since 2012 there have been 250 requests for cooperation from overseas police in death penalty related cases. Of those, 15 have been rejected. In the other 235 cases the requested information was presumably provided and the suspects left to confront whatever fate awaited them. The guidelines require the AFP to seek ministerial approval to cooperate with overseas police only when an Australian has been detained, arrested, charged or convicted with an offence carrying the death penalty. Of course, that will usually be too late; the die will have been cast when the suspects were first 'dobbed in' by the AFP.

Some dismiss such concerns on the basis that those executed have brought their fate upon themselves by their crimes, but that does not make the death penalty any less barbaric and, as the extraordinary reformation of Andrew and Myurin demonstrates, not everyone who has committed a serious offence deserves to be executed. Such arguments also overlook the fact that the AFP guidelines do not require anyone to be confident that the suspects are actually guilty before providing potentially damning information about them; the apparent reliability of the evidence is again merely one factor to be considered along with others. Nor do they require officers to take into account the likelihood of suspects being tried in courts that may be tainted by corruption or lacking elementary standards of fairness such as the need for guilt to be proven beyond reasonable doubt. Indeed, in his recent interview the Commissioner made it clear that information would not be withheld from other jurisdictions due to considerations of this kind.

The potential for wrongful convictions was demonstrated by the recent events in Indonesia. Mary Jane Veloso, who was to be executed with the other eight prisoners, received a last minute reprieve when people she claimed had tricked her into carrying the drugs surrendered to police and Philippine investigators said they believed she had carried them unknowingly. One of those actually executed was Rodrigo Gularte, a paranoid schizophrenic who reportedly suffered from hallucinations, spoke to ghosts, did not understand he was to

be executed until the last few minutes and then apparently asked to be buried in Brazil near his family in case he was 'resuscitated'. Were either of them guilty or were they innocent dupes of others?

The AFP has an enviable reputation for integrity and professionalism and, as the Commissioner mentioned, its officers are sometimes required to make difficult judgments. I do not accept that the course adopted in relation to the 'Bali nine' was either necessary or appropriate, but I have no wish to add my voice to the criticism of an officer who made a conscientious if fateful decision some ten years ago and has agonised over it ever since. A decade ago there was still a widespread belief that rigorous policing could stem the importation of drugs into Australia and save many lives.

Unfortunately, that has proven to be a pipe dream. The AFP has been both competent and effective. There has been many seizures, some involving enormous quantities, and many arrests. But the flow of drugs is so great that even the largest seizures rarely, if ever, lead to any shortages of supply and those arrested are quickly replaced by others. We have not even managed to keep drugs out of prisons. Any suggestion that users are denied access to drugs when some hapless courier is arrested and executed is as fanciful as suggesting that the pubs run dry whenever a beer truck breaks down. There are always more supplies in the pipeline. That unpalatable reality raises important questions about what other strategies might reduce the human toll of drug abuse, but if there were ever any valid grounds for the belief that exposing people to execution would save many lives, there are no longer.

There may be exceptional cases in which evidence of some impending offence, such as an imminent terrorist attack, should be disclosed no matter what the risk to offenders. But there should be a general principle of non disclosure and the scope for exceptions should be defined by theAustralian Parliament, not by the fiat of a police commissioner or ad hoc decisions by other officers. The practice of leaving it to the AFP to make all the moral judgments involves an indefensible abdication of responsibility by our national government.

And the AFP has made it clear that the current practice will continue unless the government intervenes. This will inevitably mean that more Australians will face execution. More of our elected representatives will plead for their lives and express anger and regret when their pleas are not heeded, and the indescribable grief and anguish of innocent parents will again be displayed on national television.

People who wave goodbye to their older children as they leave for Bali or some other exotic location may sometimes feel a twinge of anxiety about the risk of them facing charges overseas, whether due to some youthful indiscretion, ignorance of a local law or drugs slipped into their bags by a dealer eager offload the risk of customs inspections. They should not have to fear the actions of AFP officers acting on an implicit assumption that such young lives may be sacrificed in the forlorn hope of causing a momentary blip in the flow of drugs to a market already amply supplied.

Yet whilst our politicians decry the death penalty, they continue to permit the AFP to collaborate with the executioners. The deaths of Andrew Chan and Myurin Sukumaran should have conveyed a clear message: if you don't like the evil he practices, do not keep dancing with the devil.

Ken Crispin QC

ACAT
AUSTRALIAN CAPITAL TERRITORY
CIVIL & ADMINISTRATIVE TRIBUNAL

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The ACT Civil and Administrative Tribunal is implementing a new case management system. The database is scheduled to commence or "go live" on 12 October 2015. We expect that this updated technology will assist to streamline the work of the Tribunal, particularly in relation to the commencement of matters, tracking, storage and retrieval of some documents and issuing notices and orders. It will also provide a platform to enable electronic lodgement in the future.

You may have noticed that some forms have been changed in preparation for the new system. More forms will be changed in the coming months.

Other essential preparation for the new system (such as training) will mean that there are fewer people in registry at times from late August to mid October. To assist to manage the reduced capacity, the tribunal will reduce the listing of applications in some periods and, on the days immediately before and after the go live date, no matters will be listed other than those required to be dealt with urgently.

Registration of applications, allocations of conference and hearing dates, processing and despatch of tribunal outcomes and general contact with the tribunal registry

may be delayed.

At this stage the critical dates are -

24-28 August 2015
7-25 September 2015
6-8 October 2015
9 and 12 October 2015

Please do not hesitate to contact the tribunal to discuss the flow on effects of the implementation.

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SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

800TH ANNIVERSARY OF THE SIGNING OF MAGNA CARTA

JUSTICE RICHARD REFSHAUGE

15 JUNE 2015

I acknowledge the traditional owners of the lands on which we are meeting and pay my respects to their elders past and present and to the continuing contribution they make to our culture.

Eight hundred years ago today King John of England affixed his seal to a large document of parchment beside a sodden Thames River at Runnymede. Thanks to years of unsuccessful foreign policies and heavy taxation, the King was facing a rebellion by the country's powerful barons. In short, the barons had had it. They threatened King John with war and captured London in May 1215.

King John, like most politicians, decided that negotiation was the idea of the day. He brokered a political compromise with the band of rebellious barons and entered into the treaty with them "in good faith and perpetuity". This parchment treaty became known by its Latin name as the Magna Carta because of its size, not its significance and to distinguish it from the shorter Charter of the Forest.

That description of what happened shows the falsity of one of the few jokes about Magna Carta, all very weak.
Question: Where was Magna Carta signed?
Answer: At the bottom.
It was, of course, not signed but sealed by the King's great seal.

Despite our octocentenarian celebrations, the Magna Carta did not actually last very long. On 24 August, Pope Innocent III, at King John's urging, declared the Charter null and void on a basis that would be entirely unexceptional to a modern lawyer, namely that it was entered into under duress (Crescendo Management Pty Ltd v Westpac Banking Corporation (1988) 19 NSWLR 40 at 46).

That led to war and the war of the Barons lasted from 1215 to 1217.

God, however, did not smile on King John and he died just over a year later on 19 October 1216.

The annulment of the Magna Carta and the death of King John did not, however, see the end of the agreement or the ideas enshrined in it and John's eldest son, Henry, then nine years old, re-issued the Charter on 12 November 1216 as an affirmation of the new King's future good government. On this occasion, it was sponsored by a Papal Legate so acquiring explicit Papal approval. The text, however, had been significantly modified to remove, in particular, the chapters that most directly challenged royal sovereignty.

In 1225, Henry III confirmed the Charter but this version differed even more from the original, reducing the sixty-three chapters down to just thirty-seven. The 1225 edition was re-issued from time to time; it was re-issued in all forty-four times in the next 200 years. Most significantly it was re-issued in 1297 when it was the first to be copied on to the official "Statute Roll" thereby making it a statute and its thirty-seven chapters the definitive text under English law.

Edward the First, who affixed his royal seal to that latest version on 12 October 1297, made it an integral part of the law. Having affixed his seal, copies were distributed throughout the land and by Letters Patent he directed his justices to administer the Charter as common law. No judgements were to be given henceforth that were contrary to the Charter and so Magna Carta, whether as common law or as statute, entered the law of the land as part of the law of England from that time forward and became part of the law of

all those Imperial colonies and possessions to which English law was carried. Despite the manifold references to the 1215 original, it is the 1297 edition which is the real statutory power in force in the UK and more widely in the Empire that England created.

As a result, it became Australian law inherited from the United Kingdom. What remains of the 1297 edition is now part of Australian Capital Territory law and can be seen on our Legislation Register.

Gradually over time, provisions of the Magna Carta, were repealed or fell into disuse. By 1965, only nine chapters remained in force in the UK as to which five were not applicable in Australia, four were obsolete or superseded leaving one, chapter 29 (originally chapter 39) as part of the law of Australia. By 2015, only three remained in force, in the UK itself, two not being applicable to Australia, the third being chapter 29.

In 1973, the then Law Reform Commission of the Australian Capital Territory considered that this chapter, alone of the provisions of the Magna Carta, should be preserved. It commented that "its value is ... said to be 'chiefly sentimental', but this may be an exaggeration; does not the Crown's promise not to 'defer' justice or right to any man, make unlawful and unreasonable delay by the executive in rendering his due to his subjects? Whether that is so or not, we think that this provision should remain in force, and should not be restated in modern terms".

By a rather convoluted legislative history, then, in our statute law, Magna Carta, 1297 now appears with the sole provision which, relevantly, provides in words that have been quoted many times over the years:

No free man shall be taken or imprisoned, or disseised of his freehold, liberties or free customs, or be outlawed or exiled or in any otherwise destroyed; nor will we pass upon him nor condemn him, but by lawful judgement of his peers or by the law of the land.

We will sell to no man, and we will not deny or defer to any man, either justice or right.

That, however, is by no means the sum total of Magna Carta. It is, as one commentator has it, a brand and, as such it is not just the sum of its parts. It is about rights, freedoms and the rule of law, even though a textual analysis would not support that.

It is interesting that our celebrations this year are about an Act which deals with human rights. In recent history, the only other Act which has been celebrated in such a way was when, last year, we celebrated the tenth anniversary of the passing of the Human Rights Act 2004 (ACT). Even when we celebrated the Centenary of Federation, the focus was on the creation of the Commonwealth and the coming together of the colonies rather than the Constitution.

This has, perhaps, much to say about the resonance of rights and liberties in the civic consciousness that these should be statutes which we specially acknowledge.

It is to the Magna Carta, and its influence, that I then turn.

It is a daunting task. I am conscious of the implications of what Lord Sumption, of the UK Supreme Court, said earlier this year when he commented:

It is impossible to say anything new about Magna Carta, unless you say something mad. In fact, even if you say something mad, the likelihood is that it will have been said before, probably quite recently.

As his Lordship continued,

"You must not expect any startling new line from me, at least of all in a centenary year to which something portentous is said about Magna Carta every day".

That is indeed applicable to what I will say.

It seems to me that the most important thing about Magna Carta is a word that came into our lexicon of legal descriptions in 1997 with that fine docudrama "The Castle". That is to say, "The Vibe".

The continuing significance is not so much the text

itself but what Sir Gerard Brennan called the "beneficial misinterpretations – indeed the myth" with which the Charter has been invested down the years. We Australians, with our no-nonsense and iconoclastic approach to life and, perhaps, the law, probably prefer "the vibe" to "the myth." So Magna Carta came to stand for the rule of law, limits on authoritarian rule, government subject to law and the rights and liberties of citizens.

Textually, the document was not a democratic document; indeed, in some ways it could be called reactionary. It was certainly thoroughly feudal.

Thus, from its heartfelt plea for "standard measures" of wine and ale "throughout the kingdom" (perhaps not too alien a plea to Australians) to its ruminations on what should happen to a man's fortune should he die while in debt to the Jews, the medievalism of the document sings through its 63 chapters.

It had, however, an unintended genius. For all its medieval quirkiness, the Magna Carta had a universalist heart that still beats today.

The principal effect was that it limited the sovereign's power and this, more than perhaps anything else, has given rise to the enduring attributions to the Magna Carta as the source, at least in the underlying principles, of those subsequent institutions which have limited executive power: parliament, the writ of habeas corpus, trial by jury, freedom from summary arrest and imprisonment. It started the process of carving out space for what would become civil society. It may also be said to have begun the effort of codifying the law in a rational way.

It became a major influence on the making of the Bill of Rights 1689 which guaranteed freedom of speech, a free press, freedom from excessive bail and freedom from cruel and unusual punishments.

We owe much to one man for this, the judge and politician Sir Edward Coke who became Chief Justice of the Court of King's Bench in the early 17th Century. Despite his prodigious learning, he had a rather irascible disposition and fell out with King James the First as a result of that king's interference in the workings of the courts. He became an implacable opponent of the Stuart kings and their supposed Divine Right to Rule. Indeed, Lord Coke was dismissed in November 1616. Nevertheless, he is said to have transformed Magna Carta from a somewhat technical catalogue of feudal regulations into the foundation document of the English Constitution which status it has since then largely enjoyed. He even regarded it as the source of those bulwarks that protect the citizenry from governmental autocratic oppression, namely the writ of habeas corpus and the right to trial by jury. That, historically, neither of these claims can be substantiated, does not dilute the importance of such mechanisms and to which a mere reference to "Magna Carta" is sufficient to establish. Thus, Lord Coke defined in the words of Magna Carta three enduring fictions:

1. He took the provisions which protected a man's "liberties", which actually meant his privileges and immunities, and treated them as referring to the liberty of the subject which, according to him, resulted in all invasions of personal liberty by the Crown being unlawful.

2. He suggested that Magna Carta was the origin of parliamentary sovereignty, although no parliament existed for half a century after it was sealed.

3. He asserted that Magna Carta prevented the exaction of money by the Crown without consent although the only chapters dealing with taxation in the Charter had been removed by 1297.

Similarly, it has been said to have affirmed the right to trial by jury when that did not then exist and trial by battle or ordeal was the order of the day.

Again, it has been said to be the source of habeas corpus, a writ, however, which did not exist for another 200 years.

Lord Coke would not have found much jurisprudential comity with the originalist school of constitutional interpretation so ably represented in the US Supreme Court of which Justice Scalia is so robust and

effective a proponent.

Perhaps, overarchingly, the Charter legitimately did stand for the supremacy of the law over the Crown and, therefore, the other organs of government and, in this sense, it was a very important vibe.

There is no doubt that Magna Carta has had wide influence. Indeed, it has been called the foundation of human rights, the father of all constitutions, the basis of the civil liberties of a free and democratic society, the bedrock of democracy.

If that shows some signs of hubris, it accurately depicts the strength of the vibe that it has generated.

Even school children are infected by its vibe, though not always as accurately as we would perceive it. As one examinee explained "Magna Carta said that no man should be hanged twice for the same offence". This is an interesting interpretation of the doctrine of double jeopardy, also apparently sourced to Magna Carta without a textual basis, but, no doubt, the same vibe.

Certainly, its tenor is well able to be seen internationally. It was the inspiration for the French Declaration of the Rights of Man and Citizen (1789). It was used by the founding fathers of the United States of America in drafting the constitution of that great nation and, in particular, its Bill or Rights (1791). It was influential in the creation of the Universal Declaration of Human Rights (1948). It was a basis on which was created the European Convention on Human Rights (1950). It has been seen as an important fundamental source of the Basic Law of Hong Kong (199).

Nelson Mandela referred to it from the dock during the Rivonia trial of 1964 and German-born composer, Kurt Weill based a cantata on it. In Tianamen Square, some of the pro-democracy protesters sourced it as one of the western pillars of democratic freedoms.

Australia is, of course, fortunate to have a copy of one of the sealed copies of the Charter of Edward I, the one apparently intended for the County of Surrey. It is now to be found in Parliament House. On 12 October 1997, the 700th anniversary of that document, the commonwealth named Magna Carta Place, Langton Crescent in this city as another expression of the debt we owe to the principles attributed to and generated by Magna Carta.

If the politician who said that some of the people now born were to live to 150 years old is to be believed and if I am one of those people, I will be present in my last year at the celebration of the 800th anniversary of that document.

It remains a living document. Indeed, so far as the researches of the Chief Justice's associate have managed to uncover, it has been referred to in ten decisions of this Court since 1997 including as justifying a right not to be held or punished except according to law, a right to a fair trial, the powers of a sheriff and the right to due process, a fair hearing and a fair trial. One of the first of these references was made by Justice Gallop in Paramasivan v Flynn [1998] ACTSC 10 and I am delighted that the Honourable John Gallop has joined us for this ceremony today.

In none of those decisions was the reference to Magna Carta determinative, however, and it seems to me unlikely that it would be a sure foundation for many decisions for which, in any event, the common law and other statutes now would provide more definitive authority. This is not dissimilar to the experience in the United Kingdom where, since 1900, Magna Carta has been cited in nearly one hundred and seventy judgments but, in almost every case, it has been largely rhetorical and, Lord Sumption commented, "On the rare occasions when the court has been presented with a case in which it might actually make a difference, the judges have shied away".

It has been referred to in the High Court of Australia a number of times, but in none that I could discover was it used to decide a point in contention, mostly being used for historical purposes and to set out the kind of principles to which I refer below.

In America, however, perhaps because of the circumstances of its birth as a nation and the influence Magna Carta clearly had on that country's Constitution and Bill of Rights, it has had much greater

effect. The due process clause of the fifth and fourteenth amendments are based on the surviving article as interpreted by Lord Coke. In 1991, it was calculated that Magna Carta had been cited in more than nine hundred decisions of State and Federal Courts to that date and in more than sixty Supreme Court decisions in the previous half century. I am not sure whether the originalists have contributed to this or not.

Nevertheless, it is the vibe which is so important. It is a catchcry for the protections that the law has given citizens from arbitrary oppression that attempts to stay the hands of overzealous politicians and governments rather than the actual provisions which are now better and effectively enshrined in more manageable legislation such as the Human Rights Act 2004 (ACT). There can be no doubt that its influence has been the source of much common law and the incentive for many of the statutes that protect our human rights.

As Lord Bingham of Cornhill observed, when eschewing the possibility of enforcing a medieval statute in modern times

The significance of Magna Carta lay not only in what it actually said but, perhaps to an even greater extent, in what later generations claimed and believed it had said. Sometimes the myth is more important than the actuality.

Thus, it is important as an inspiration for a whole range of principles such as the supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, the separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

It is, therefore, appropriate that today marks also the start of Refugee Week where we pay attention to those who, by definition, have had the rights that we enjoy, stripped away, and who seek the protection of those nations that respect liberty, tolerance, democracy and the recognition of the dignity of each human being.

It seems to me that Sir Gerard Brennan when speaking at the naming of Magna Carta Place in Canberra on 12 October 1997, summed up in words that I could not better, the influence of Magna Carta. His Honour, said

Above all, Magna Carta has lived in the hearts and minds of our people. It is an incantation of the spirit of liberty. Whatever its text or meaning, it has become the talisman of a society in which tolerance and democracy reside, a society in which each man and woman has and is accorded his or her unique dignity, a society in which power and privilege do not produce tyranny and oppression. It matters not that this is the myth of Magna Carta for the myth is the reality that continues to infuse the deepest aspirations of the Australian people. Those aspirations are our surest guarantee of a free and confident society.

It is appropriate that, with clear eyesight about what we now celebrate we should be ever grateful that we have a lodestar by which to ensure the health of our society by the vibe of a document which allows us to protect our freedoms, limit improper incursions on them, enshrine the rule of law in our thinking and our actions and to ensure that the rights of individuals are celebrated and nurtured.

We should, however, bear a warning amidst the excitement of our celebrations, for the rights and freedoms we celebrate are not necessarily secure. They require constant protection and support. As the eminent jurist, Sir William Blackstone, commented centuries ago, "the body of the charter has unfortunately been gnawn by rats" We must not let our fears, our alienation, our selfishness, our xenophobia, or our smugness allow our leaders to take up the task that the rats left unfinished.

It is entirely appropriate that this Court should celebrate and honour that for which Magna Carta stands. It is that for which this Court stands and which all of its judicial officers past and present have sought to deliver as day by day they toil in the provision of justice according to law.

I am honoured to have been a part of this important ceremony.

The Hon Richard Refshauge

A Time to Lead

By Sean Costello
ACT Human Right Commission

On 1 July, the ACT Human Rights Act celebrated eleven years of operation. The experiences of other jurisdictions suggest that the coming decade is a critical time for the legislation to truly impact upon ACT law. Seminal cases in the United Kingdom, and New Zealand, were decided in the second decade of human rights legislation being in operation. Anecdotally, it was also in this period that senior counsel began calling on juniors and solicitors to research human rights arguments, leading to an increase in human rights litigation.

The ACT Human Rights Commissioner recently released our summary of the first decade of operation. We found its main benefit has been in influencing the formulation of new legislation and policy. The HR Act and the standards that it upholds are frequently invoked in parliamentary debates by members across the political divide. Significantly, the ACT Scrutiny of Bills Committee's reports on the compatibility of legislation with the HR Act are routinely referred to at the debate stage of bills. The Committee's concerns are also often cited as the basis for government amendments to bills. In 2014 alone, close to 100 government amendments in relation to 7 bills were moved, ostensibly in response to comments made by the Committee.

There has been a slightly different story in the courts. Overall, in its first ten years of operation, the HR Act has been mentioned in approximately 50 cases in the ACT tribunals (6.6 per cent of published decisions), 164 cases in the ACT Supreme Court (9.2 per cent of 1,846 published decisions) and in 29 cases in the ACT Court of Appeal (7.6 per cent of 371 published decisions). In comparison, since 2007 the Victorian Charter has been mentioned in approximately 17,596 cases (1.1 per cent of published decisions), 4,951 in the Victorian Supreme Court (2.625 per cent of cases) and 2,720 Victorian Court of Appeal cases (2.875 per cent of reported decisions).

Several recent decisions point to Australian human rights jurisprudence reaching a critical juncture. The ACT and Victoria are grappling with how the courts should interpret legislation consistently with human rights (see sections 30 and 28 of the HRA), how ACAT and courts other than the Supreme Court can apply the law (see s.40C) and how human rights jurisprudence, including the assessment of damages, is to interact with common/ administrative law.

In LM v Children's' Court [2014] ACTSC 26, Master Mossop of the ACT Supreme Court considered the ability of the Children's Court (and ACAT and other courts other than the Supreme Court) to assess whether a Public Authority has breached its human rights obligations, and the extent of any remedy for a breach. The Court considered if, and how, the Children's Court may assess the actions and decisions of the Director of Public Prosecutions against human rights, regarding the DPP's deciding to charge a young offender with a more serious offence after she had plead guilty to a lesser one. The Master agreed in principle that such courts and tribunals could consider HRA compliance, however also raised questions how the court should balance potentially 'unlawful' actions of an authority against alleged criminal conduct, particularly when the remedy sought was a permanent stay of proceedings. The Master confirmed an express power to grant relief under the HRA is given only to the Supreme Court. However, His Honour also suggested that inferior courts and tribunals (and the Supreme Court) retain their inherent, statutory or common law jurisdictions to grant remedies, but left open the question as to whether such a remedy may include factors beyond the traditional scope of that remedy. The Master ultimately determined that a permanent stay should not be granted. Until these issues are settled, it is unclear to what extent ACAT and other courts may assess, and remedy, breaches of the HRA.

Recent Victorian case law has confirmed this assessment, although the question of the appropriate balancing of interests in relation to remedies arguably remains unclear. In Goode v Common Equity Housing [2014] VSC 585, Justice Bell of the Victorian Supreme Court confirmed that where arguments were made under the Victorian Charter at the same time as other proceedings (in that case a claim under the Victorian Equal Opportunity Act) the Charter arguments still needed to be considered by the Tribunal. This was particularly so even though the EOA action failed.

Members of the Victorian judiciary have also questioned if it time for a reconsideration of the New Zealand test enunciated in R v Hansen, arguably adopted by the ACT Supreme Court in R v Fearnside [2009] ACTCA 3. That test appeared to have lost favour under the ACT decision In the Matter of an Application for Bail by Isa Islam [2010] ACTSC 147, which followed the Victorian Court of Appeal decision in R v Momcilovic [2010] VSCA 50. However, Justice Tate of the Victorian Court of Appeal, in last year's Human Rights Under the Charter Conference argued that the High Court's split reasoning in the appeal to that decision reopened this question. A key difference in these tests is at what point the question of limitation of rights is put; it is applied earlier in the Fearnside/Hansen test, and later in the Momcilovic (Court of Appeal)/Islam test. This can make a material difference to the interpretation of legislation, and in particular whether the court makes a Declaration.[1]

Other human rights jurisdictions have tended to solve these questions through jurisprudence. In New Zealand, the courts determined that damages could be awarded for human rights breaches (see Simpson v Attorney-General (Baigent's Case) [1994] 3 NSLR 667); and in Ghaidan, the House of Lords applied a test to liberally reinterpret legislation. Commentators like Nolan have also noted that in the United Kingdom, the development of human rights law has revealed key benefits to mounting litigation based on human rights as well as negligence,[2] because of the prospect of broader actionable conduct and subject matter,[3] broader standing,[4] and potentially narrower defences for public authorities.[5]

It seems the time is ripe for the ACT grapple with such matters, to achieve better outcomes for parties, and potentially recast the law of both the ACT and Victoria in the process. Nonetheless, all legislation can be improved, and with this in mind, the Human Rights Commissioner is seeking feedback from the Bar on their views about nearly eleven years of legislated human rights. We would welcome feedback via our survey at:

https://www.surveymonkey.net/collect/?collector_id=63889641

which will be collated and presented to Government.

1 See http://www.judicialcollege.vic.edu.au/sites/default/files/jcv_online_journal_vol02.pdf for a full list of Conference papers

2 D Nolan, (2013), *Negligence and Human Rights Law: The Case for Separate Development*, *The Modern Law Review*, 76(2): 286-318.

3 See for example *Michael and others (Appellants) v The Chief Constable of South Wales Police and another (Respondents)* [2015] UKSC 2 the Supreme Court found that while police did not owe a duty to a victim of crime in negligence, the family could pursue an action under the right to life in the UK *Human Rights Act 1998*

4 *Michael and others (Appellants) v The Chief Constable of South Wales Police and another* concerned victims of a deceased person bringing an action

5 The HR Act permits only two exceptions to the duty to comply with human rights if a Public Authority has disproportionately limited rights. These relate to circumstances where there is an express direction by a law for the public authority to act in a manner inconsistent with the HR Act, or where a law is incapable of being interpreted consistently with human rights.

Welcome New Practising Members to the Bar

Mr Brodie Buckland has joined practice at the private Bar as a Reader and is located at Blackburn Chambers. Mr Buckland may be contacted at his Chambers on (02) 6247 5040 or e| buckland@blackburnchambers.com.au

Ms Alicia Irving has joined practice at the private Bar as a Reader and is located at Blackburn Chambers. Ms Irving may be contacted at her Chambers on (02) 6247 5070 or e| irving@blackburnchambers.com.au

VALE

Peter Williams of NZ died in June 2015. He was the outstanding Kiwi human rights lawyer of his generation who, through his work as a barrister and as president of the Howard league for Penal Reform for 30 years, did the most for the rights of the accused and the incarcerated in New Zealand.

Williams sailed to Mururoa Atoll with a Greenpeace flotilla in 1995 to protest against French nuclear testing He appeared in major trials, often in the 'hardest' of cases. He became a Queens Counsel 1987, and a knight – Sir Peter – in March 2015.

Kevin O'Leary QC

He will be known to members of the Bar Association as a former solicitor, first and later a barrister practising before the ACT Supreme Court. A personalia note from volume 59 of the Australian Law Journal, of 4 October 1985 records the following biographical information.

He was appointed Chief Justice of the Northern Territory Supreme Court on 4 September 1985 .He remained with that court until 1987.

He held degrees of a BA and an LLB from the University of Sydney and was admitted to practice as a solicitor of the Supreme Court of New South Wales in 1949 and later was called to the New South Wales bar in 1957.

He subsequently left Sydney to practice in Canberra and in 1964-1970 was a member of the Council of the Law Society of the ACT and its President in 1967-1970.

He was a member of the Executive of the law Council of Australia from 1969-1977 and its President from 1974-1976. A number of members of the ACT Bar Association will recall that he was first Director of the ANU Legal Workshop which commenced operating in 1972 and he remained its Director until the end of 1983. In January-June 1976 he served as an Acting Judge of the National Court of Papua New Guinea.

The ACT Bar Association is the proud owner of the robes of office of O'Leary QC which he wore during his appointment as Chief Justice.

Greetings from Kokopo, East New Britain

Since being sworn in as a judge of the National & Supreme Courts of Papua New Guinea, I have had an interesting time.

The Court structure here is currently like that of the Federal Court of Australia. The District Courts are the Magistracy with appeals to the National Court. The National Court is the superior trial court of general jurisdiction.

Appeals lie to the Supreme Court which sits usually in a bench of three. There is currently no appeal from the Supreme Court. To resolve conflict, a five judge bench is assembled.

There is a proposal before Parliament to re-constitute the present Supreme Court as a Court of Appeal and allow appeals from it only to a Supreme Court with a specialised membership, like the High Court of Australia.

Outside the Court structure, the Ombudsman Commission functions to ensure that 'leaders', ie all high-ranking officials whether legislators, administrators or judges, adhere to appropriate standards of conduct. Any leader alleged to have transgressed is subject to scrutiny by the Ombudsman Commission. If it finds an allegation credible, after hearing a leader's response to the allegation, it may refer the allegation to the Public Prosecutor. The latter will then request the Chief Justice to convene a Leadership Tribunal. That comprises 3 members usually including one National Court Judge and two District Court Judges, although the membership could include foreign judges as occurred in 2011 when the then Prime Minister was referred. It functions as a disciplinary tribunal. It may dismiss the leader from office and ban him or her from holding a public office for up to 3 years. It may suspend the leader for up to 3 months and/or impose a fine.

To be referred by the Ombudsman Commission is no light matter. The leader is stood down from office without pay until the Tribunal decides his or her fate.

The powers and procedures of the National Court are similar to our Supreme Court, including judicial review of inferior Tribunals, although some things are ACT pre 1975.

The divorce law would have been a delight to the late Justice Percy Ernest Joske, complete with discretion statements! For the bulk of you who don't recall those days, that was a confessional statement, confidentially supplied, of a petitioner's own matrimonial infidelities conferring a discretion, not usually unfavourably exercised, to decline the petition.

The criminal law is basically the Queensland Criminal Code of Sur Samuel Griffith.
More of this later perhaps.

Alas for Purnell and Pappas, there are no juries. All trials are before judge alone. It does save on Court accommodation and, no doubt, administrative costs. However, it involves no lessening of the impact of "the Golden Thread".

My first sitting at Kokopo was greeted, just as counsel were introducing themselves, with a 7.2 earthquake. A sign, no doubt, that the local gods were pleased to see me. Power outages are also fairly frequent.

None of this dampens the enthusiasm of the local lawyers for argument though the legal discourse is refreshingly robust. Whilst lawyers are polite to each other and the Bench, litigants, at least in writing, go hammer and tongs. The opponent has put forward "devious and deceitful" allegations, that are a "pack of lies".

As a concession to the climate, lawyers, unless from Australia, do not wear bar jackets although they are officially prescribed. No wigs, even in crime. But judges are both bewigged and enrobed, even unto scarlet in crime. Black and white for civil.

The cases are varied, from assault, rapes and murders to land disputes and commercial debt.

Politics is never far away. One case involves two senior police officers taking out an arrest warrant against the Prime Minister for alleged financial malfeasance. The Commissioner of Police refused to let them execute it and, after his

dismissal from office was charged with contempt. He was found guilty by Injia CJ and sentenced to 3 years in Bomana gaol. An appeal is pending and I gave him bail pending the appeal. There may well be an appeal against that as well.

That, of course, says nothing as to the merits or otherwise of the appeal.

PNG does not, at least as yet, have truth in sentencing. Remissions are ACT pre-Sentencing Act. The Court does not make non-parole orders. Eligibility for parole is at 50% of the sentence as reduced by remissions. One third is standard for remissions.

All in all, it is not a hardship post. For those enduring the Canberra Winter, it is like Darwin.

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J Ferguson Thomson RFD

Ceased private practice as a Barrister at the end of the 2014/15 year.

Fergus (as he prefers to be known) was born on 23/12/39, in Scotland. He learned to read, fight and pray at an early age. He distinguished himself early by attending the same congregation as Deborah Kerr (who went on to become the famous UK actress). Her rise to the top was attributed in part to Thomson's gallant assistance in her tree climbing as children. Another noted was the man known to us as having one foot in the grave, Richard Wilson. "Bob a job" was Fergus' entrée to the Wilson artistic household.

Fergus emigrated to Australia in 1954, settling in Wollongong with his parents. He was active in rugby, surf lifesaving (a mass rescue of 27 people being one of his memories), and social life. After Wollongong High, Fergus worked at Australian Iron & Steel for a short time. He there became an active member of the Federated Iron Workers Union.
He then took himself off at age 18 to New Guinea, for the duties of Patrol Officer. A little over a year later, Fergus was back to the 'Gong. Enthused for the practice of law by his New Guinea experiences, he commenced as an Article Clerk with Keith Griffin.
He commenced his law studies through the Sydney University Law Extension Committee.
He continued to take his Rugby seriously, though urged by the captain not to touch the ball overly often.

Fergus migrated again in 1962, to Yass, commencing as junior Solicitor at Phillips & Co.
Busy in litigation and life, he briefed barristers who would become somewhat noteworthy in their achievements. Inter alia, Anthony Mason, Bob Hope, and Warren Nichol.

A dedicated advocate, even if highly inexperienced, Thomson found himself confronting the wrath of presiding Magistrate. Pressing a point (it was the Queen's Court, not the personal bailiwick of His Worship), standing against an irrelevant attack on the character of his female client, Fergus found himself enjoying the hospitality of Her Majesty over the luncheon adjournment (the Yass Lock-up cells).
Tactful guidance by the all powerful and wise Clerk of the Court led to Thomson being "sprung" for a further 50 years of legal practice.

After failing to acquit himself on the tennis Court against a c.90 year old eminent grazier, and Knight of the Realm, it was time to move. To Canberra in 1964, with his Wife of a few months. Seeking respite from his dingy little office where a stingy ray of sunshine struggled weakly through the window, and from conveyancing and probate, Thomson joined the Army (again).

Notwithstanding Thomson's distinguished but little recognised service as a "Nasho" infantry Private in the late 1950's, Captain Fergus Thomson was allocated to Army Legal Corp.

With a posting to the Republic of Vietnam looming, Thomson undertook rigorous jungle training in Queensland and qualified to lead a platoon size force in basic combat activity. During which he learned a valuable lesson from his corporal – never volunteer to carry the machine gun and its bandolier.
With young child (Angus) recently borne, and despite his incompetence with a rifle, Thomson was promoted Major and posted in 1967 to HQ Australian Task Force, Nui Dat.

Thomson's legal work in Vietnam was the grist of that of a criminal lawyer "in the trenches". Major courts martial, including a murder of an officer (fragging), appearing (alternatively) for the prosecution and defence. He sat as Judge-Advocate on hearings for Aussies and Kiwis. One or two we remember reading about in the 1960's in the Australian Press. One went to the High Court. Major Thompson was led by Brennan QC.

Thomson's R&R was scheduled for the standard 5 days leave, in Canberra. Departure from Saigon was delayed for 2 days by the January 1968 Tet Offensive. We are lucky to have him with us today. Fergus received the lightest of shrapnel wounds at Thon Son Nuit Airbase. Home late. Neither he nor his fellow returning R&R soldiers were given the extra 2 days leave. Injustice from the Army Minister, still remembered. Resisting Government injustice was a feature of Fergus' career thereafter.

Injustice was tempered with humour. Fellow officers at Nui Dat were not appreciative of Thomson's call for free beer in return for allocation of home leave. Thomson found himself wet and smelly, and not from the beer. Drying out soggy clothes on top of the head in dripping gun pits was another comical ritual (with photograph to prove it).

Transferring from Regular Army to Active Reserve in 1971, Mr Thomson commenced his very successful Commonwealth Public Service career. Attorney-General's Department to Commonwealth Legal Aid Commission to the Law Reform Commission. Major contributions to the development of administrative law included the AD(JR) and FOI legislation, and establishment of the AAT.

Thomson headed the challenging human rights and anti terrorist branches simultaneously. Thomson saw the irony, but in the halcyon days, it was not prohibitive for a good administrator and lawyer.

Thomson worked under various luminaries.
Alan Neaves, later Justice Neaves of the Federal Court; Lindsay Curtis, later AAT President. Fergus was appointed Secretary to the Parliamentary Commission of Inquiry into the conduct of a High Court Judge. His abilities were recognised and Thomson was invited by the Commission's President (Sir George Lush) to contribute as one Counsel assisting. Prior to the Commission closing down on the death of the Judge, Fergus distinguished himself by leaving an (unopened) expensive French red on a Manly Ferry. The price of doing one's duty.

Attorney- General Durack tasked Thomson with the closing of Commonwealth legal aid offices and transfer of service delivery States and to the ACT and NT. Much later (during his later private practice time), Thomson was appointed as a Commissioner (ACT Bar Nominee) to the ACT Legal Aid Commission. Thomson also took up a full time advocacy position with the ACT Legal Aid Office for a short period. He also served on the Legal Aid Review committee as Bar Nominee.

Further, Thomson has served on the ACT Law Society Pro Bono committees system for many years.
At the Human Rights Commission, Fergus, as CEO, Thomson worked under the Chair of the Honourable Dame Roma Mitchell (former Justice of SA Supreme Court and SA Governor). On one occasion, Dame Roma (charming but delightful) counselled Thomson that if he lost again to a particular barrister, she would not be pleased. Fergus won. Thomson did his own advocacy in the Commission, an example to all

public sector lawyers. Regrettably, this practice has fallen away.

Leaving the Public Service in 2000, Thomson became very active as a volunteer for numerous community groups needing experience in dealing with governments. He gave back to the Veteran's sector, grateful for the hot tea served up by the Salvation Army at Nui Dat after hours of perimeter guard duty in waterlogged trenches on stand-to. Enemy action expected, hence Thomson and other non combatants called upon. The Vietnam Veterans' Federation was one of his major activities, assisting with entitlements claims, including AAT appearances. He has become a Legacy volunteer.

An academic career beckoned (2002), Fergus taking up an Associate Professorship with Royal Melbourne Institute of Technology, and as Visiting Fellow at the ANU Law School. He conducted a course applying a practitioner's eye to student assignment work. Thomson took up private practice at the ACT Bar, joining Silk Chambers. He practise overlapped his other activities, mentoring students, and assisting Veterans and other disadvantaged people, usually on a pro bono basis.

Other matters included a building dispute that took him back to Yass Courthouse. A sentimental (voluntary) revisit to the Lock-up coincided. Full circle, time to retire.

Fergus remains an active Rugby supporter, martial artist, traveller, family man (Wife, Struan, children, Angus and Kirsty, and grandchildren). He will have time for more of these pleasures.

The Canberra Bar, and the full range of the Profession, will miss the depth of experience of a man with c.55 years legal practice. He was a wonderful Chambers member, instinctively able to contribute on short notice to discussion on a range of legal subjects. He re-introduced the Canberra Bar to a character of barrister which was not uncommon at the Bar even into the mid 1980is. Tolerant, respectful of colleagues with alternative opinions, playing the ball, not the man. Collegiate and generous.
And, wait there is more. Thomson is not yet dead.

Christopher Ryan (with assistance from the hapless Subject).

NOTICE OF ANNUAL GENERAL MEETING

Notice was given on 17 August 2015 pursuant to s249H of the Corporations Act 2001, that the AGM of the ACT Bar Association will be held at AMP Building, 12th Floor, 1 Hobart Place, Canberra City ***at 5.15pm on Tuesday 15 September 2015***

Call for Nominations of Office Bearers

Notice is hereby given pursuant to Artile 11.6 of the Articles of Association of the ACT:

1. Calling for nominations of candidates for election for the following offices:

President
Vice-President
Treasurer
Secretary
Five Council Members

2. Nominations must be received by the Returning Officer or be left at the Office of the Association at 1st Floor, AMP Building, 1 Hobart Place, Canberra not later than **5pm on Monday, 31 August 2015;**

3. The ballot shall open on Wednesday, 3 September 2015 for the casting of votes in accordance with Article 11.7.4 and shall close on **Friday, 11 September 2015 at 5pm.**

THE PROVINCE OF AN INDEPENDENT LEGAL PROFESSION[1#]

W. Sofronoff[2*]

Our language, our law and our constitutional system originated in England. England and Australia are, therefore, bound together by ties that will endure notwithstanding the changes that the future will bring. The influence of England's legal tradition upon us is, I think, as important as the influence of the English language. For it is the law that has given rise to assumptions that infuse not only the whole of civil life as we know. For this reason the legal and constitutional history of England remains relevant to any understanding of our political and legal institutions and the ideas which underpin them. It is, indeed, dangerous to contemplate changes to fundamental institutions without first considering the reasons, revealed by history, for their present form. For this reason, Sir Edmund Burke said:

> "It is with infinite caution, that any man ought to adventure upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society, or on building it up again, without having models and patterns of approved utility before his eyes."[3]

Sir Matthew Hale said something similar:

> "It is a reason for me to prefer a law by which a kingdom hath been happily governed four or five hundred years than to adventure the happiness and peace of a kingdom upon some new theory of my own though I am better acquainted with the reasonableness of my own theory than with that law. Again I have reason to assure myself that long experience makes more discoveries touching conveniences or inconveniences of laws than is possible for the wisest counsel of men at first to foresee. And that those amendments and supplements that through the various experiences of wise and knowing men have been applied to any law must needs be better suited to the convenience of laws, than the best invention of the most pregnant wits not aided by such a series and tract of experience."[4]

It is felicitous that this week marks the 800th anniversary of the signing of Magna Carta. It was presented to King John on 15 June 1215; it was sealed on 19 June 1215.

Chapter 39 provided as follows:

> "No free man shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers and by the law of the land."

It has been observed[5] that the expression "in accordance with the law of the land" might originally have been intended to have a narrow and technical meaning. However, by the 14th Century it was read as equivalent to "by due process of law".

For these propositions to have been included in Magna Carta implies that they had long been considered, if not accepted, before that document came into existence. As Lord Bingham has pointed out, Magna Carta was not a peace accord botched up to meet a sudden crisis and which was liable to unravel. It had a quality of inherent strength because it expressed the existing will of the people, or at any rate the articulate representatives of the

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1 # Paper delivered to the Australian Academy of Law, 18 June 2015, Supreme Court of Queensland and Keynote Address presented to the Criminal Lawyers Association of the Northern Territory at Bali, 22 June 2015.

2 * QC, BA, LLB, FIAMA. I must express my gratitude to Polina Kinchina, LLB, for her extensive research.

3 *Reflections on the French Revolution* at 90.

4 Holdsworth, *History of English Law* Vol V at 504.

5 *Magna Carta, A Commentary on the Great Charter of King John*, McKechnie, 2nd Edition 1914, at 379.

people.[6]

So, by 1215 it was already assumed that no prejudice ought be suffered by any person except by the enforcement of a law of general application. This was a rejection of arbitrary power. Of course, it was to take many more centuries until such a result was truly realised. It is the purpose of this paper to consider the contribution of barristers towards that end. I do not include solicitors only because the history of the development of that branch of the profession is quite separate from that of the Bar. And, for reasons that are well understood, although is no longer relevant or correct to speak of senior and inferior branches of the profession, the principles which underlie the practice of each are different.

The birth of an identifiable Bar in England can also be traced to Magna Carta.[7]

Because all departments of government were centred in the King's household, the legal tribunals which dispensed the King's justice followed wherever the King went[8] so, as the King moved around his kingdom, perhaps from one favourite hunting ground to another, crowds of supplicants and litigants followed him slavishly. Law suits in which the Crown had a particular interest were known as royal pleas or "pleas of the Crown".[9] Those in which the Crown had no interest were ordinary or "common pleas".[10] Common pleas did not require to be determined in the royal presence, unlike royal pleas. So it was possible to appoint a bench of judges to sit in a single place to hear such matters irrespective where the King might be. This would obviate the great expense of litigants travelling the country and engaging lawyers, if necessary, at such places as the King choose to stop.

For this reason Chapter 17 of Magna Carta provided:

> "Common pleas shall not follow our Court, but shall be held in some fixed place."

This provision had two large unforeseen consequences. First, it physically divided the Court of Common Pleas, which would evolve into the Courts of Westminster, from the Royal Court of St James and from the King's direct influence. Second, and most importantly for the purposes of the present discussion, Chapter 17 concentrated the common lawyers in one location and thereby formed them into an organised body. They acquired properties in which to house themselves. These were the Inns of Court.[11]

By the reign of Queen Elizabeth (1558-1603) it was possible for Lord Coke to describe the Inner temple, Greys Inn, Lincolns Inn and the Middle Temple as follows:

> "foure famous and renowned Colleges or houses of Court … all these … [are] not farre distant one from another, and all together doe make the most famous Universitie for profession of law onely, or of any one humane science, that is in the world, an advance of itself above all others. In which houses of Court and Chancery the readings and other exercises of the lawes therein continually used are most excellent, and behooveful for attaining to the knowledge of these lawes."[12]

The giving of instruction assumes a formally recorded body of knowledge. The written legal record began at least

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6 *The Rule of Law,* Bingham at 12; McKechnie, *op. cit.* 111.

7 It might be thought that Chapter 45, which obliged King John to "appoint as justices, constables, sheriffs or bailiffs only such as know the law of the realm and mean to observe it well" was the foundation for a judiciary of technically learned professionals. But that would be a mistake. The clause was directed at particular French cronies of the King and, after he died, the clause did not survive to make it into the reformulated Charter of 11216. It is missing from the third edition of Charter sealed in 1225 which is its final form.

8 McKechnie at 262.

9 *ibid.* at 263.

10 *Ibid*.

11 *Yale Lectures on English and American Laws in Jurisprudence* (1894), Yale University Law Journal 34 at 43; The Inns appear to have been established soon after Magna Carta but the available records of the oldest of these Inns, Lincolns Inn, go back only to 1423*; Ibid* at 44

12 Dillon, *op. cit.* at 50.

as early as 1284 in the form of reports of cases.[13] These Year Books chiefly contained cases heard in the Court of Common Pleas.[14]

It was, of course, the barristers who made the notes of cases which they themselves would then use in subsequent matters. And the reports of decided cases would, by a natural process of reasoning, give rise to an identification of common principles of law appearing in them. By the time of Queen Elizabeth, Francis Bacon was able to give advice to reporters concerning the form which a report should assume:

> "Let this be the method of taking down judgments and committing them to writing. Record the cases precisely, the judgments themselves word for word; add the reasons which the judges allege for their judgments: do not mix up the authority of cases brought forward as examples with the principal case; and omit the perorations of counsel, unless they contain something very remarkable."[15]

However, from a very early stage it was accepted that a considered decision, recorded in the Year Book, could be regarded as laying down a general rule for the future. In 1304, counsel in argument was able to submit:

> "The judgment to be given by you will be hereafter an authority in every *quare non admisit* in England."

Similarly, in 1310, BerefordCJ said:

> "By decision on this avowry we shall make a law throughout all the land."[16]

Of course, just as at the present day, not every case is reported. An editor somewhere makes a decision whether a case will be included in the law reports and, as a consequence, whether a case will ever be available as an authority. No judge can hope to have any significant effect upon the development of the law if his or her judgments are ignored by present and future members of the bench. When Lord Campbell was a reporter of *nisi prius* decisions during the time of Lord Ellenborough's tenure as Chief Justice, it is said:

> "Campbell … exercised an absolute discretion as to what decisions he reported and what he suppressed, and sternly rejected any which appeared to him inconsistent with former rulings or recognised principles. He jocularly took credit for helping to establish the Chief Justice's reputation as a lawyer, and he used to boast that he had, in one of his drawers, material for an additional volume in the shape of 'bad Ellenborough law'."[17]

Another feature of the centralisation of the English profession around the Inns of Court was an intimacy between bench and Bar. The members of the bench were appointed from the ranks of serjeants at law, at that time the highest rank in the legal profession. They considered themselves as belonging to an order and addressed each other as "brother". Appointment to the bench did not mean any cessation of membership of the order; on the contrary, because it was regarded as essential that a member of the bench be appointed from this order, it became common in later days to appoint a barrister as a serjeant at law merely as a precursor to an immediate appointment to the

13 *A History of English Law*, Holdsworth, Vol II at 526.
14 *Ibid* at 537.
15 Quoted in *Some lessons from our legal history,* Holdsworth, at 13.
16 Cited in *History of English Law*, Holdsworth, Vol II at 541.
17 *Some lessons from our legal history, op. cit.*, at 24-25, footnote 49.

bench. It is why until recent times judges commonly addressed each other as "brother".

The senior barristers, the serjeants at law and the judges constituted the governors of each of the Inns of Court, the so called "benchers". As a consequence of membership of an Inn, a barrister learnt the craft of advocacy in company with senior practitioners, on terms of some intimacy with judges and inevitably was imbued with the culture of the profession of barrister.

The opportunity for barristers to influence the development of the law was not restricted to writing notes of cases and breaking bread with judges. They gradually gained control over the court process itself. It happened in this way.

Until the early 1700s it was unusual for counsel to appear in criminal trials other than political trials for treason and other State Trials. While on the prosecution side it was a matter of choice whether the Crown did or did not brief counsel in an ordinary criminal case, defendants were barred from using lawyers. As a consequence, there were few rules of evidence and judges routinely examined witnesses and defendants.[18]

Trials were quick. Almost no trial took more than 20 minutes.[19] In the early 18th century, a session conducted at the Old Bailey lasted several days and a single jury of 12 was impanelled for the whole session. This jury would process between 50 and 100 cases of felony and serious misdemeanours.[20] Most of the jurors who sat at any session were veterans of other sessions.[21] The absence of challenges to jurors, of opening or closing statements, of examination and cross examination and of any applicable evidentiary or procedural rules made for swift justice. But it must not be thought that those who participated officially in these trials believed that the defendant was being treated unfairly. It was believed that the accused was more expert about the facts than any lawyer and needed no intermediary to be able to tell a truthful story:

> "… criminals of that sort, should not have any assistance in matters of fact, but defend upon plain ruth, which they know best, without any dilatories, arts or evasions".[22]

William Hawkins, in his famous *Pleas of the Crown*, published in 1721, said that any layman:

> "… may as properly speak to a matter of fact, as if he were the best lawyer; and that it requires no manner of skill to make a plain and honest offence, which in cases of this kind, is always the best …
> [since] it is the duty of the court to be indifferent between the King and the prisoner, and to see that the indictment be good in law, and the proceedings regular, and the evidence legal, and such as fully proves the point in issue … [the innocent are better off] having the court their only counsel."[23]

This process was in contrast with that which applied in State trials. Although for a long time counsel was denied

18 *The rise of the contentious spirit: adversary of procedure in 18th century England,* Stephan Landsman (1990) 75 Cornell Law Review 498 at 498-499.
19 *A history of the English Assizes* 1558-1714, JS Cockburn, at 109.
20 *The criminal trial before the lawyers,* John H Langbein (1978) 45 University of Chicago Law Review 263 at 274.
21 *Ibid* at 276.
22 Langbein, *op. cit.* at 308.
23 Hawkins, *Pleas of the Crown, Vol II* at 400.

even in such cases, it became common for such an accused to consult counsel before the trial in order to obtain advice about points that might be taken. Even in these cases hostility was shown to defendants who obtained such assistance. In the trial of Steven College[24] the accused's notes, which he had prepared for his use at the trial, were taken from him and examined by prosecution counsel who was thus enabled to ensure that witnesses whom College might have contradicted or cross examined were not called. However, in the decades culminating in the glorious revolution of 1688 it became widely believed that innocent men had been condemned to death as traitors.[25] As one contemporary writer put it the judges "generally have betrayed their poor client, to please, as they apprehended, their better client, the King …".[26]

The *Treason Act* 1696 provided for a right to counsel to an accused in treason cases but there was still no right to counsel in ordinary criminal cases. However, counsel could be permitted to appear in the exercise of the court's discretions and this became more common in the early 1700s. They would examine or cross examine for the defence; there was still no right to address a jury at the end of the case. Of course, the ability of a judge to conduct a trial without the aid of counsel implies that a judge undertook an interventionist role and that the occasion for consideration of points of law were very few. Counsel's limited role was summarised in a case in 1777 as follows:

> "Your counsel are not at liberty to state any matter of fact; they are permitted to examine your witnesses; and they are here to speak to any matters of law that may arise; but if your defence arises out of matter of fact, you must yourself state it to me and the jury."[27]

However, one of the inevitable consequences of permitting counsel to "speak to any matters of law that may arise" is that such matters of law would then arise. In a number of cases in the 1730s evidentiary points were taken which led to acquittals.[28]

Thus, in the prosecution of a woman for forgery of a bill of exchange, the prosecutor sought to lead evidence of a second forgery almost identical to the one charged. The following exchange occurred:

> "Prisoner's counsel: I submit to your Lordships, whether that question can be asked.
> Court: Why do you ask the question, Mr Howarth?
> Prosecuting counsel: She was paid by a £50 bank bill, which I shall produce to you.
> Court: We have considered of it, and it is not evidence, the case must rest here, upon this being a forged bill; she may have issued other forged bills, and may not have issued this."[29]

This was, of course, an objection to similar fact evidence being led.

Over the course of the 18th Century, rules of evidence conceived by barristers became part of an advocate's weaponry. A leading barrister of the day asserted it as an inviolable principle that:

24 (1681) 8 StTr 549 at 585.
25 Langbein, *op. cit.* at 309.
26 *Ibid* at 309.
27 Landsman, *op. cit.* at 534, footnote 183.
28 Landsman, *op. cit.* at 537-538.
29 Landsman, *op. cit.* at 559.

> "The King cannot break down, or infringe, or invade any one of the rules of evidence; he has no prerogative to say that innocence shall not be protected."

It can therefore be said that barristers came to harness the rules of evidence to control the trial itself. In that way they created the law of evidence.
It common to think that, upon taking an objection to evidence, it is counsel who submits to a judge's ruling. It may be more accurate to take the view that it is counsel, by taking an objection, who requires the court to submit to the operation of the law and thereby controls the trial. Certainly it is the natural perspective of many criminal barristers.

This intrusion of barristers into criminal cases, albeit at the discretion of the judge, gained strength over the course of the 18th Century so that by the middle of that century a barrister who was given leave to appear could insist upon putting his instructions over judicial objection. In a prosecution of a man for stealing lead from buried coffins, defence counsel suggested during cross examination that high ranking church officials might have authorised the defendant's scheme. The judge rebuked him for putting matters that impugned the character and reputation of a person not present in court, to which the answer was:

"I must follow my instructions and will not go from them."[30]

This is an assertion of a right to cross examine which the judge himself could not limit. By the late 1700s it had become common to have counsel appear in criminal matters and finally, in 1836, a statute was passed which provided for a right to counsel in all criminal cases.[31]

Barristers did not only influence the development of the common law and court procedure; they also influenced the content of important statutes. From the earliest times lawyers were powerful and influential members of the House of Commons. Sir William Holdsworth has demonstrated in detail the effect which the common lawyers had upon the form which the Statute of Uses finally took.[32] He has also pointed out that the Statute of Frauds was the creation of Lord Nottingham and Chief Justice North.[33] The involvement of practising lawyers as law reform commissioners began in England in the 19th Century and continues to this day in Australia.

It is fair to observe that, although anybody might conceive a good public policy, because lawyers spend their working lives considering and applying statutes, they are likely to have a better idea than anyone else concerning the form which legislation ought to take so as to make it effective in addressing its aims. Indeed, they may for that reason be the first to apprehend a need for a new statute.

A consideration of the history of the involvement of barristers thus far demonstrates, at least to me, that the character of our courts, the ways in which they operate and the laws which they apply have all been the product of incremental influence of barristers working as advisers, as advocates, as judges and as law reformers.

30 Landsman, *op. cit.* at 540.
31 *Defence of Felony Act* 1836.
32 *History of English Law,* Vol IV at 453-461.
33 Holdsworth, Some lessons from our legal history, *op. cit.* at 48.

However, while their influence in these respects has been very wide, it runs much more deeply.

As I observed at the beginning, the *Australian Constitution* and the form of government we employ in the Commonwealth, the States and the Territories all arise directly from the form of British government in 1900. That form was the product of many influences but not least of these was the influence of a number of barristers.
So, it is a fundamental principle of our Constitution that the executive has no right to levy money from citizens in the absence of a statute of the Parliament authorising it to do so. This guarantee against the exercise of arbitrary executive power was hard won during the course of the 17th Century. Charles I had adopted the practice of compelling persons to lend him money without the benefit of parliamentary approval. Upon non-payment those who refused to pay were imprisoned. A constitutional crisis ensued when Parliament sought to resist the King's actions. Parliament passed the Petition of Right on 7 June 1628. That document contained restrictions upon the King including a prohibition against non-Parliamentary taxation. The King agreed to the Petition of Right but immediately breached its terms. He prorogued Parliament and levied a tax called "ship money". Like scabrous politicians to this day he sought to justify the tax on the pretext of the danger to commerce from terrorists, that is to say pirates, as well as upon the grounds of vague military threats from religious opponents in Europe.

John Hampden was a graduate of Magdalen College, Oxford and was a barrister, a member of the Inner Temple. On principle he refused to pay the tax and was prosecuted. He lost the case, nine judges to three. But he never paid the money and by taking on the King he became the most celebrated man in England. His public stand meant that others refused to pay the tax so that only 20% of the money demanded was ever raised and the Act was a failure. It was repealed three years later. He thereby helped to establish the principle that there can be no tax without parliamentary approval.

Another barrister and a contemporary of Hampden's was John Pym. He too was educated at Oxford and went on to join the Middle Temple. He was one of the chief drafters of the Grand Remonstrance, a list of grievances drawn by parliament and presented to Charles I in 1641. He was the effective leader of the opposition to the King in parliament and was the proponent of that document. He led parliament in its abolition of the Court of Star Chamber by the enactment of the *Habeas Corpus Act* 1640. Lord Bingham, in his book *The Rule of Law*, regards *Habeas Corpus* as one of the milestones leading to the rule of law as we understand it today.

It is difficult to imagine that the battles undertaken by Hampton and Pym, involving matters of political principle which are to be considered in the context of an exercise of political power by legislation, could have been championed by other than lawyers. Nor do I think that it is a coincidence that four of the strongest Australian Prime Ministers of modern times were lawyers, Menzies, Whitlam, Hawke and Howard. Moreover, as periodicals of today show, the place of lawyers in the vanguard of battles for freedom continues to the present day.[34]
It is an accepted axiom that there can be no liberal democracy in the absence of the rule of law and that the rule of law, as it is understood in such a polity, requires the existence of independent judges.
The *Bill of Rights* 1689 established some fundamental constitutional principles. In particular, it firmly estab-

34 800 members of the Hong Kong Law Society met in August 2014 and passed a resolution of no confidence in their own President on account of his statements that Hong Kong judges should be "patriotic" and his open support for the Communist Party of China (Reuters, 15 August, 2014). In Iran, the government which took power in 1979 moved swiftly to close down the Bar Association and to arrest and imprison the majority of the members of the Association's Board of Directors (*Iranian Bar Association, Struggle for Independence,* Iran Human Rights Association Centre, 2012);

lished the authority and independence of parliament. However, it lacked an important provision. Although the committee which drafted the Bill had included a provision safeguarding the tenure of judges and the protection of their salaries, that provision was dropped at the time. Twelve years later, when the *Act of Settlement* was passed in 1701, to provide for the Protestants succession, the provision was included and passed through both Houses without a division.[35] When put together with the established principle that judges are immune from civil suit or criminal prosecution by acts done in a judicial capacity, the judges thereupon became truly independent.
Sir William Holdsworth has observed that there was a change for the better in the quality of the bench after the Revolution when the influence of the executive upon judges' tenure came to an end.[36]

However, security of tenure, while fundamentally important, is in a sense mere machinery. Its essence is to secure against interference by the executive or other appointing authority.[37] Such machinery safeguards do not provide a guarantee against lack of integrity. For example, it has often been argued that the prospect of judicial promotion within a court or to a higher court gives rise to the possibility of a loss of integrity.[38] Such a prospect cannot be guarded against by any rationally based machinery. Indeed, what ultimately stands between any judge and the temptation of executive preferment is not an institutional safeguard but personal character.[39]

Integrity is innate; however, the behaviour required of professionals of integrity within the technical constraints of a profession must be learned by experience and that experience must be gained before appointment to the bench. I wish to make a connection between certain features of the Bar as a profession, which distinguish it from other professions, and the inculcation of the necessary attitude required in a truly independent judge.
The necessary form of independence under discussion is an individual attribute of a barrister and not one that belongs to the Bar as a body. That independence requires a barrister to be independent from the improper influence of clients, of third parties and even, on occasion, of judges themselves. The assertion of such independence may risks to reputation and to income.

The *Australian Barristers' Rules* contain provisions, familiar to all of us, which articulate aspects of a barrister's duty to the court. That duty may, on occasions, conflict with the interests of the client but will nevertheless prevail. None of these rules generally raise any practical difficulties in application nor, indeed, any real temptation to disobey.

More subtle difficulties can arise when the barrister's opinion about how to conduct the case conflicts with that of the client. As long ago as 1876 an English judge said:

> "The nature of the advocate's office makes it clear that in the performance of his duty he must be entirely independent, and act according to his own discretion and judgment in the conduct of the cause for his client. His legal right is to conduct the case without any regard to the wishes of his client, so long as his mandate is unrecalled …"[40]

35 *The Rule of Law*, Bingham at 25.
36 *Some lessons from our legal history*, *op. cit.* at 25.
37 *Valente v The Queen* (1985) 2 SCR 673 at 698.
38 See *Forge v ASIC* (2006) 228 CLR 45 at [44] per Gleeson CJ.
39 *Ibid* per Gleeson CJ at [44].
40 *Batchelor v Pattison & Mackersy* (1876) 3 R 914 at 918.

The *Australian Barristers' Rules* provide to a similar effect:

> "41 A barrister must not act as the mere mouthpiece of the client or of the instructing solicitor and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client's and the instructing solicitor's wishes were practicable.
>
> 42. A barrister will not have breached the barrister's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing solicitor's wishes, simply by choosing, contrary to those wishes, to exercise the forensic judgments called for during the case so as to:
> (a) confine any hearing to those issues which the barrister believes to be the real issue;
> (b) present the client's case as quickly and simply as may be consistent with its robust advancement; or
> (c) inform the court of any persuasive authority against the client's case."

What these rules and the principle which underlies them attest is that the loyalty purchased by a client is a limited loyalty. The lawyer's technical skills are made available for reward; the lawyer's personal and political convictions are not available.[41] This raises the question why the lawyer's total commitment is not engaged. I think that the answer is to be found in the nature of a profession strictly so called.

It must not be forgotten that the primary meaning of the word profession, or at least its original meaning, was, according to the Oxford English Dictionary "the declaration, promise or vow made by one entering a religious order; the action of declaring, acknowledging, or avowing a belief". In describing a calling it was, at first, applied only to divinity, law and medicine. Each of these is a vocation. They imply the acceptance of a code of conduct aimed at serving the public good.

The great American jurist, Dean Pound, has said:

> "The member of a profession does not regard himself as in competition with his professional brethren. He is not bartering his services as is the artisan nor exchanging the products of his skill and learning as the farmer sells wheat or corn … the best service of the professional man is often rendered for no equivalent or for a trifling equivalent and it is his pride to do what he does in a way worthy of his profession even if done with no expectation of reward. This spirit of public service in which the profession of law is and ought to be exercised is a prerequisite of sound administration of justice according to law."[42]

Why is there said to be a "spirit of public service" in what is, in every other respect, a private business carried on for profit?

The answer lies, I think, in the peculiar role in our system of government of the Courts. It is axiomatic that the Courts exist to vindicate the rule of law. As every practitioner knows, the court process would be strained beyond endurance but for the assistance given to judges by lawyers. When a court's jurisdiction is engaged by a litigant

41 *The independence of lawyers,* Robert W Gordon, (1988) 68 Boston University Law Review 1 at 13.
42 *Redefining the "public" profession,* Debra Lyn Bassett (2005) 36 Rutgers Law Journal 721 at 750.

in person, the most efficient dispatch of the case at hand immediately becomes impossible. Moreover, even the just determination of the case at hand becomes much more difficult. Consequently, the upholding of the rule of law would be defeated if there were no lawyers representing clients. Moreover, that aim would also be defeated if lawyers were free to conduct cases in whatever manner might suit the client's peculiar interests or even dishonestly.

Indeed, so great is the need for there to be advocates if the courts are to function that, except in defined and limited circumstances, a barrister cannot refuse a brief.
The origin of the "cab rank rule", as it has come to be known, is lost in history. But its finest exposition was by the great barrister, perhaps the greatest barrister ever, Thomas Erskine in his speech in defence of Tom Paine, on a charge of seditious libel. Paine's book, "*The Rights of Man*", was regarded as a work which endangered public order at a time when it was feared, for seemingly good reason, that the violence of the French Revolution might spread to England. Erskine was heavily criticised in the newspapers for even taking the case. He defended himself in lapidary terms:

> "I will forever, at all hazards, assert the dignity, independence, and integrity of the English Bar; without which impartial justice, the most valuable part of the English Constitution, can have no existence. From the moment that any advocate can be permitted to say, that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end. If the advocate refuses to defend, from what he may think of the charge or of the defence, he assumes the character of the judge; nay, he assumes it before the hour of judgment; and in proportion to his rank and reputation, puts the heavy influence of, perhaps, a mistaken opinion into the scale against the accused, in whose favour the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel."

The subject matter of a barrister's practice is constituted by laws enforceable by a sovereign authority. A lawyer is concerned with legal rights and obligations. These rights and obligations are those which the State, by its coercive powers, will enforce. Whether in the field of civil law, public law or criminal law, the end point, if a litigant is foolish enough to go there, may involve invoking the assistance of the State to apply a physical sanction. That much is obvious in the field of criminal law. However, even in the fields of civil or public law, an obstinate disregard of court process can ultimately lead to imprisonment for contempt. Therefore, a refusal by a barrister to act for a person may involve exposing that person to the risk of an unjustly applied sanction. It is unacceptable, in a constitutional democracy, for any person to be exposed to such a peril without protection against the possibility of an unjust outcome. Indeed, the judges themselves, who wield the ultimate power, deserve and require assistance to protect litigants against the possibility of injustice.

A corollary of a public duty to act for all comers is the requirement, adverted to earlier, that a barrister must never be the mere mouthpiece of the client. This requires a barrister to be fair, honest and candid to the court and to the opponent. While the duty is often expressed as one owed to the court, at the most fundamental level it is a rule of conduct that exists to support the rule of law. For such reasons, it is no mere matter of etiquette that a barrister in court never states "I think that" but says "I submit that". The submission advances the client's case; the personal

opinion of the barrister is irrelevant. It is also harmful to the extent that it implies identification of the barrister with the client. Rule 43 of the *Barristers' Rules* enshrines this proposition. This rule against personal identification with the client's cause is also a protection for the independence of the barrister and a guarantee that the public perception of the barrister's conduct will recognise that what a barrister does so powerfully, and sometimes so hurtfully, is done out of duty and not personal interest. As Sir Robert Megarry put it:

> "When appearance in court for a client is a professional duty and not as of choice, any identification of counsel with his client or his client's interest lacks reality. The Bar is virtually free from any political or social reproaches arising from performing its forensic duty … the dissociation between the man and the advocate is nearly complete even in the public eye."[43]

We speak of the barrister's duty to the court; however, I think we really mean the barrister's duty to the rule of law. This can be seen from the occasions when it will be the barrister's duty to challenge the court itself
Late in the 18th century, a cleric, the Dean of St Asaph, had caused to be published a pamphlet advocating general adult franchise. He was charged with seditious libel. Erskine was briefed to defend him. At the time, the accepted legal doctrine was that the question for a jury in such a case was solely with the issue whether the defendant had published the material and whether the meanings attributed to the words by the prosecutor had been established. Whether the innuendos were libellous and whether the defendant acted in good faith were matters of law for the judge. This legal proposition was the subject of great controversy. As one pamphleteer put it:

> "Why force 12 honest men in palpable violation of their oaths to pronounce their fellow subject a guilty man when almost at the same moment you forbid their inquiry into the only circumstance which in the eye of the law constitutes guilt – malignity or innocence of his intentions …"[44]

In short, under the existing law the jury was bound to find the Dean of St Asaph guilty. Erskine's only chance of acquittal was to induce them to make a finding inconsistent with the law.
His closing submission to the jury raised the rarely discussed principle of jury nullification. Jury nullification occurs when a jury acquits a defendant even though the members of the jury unanimously believe that the accused is guilty of the charges. This can occur when the members of the jury, as representatives of the people, disapprove of the law which the accused has been charged with contravening or believes that the accused should not have been charged in that particular case. Needless to say, judges rarely inform juries that they have this power. But it is a safeguard against tyrannical laws. A legislature may pass whatever laws it thinks fit; if juries refuse to convict then the law is set at nought.
Erskine said:

> "Crimes consist wholly in intention. Of that which passes in the breast of an Englishman as the motives of his actions, none but an English jury shall judge … the administration of criminal justice in the hands of the people is the basis of freedom. While that remains there can be no tyranny, because the people will not execute tyrannical laws on themselves. Whenever it is lost, liberty must fall along with it."[45]

43 *Lawyers and Litigants in England*, Sir Robert Megarry, Hamlin Lecture 1962 at 33.
44 *For the Defence*, L P Stryker, 1947, Staples Press at 121-122.
45 *Speeches of Erskine*, Volume 1, 1810, at 198, 199, 200.

Justice Buller's charge to the jury was firmly to the opposite effect. He said:

> "But upon his evidence it stands thus; he afterwards published [the pamphlet] in English … there is no contradiction as to the publication: and if you are satisfied of this in point of fact, it is my duty to tell you in point of law you are bound to find the defendant guilty."

The jury went away to consider its verdict and returned in only half an hour. What followed is recorded in the transcript:

> "Associate: Gentlemen, do you find the defendant guilty or not guilty?
>
> Foreman: Guilty of publishing only.
>
> Mr Erskine: You find him guilty of publishing only?
>
> A juror: Guilty only of publishing.
>
> Mr Justice Buller: I believe that is a verdict not quite correct … if you find him guilty of publishing, you must not say the word *only*.
>
> Mr Erskine: By that they mean to find that there was no sedition.
>
> A juror: We find him guilty of publishing. We do not find anything else.
>
> Mr Erskine: I beg your Lordship's pardon with great submission. I am sure I mean nothing that is irregular. I understand they say, we only find him guilty of publishing.
>
> A juror: Certainly, that is all we do find.
> …
>
> Mr Erskine: Gentlemen, I desire to know whether you mean the word *only* to stand in your verdict?
>
> One of the jury: Certainly.
>
> Another juror: Certainly.
>
> Mr Justice Buller: Gentlemen, if you add the word *only*, it will be negativing the innuendos …
> …
>
> Mr Erskine: My Lord, I desire the verdict may be recorded. I desire your Lordship sitting here as Judge to record the verdict as given by the jury. If the jury depart from the word *only* they alter their verdict.
>
> Mr Justice Buller: I will take the verdict as they mean to give it; it shall not be altered. Gentlemen, if I understand you right, your verdict is this, you mean to say guilty of publishing this libel?
>
> A juror: No; the pamphlet, we do not decide upon it being a libel.

Mr Erskine: Is the word *only* to stand part of your verdict?

A juror: Certainly.

Mr Erskine: Then I insist it shall be recorded.

Mr Justice Buller: Then the verdict must be misunderstood; let me understand the jury.

Mr Erskine: The jury do understand their verdict.

Mr Justice Buller: Sir, I will not be interrupted.

Mr Erskine: I stand here as an advocate for a brother citizen, and I desire that the word *only* may be recorded.

Mr Justice Buller: Sit down, Sir; remember your duty or I shall be obliged to proceed in another manner.

Mr Erskine: Your Lordship may proceed in what manner you think fit; I know my duty as well as your Lordship knows yours. I shall not alter my conduct."

There are very few Erskines in the world. Courage was intrinsic in him. In November 1778 Captain Baillie was the Governor of a Seaman's Mission, the charitable funds of which were being corruptly misappropriated. He wrote a letter to the directors exposing these crimes. The Chairman, Lord Sandwich, himself corrupt, provoked several of the directors to institute a prosecution for seditious libel. He himself controlled the litigation behind the scenes. Erskine was briefed as the third junior in the case to defend Baillie and so he spoke last. Of the barristers, he alone invoked Lord Sandwich's name. The presiding Judge, Lord Mansfield, stopped him. He said Lord Sandwich was neither a party nor a witness and should not be referred to. Erskine's response was this:

> "I know, that he is not formally before the Court, but, for that very reason, I will bring him before the Court: … I will drag him to light, who is the dark mover behind this scene of iniquity. I assert, that the Earl of Sandwich has but one road to escape out of this business without pollution and disgrace: and that is, by publicly disavowing the acts of the Prosecutors, and restoring Captain Baillie to his command. … If he keeps this injured man suspended, or dares to turn that suspension into a removal, I shall then not scruple to declare him an accomplice in their guilt, a shameless oppressor, a disgrace to his rank, and a traitor to his trust."[46]

As I have said, the trial of Captain Baillie took place in November 1778. Erskine had been called to the Bar only in July of that year.[47]

However, all of us have seen barristers who, when the occasion demanded it, have been prepared to stand up to judicial pressure. Indeed, it would be difficult to imagine a Bill Pincus, a Tom Hughes or a Cedric Hampson acting otherwise. Those of us who do not have the strength of character of such heroes at least have profited by their example. Their example is available to us because of one of the characteristics of our odd profession.

46 *Speeches of Erskine*, *ibid* at 30.
47 Not surprisingly he took silk five years later in 1783.

From the time of the serjeants, when the serjeants and judges addressed each other as "brother", barristers have shared a close professional intimacy with each other even after they have been appointed to the bench. As Sir Robert Alexander has said:

> "The Bench is raised up from the Bar and carries its concept of legal practice. The Bar's traditions and its independence are jealously guarded by the judges, whose own independence and separation from the political or executive field is constitutionally assured. …. Association fosters an awareness of any deviation from propriety, as well as a unique opportunity for succeeding generations to be imbued with the standards of the profession. The Bar is a small profession of independent lawyers; by an osmotic process difficult to define reputations are built up and those who are dishonourable or who cut corners are gradually identified. This and the duty to the court are positive forces and the practice of the law."[48]

This form of cultural breeding has resulted in judges who are capable of resisting the political pressures of the moment. An example from 19th Century South Africa will illustrate this. A Cape Colony judge was pressed with a submission that, the Colony being in a state of rebellion, he ought not to apply the law in a way that was likely to increase disorder. However, he said:

> "But then it is said that the country is in such an unsettled state and the applicants are reputed to be of such a dangerous character that the Court ought not to exercise a power which, under ordinary circumstances might be usefully and properly exercised. The disturbed state of the country ought not in my opinion to influence the Court, for its first and most sacred duty is to administer justice to those who seek it and not to preserve the peace of the country … the civil courts of the country have but one duty to perform and that is to administer the laws of the country without fear, favour or prejudice, independently of the consequences which ensue."[49]

That dictum was quoted and applied by Kannemeyer J in *Nkwinti v Commissioner of Police.*[50] In concluding that the continued detention of the applicant during a state of emergency was illegal, Kannemeyer J declined to take into account the possible consequences of his order. Even if, as a result of his order, every detainee held under emergency regulations was to be considered as being held illegally and had to be set free, he said he could not shirk making the order.

Such attitudes are not characteristic of judges who have a proclivity to please the executive government or who crave popularity.

This institutionally close association of barristers which has resulted from Chapter 17 of Magna Carta has given rise to a peculiar caste. The great German sociologist and philosopher, Max Weber identified two important concepts in this area:

> "One is the calling of the aristocracy of the intellect; the other is a notion of duty over and beyond the everyday sense of doing a job."[51]

48 *The History of the Law as an Independent Profession and the Present English System*, Robert S Alexander, (1983-1984) 19 Forum 185 at 201.

49 *Willem Kok and Nathaniel Balie* (1879) Buchanan Supreme Court Reports 45 at 66 quoted in *Hard Cases in Wicked Legal Systems*, Second Edition, Dyzenhaus at 152.

50 (1986) (2) SA 421(e) at 439.

51 *Redefining the "Public" Profession*, (2005) 36 Rutgers Law Journal 721 at 729.

It is dangerous to speak in such terms and not only because it will draw the fire of populists if misunderstood. The gravest danger lies in the possibility that we will fool ourselves:

> "[A] profession is likely to employ altruistic pretence; that is, it will try to conceal the extent to which its members are motivated by financial incentives, in order to make more plausible the implication that they have been drawn to the profession by the opportunity to pursue a calling that yields rich intellectual rewards."[52]

Nevertheless, we cannot afford to shut our eyes to one characteristic of a profession. It is that professionals possess and draw upon and employ a store of knowledge that is more than ordinarily complex. It follows that being a "self-made man" or "knock-about bloke" or even being a "bloke" at all is neither a necessary nor a sufficient qualification for membership of the profession. It also follows that there can never be a large or across the board membership of such a profession.[53]

Ultimately, there is a more fundamental reason why our profession must be protected against being degraded by a reduction in standards. It is because our profession has a constitutional significance.
In *Kable v Director of Public Prosecutions* (*NSW*)[54] the High Court held that because the Constitution established a nationally integrated court system, State legislation which purported to confer upon such a court of function which substantially impaired its institutional integrity would be invalid. The existence of State Supreme Courts requires that they continue to answer the description of "courts". For a body to answer that description it must satisfy minimum requirements of independence and impartiality. If State legislation attempted to alter the character of a Supreme Court in such a manner that it no longer satisfied those minimum requirements, the legislation would be contrary to Chapter III of the Constitution and would, for that reason, be invalid.

As I have sought to demonstrate, Australian courts would quickly cease to function if there were no lawyers or if lawyers ceased to be bound by the ethical constraints under consideration or, indeed, if lawyers were beholden to the Executive. In my view it is a logical step from the principle established by "*Kable*" to conclude that the continued existence of an independent legal profession is mandated by the Constitution. If this is accepted, attempts by the executive or by the legislature to impinge upon that independence will be invalid.
But attacks upon the integrity of the institutions of justice can and does come from quarters other than legislative action. It can take the form of denigration and defamation of particular legal practitioners and the profession as a whole.

In February 2014 the then Premier of Queensland said this about lawyers:

> "These people are hired guns. They take money from people who sell drugs to our teenagers and young people. Yes, everybody's got a right to be defended under the law but you've got to see it for what it is: they are part of the machine, part of the criminal gang machine, and they will see, say and do anything to defend their clients, and try and get them off and indeed progress their dishonest case."[55]

52 *Professionalisms,* (1998) 40 Arizona Law Review 1 at 4.
53 *Redefining the "Public" Profession*, *op. cit.*, at 739, 740.
54 (1996) 189 CLR 51.
55 Courier Mail, 6 February 2014.

Such an attack can be met with the ordinary law of defamation if a particular lawyer is affected.

These attacks can also take the form of scandalising the court, which, in legal terms, means the publication of words calculated to bring a court or a judge into contempt and to lower the judge's or the court's authority in the eyes of the public.[56] Such contempts are punishable as criminal acts. This category of contempt exists because, without public faith in the administration of justice, the task of upholding and enforcing the law would be imperilled.

The last year and a half has seen a pattern of repetitive insults to the court which have been unprecedented in our country.

In March 2014, the then Attorney-General of Queensland falsely implied that the President of the Court of Appeal was a hypocrite for failing to recommend a woman for an appointment to the Court of Appeal and that she lacked integrity for suggesting her husband for the role.[57] These trumped-up attacks upon the character of the President of the Court of Appeal have since been continued by others.

In 1880, the then Chief Justice of New South Wales said:

> "What are such courts but the embodied force of a community whose rights they are appointed to protect? They are not associations of a few individuals claiming on their personal account special privileges and peculiar dignity by reason of their position. A Supreme Court like this, whatever may be thought of the separate members composing it, is the accepted and recognised tribunal for the maintenance of the collective authority of the entire community … it derives its force from the knowledge that it has the whole power of the community at its back."[58]

Prosecutions for such contempts are rare. There is a natural reluctance to prosecute because there is a natural sense that the public interest in prosecuting a contempt may conflict with the public interest in the freedom to discuss the administration of justice.

We can therefore put aside prosecutions for contempt in other than the most extreme cases. However, if it is true that attacks upon the judiciary and upon judges made in bad faith have a propensity to degrade the administration of justice, then the members of the Bar must accept that it is part of their duty, as participants in the administration of justice with the judges, to defend them and the judiciary as a whole against such attacks. By the possession of our peculiar knowledge and experience as barristers we are best placed to undertake this duty. This is particularly so because of the well-established principles which require restraint in judges making public statements. Justice Keane is right to say that their defining characteristic is politically neutral professionalism.[59] For that reason, the calling of a press conference by a judge, for example, to put forward a political argument as a public defence of the judge's personal position demeans that judge's office and is, in my view, conduct unbecoming a justice of the

56 *R v Gray* (1900) 2 QB 36 at 40; "Any act done or writing published calculated to bring a court or a judge of the court into contempt ought to lower his authority, is a contempt of court." Per Lord Russell CJ.
57 Sunday Mail, 23 March 2014.
58 *Re The Evening News*, Newspaper (1880) 1 NSWLR 211 at 237 per Sir James Martin CJ.
59 Keane, *op. cit.* at 3.

Supreme Court. In some cases, it would be capable of amounting to misconduct justifying removal from office. Consequently, it is imperative that lawyers, who are not constrained by these principles, to meet such attacks with great force on behalf of those judges who, from a their sense of duty, cannot defend themselves.[60]

The judiciary constitutes one of three arms of government and, as Justice Keane has rightly said, when a court resolves a dispute between citizens or between a citizen and the State, the parties are not being rendered a service; they are being governed.[61] Attacks upon the judiciary are therefore revolutionary attacks upon the judicial arm of government of which the Bar is an indispensable and intrinsic part. I believe that a failure or a refusal by the Bar to defend against threats to the courts constitute a betrayal of the profession and the public which it serves.
Sir Owen Dixon said that the rule of law is the assumption upon which our Constitution is founded.[62]

The rule of law has many facets. The right to a fair trial is cardinal among them. Without that right, there can be no equal application of the law to all. There can probably be no application of the law at all. As I have sought to show, the development of procedures which result in a fair trial has been very much the consequence of the work of barristers. The development of our constitution has also been the result partly of the work of barristers at crucial moments of history. I believe that the maintenance of the hard won right to a fair trial is also part of the work of barristers. The right to a fair trial can be corroded in a number of ways. The executive might choose not to appoint judges so that the court becomes overloaded; the executive might choose to appoint a political flunky from whom it expects some form of cooperation; it might cut the budget for legal aid so that criminal defendants are denied access to lawyers and a judge's task in ensuring a fair trial according to law thereby becomes more difficult. And politicians and others might make attacks upon the court as a whole, as well as upon lawyers and upon judges as individuals in order to degrade them in the eye of the public.

It is my view, therefore, that the proper province of the Bar is not limited to chambers and the court room. The constitutional liberties we enjoy now have been partly paid for in blood. Lawyers in other countries have been prepared and continue to be prepared to pay in loss of liberty and in death.[63] None of us will be called to pay such a price. We owe it to ourselves as members of a profession that, I believe, truly is noble to safeguard them by our advocacy wherever we are called.

60 Namibian lawyers have expressed the view that, due to "the judiciary being the weakest branch of government, it is incumbent on the legal fraternity to vigorously defend the independence of that branch." (*The independence of the Legal Profession in Namibia,* Kavendjii and Horn, at 304.

61 *The Idea of a Professional Judge,* PA Keane, Paper delivered to Judicial Conference of Australia Colloquium, Noosa, 11 October 2014, p.5

62 *Australian Communist Party v Commonwealth* (1950-1951) 83 CLR 1 at 193 per Dixon J; see also Dixon, "*The Law and the Constitution*" in *Jesting Pilate and other papers and addresses* (1965) at 53.

63 The dictatorship of Pervez Musharraf in Pakistan removed Chief Justice Chaudhry from office. Lawyers mobilised themselves into a movement which ultimately prevailed but not before many of them were beaten and imprisoned: *Pakistani Lawyers' Movement,* (2009-2010) 123 Harv.L.Rev.1705; *State of Emergency: General Pervez Musharraf's Executive Assault on Judicial Independence in Pakistan,* Qureshi, (2009-2010) 35 N.C.J.Int'lL & Com. Reg. 485; Dina Kaminskaya was a leading Soviet defence attorney for 37 years before being forcibly expelled from the Soviet Union in 1977 *Final Judgement: My Life as a Soviet Defence Attorney,* Kaminskaya, Simon and Schuster, 1982; Max Hirschberg was a prominent lawyer in Weimar Germany, overturning many wrong convictions. The apogee of his career was the cross examination of Hitler himself during Hitler's libel action against a newspaper. Five weeks after Hitler became Chancellor, Hirshberg was arrested: *Crossing Hitler,* Benjamin Carter Hett, OUP, 2008

September 2015

Thursday, 3 September 2015 at 5:30pm Tristian Jepson Memorial Foundation Lecture:

Is being a Lawyer a Health Hazard? Lecture will be held in Court 1, Supreme Court of the ACT

ANNUAL GENERAL MEETING - 15 SEPTEMBER 2015

NOMINATIONS DUE 5PM - 31 AUGUST 2015

BALLOT OPENS - 3 SEPTEMBER 2015

BALLOT CLOSES - 5PM 11 SEPTEMBER 2015

THE AUSTRALIAN BAR ASSOCIATION TRAINING COUNCIL

APPELLATE ADVOCACY 18-20 SEPTEMBER 2015, SYDNEY

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COURGETTE RESTAURANT, FRIDAY 11 DECEMBER 2015