Index to compilation of speeches delivered by the Hon. Justice V Bell

THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT

SPIGELMAN CJ
AND THE JUDGES OF
THE SUPREME COURT

Friday 19 December 2008

FAREWELL CEREMONY FOR THE HONOURABLE JUSTICE VIRGINIA BELL UPON THE OCCASION OF HER RETIREMENT AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES

1 **SPIGELMAN CJ:** It is singularly fortunate in any personal journey to meet someone who simply lights up your life. Virginia Bell is such a person. You have done it for me and I am quite confident in saying that you have done it for every other member of this Court.

2 I wish at the outset to acknowledge on behalf of us all what a wonderful companion you have been. Not least because of your influence on all of us over the last nine years, the sense of collegiality to which you have made such an important contribution will endure. It may well be the case that where you are going the need for companionship is greater than ours. We are content to make that sacrifice.

3 Your contribution in this respect was to a substantial degree determined by your personality – your equable temperament, your interest in people, your broad range of interests, your penetrating intelligence, your wit and your wisdom.

4 You have long been the preferred commentator at all those collegial events such as dinners and celebratory occasions by which the members of any institution strengthen their bonds with each other. Your command of the language manifest on those occasions was as mellifluous as it was

concise. The penetrating insights and the wit with which you always addressed us was characterised by a generosity of spirit. Your wit is never demeaning of others, it contains no needle, no undertones, no standing on dignity. It is, as one poet put it, "mirth that has no bitter springs".[1]

5 All the personal qualities to which I have referred were reflected in your judicial work where you manifested the generosity and fairness of someone who knows her roots and who is confident in her intellectual capacity. Your conduct in court was unfailingly polite. You brought to your work a high level of social consciousness, compassion for the unfortunate and a strong sense of justice, whilst recognising that those instincts could only be properly expressed within the bounds of fidelity to the law. If there was one word I would use to describe your approach it is "balanced". Furthermore, your judgments reflect an exquisite ability to cut incisively to the real point in issue. And you do it every time.

6 Over eight years as a trial judge and one year as a judge of appeal you have been involved in some of the most difficult cases which have come before the Court. The competence with which you have disposed of all of these cases is admired by all of your colleagues.

7 One case that comes to mind took the best part of a year in the high security court at the Downing Centre. It involved multiple murders in a family dispute, with four co-accused tried together. Few judges could have done this successfully.[2] This was only one of numerous criminal trials that you conducted to universal acclaim.

8 Your Honour also delivered landmark judgments on such matters as the validity of an indictment not signed by a Crown Prosecutor;[3] on the failure to pay group tax deductions as defrauding the Commonwealth;[4] the pioneering judgment on the application of the new system for detaining serious sex offenders after their sentence had been served;[5] and the

applicability of the privilege against self-incrimination in the Coroners Court.[6]

9 Perhaps the judgment that stands out for me, and which has been relied upon in every subsequent case in the field, is your exposition of the structure of the Commonwealth Criminal Code. You accurately converted into a format capable of use, and even into a format capable of explanation to a jury, the convoluted circularity and cascading definitions of the criminal responsibility provisions of that Code, which deploy words in a manner hitherto unknown in the history of the English language. Subject to those provisions being amended, we will be forever in your debt in this respect.[7]

10 Your Honour also delivered important judgments in civil matters such as a medical negligence case where a doctor had not informed a woman that her husband had AIDS.[8] And, in a fine example of the common law adapting to contemporary circumstances, your Honour held that it was not defamatory in this day and age to accuse a person of engaging in homosexual intercourse.[9]

11 As a trial judge and in the Court of Appeal your Honour became involved in the full range of this court's jurisdiction, particularly at common law. To the depth and intensity of your experience in criminal law as a practitioner, your years as a judge added breadth to your legal knowledge.

12 I was aware at the time of your elevation to the Court of Appeal, reinforced at the time of the announcement of your elevation to the High Court, that you are acutely conscious of the fact that your legal experience has primarily been in criminal law. Let me assure you that this is not a weakness but a strength, as the Commonwealth Attorney-General emphasised when announcing your appointment.

13 Every judge of this Court and, I have reason to believe, every judge in other Australian jurisdictions, who sits in criminal trials or on a Court of Criminal Appeal welcomes the appointment to the High Court of someone with your criminal trial experience and expertise.

14 One of the most significant developments in the Bar over recent decades has been the increased specialisation of legal practice, particularly in the field of crime where practitioners these days generally either do none, or do nothing else. The days of generalist practice, when most senior members of the Bar did a significant amount of criminal trial work, are gone.

15 If the High Court is to have judges with real experience of criminal trials then contemporary appointees will all have a background that is significantly specialised in that field. I assure you that your Honour's appointment is welcomed for this reason.

16 Your Honour had a unique Sydney upbringing. During your childhood years your naval officer father served as the General Manager at Garden Island. Your family lived in a house on the base. You and your brother were the only children on the island and had a unique, in the strict sense, Sydney Harbour frontage experience of exploring the rocks and waters with which you were surrounded.

17 As the only girl on the island you acquired some of the popularity of *The Daughter of the Regiment* and, as with Marie in Donizetti's Opera of that name, it has transpired that you are of aristocratic blood.

18 It is, therefore, appropriate for me to conclude with two lines from the most famous aria of that Opera, an aria which has been called the "Mount Everest" for tenors as it features nine high C's. I do not propose to sing the lines.

Ah! mes amis, quel jour de fête?

Ah! my friends, what a day of celebration?

In view of our prospective relationship it is also appropriate to mention the next line.

Je vais marcher sous vos drapeaux.

I shall march under your flags.

19 So be it.

20 **Mr M G SEXTON SC SOLICITOR GENERAL FOR NEW SOUTH WALES:** If the court pleases. On behalf of the Government of New South Wales and the Bar of New South Wales, I offer your Honour Justice Bell the warmest congratulations on your appointment to the nation's highest court.

21 The long journey to Canberra began in March of 1951 with your Honour's birth in Sydney. Your Honour was educated at Sydney Church of England Girls' Grammar School and then at the Law School of the University of Sydney from which your Honour graduated in 1976. Your Honour was initially admitted as a solicitor and practised at the Redfern Legal Centre which had only then been recently established. Your Honour practised there for six years in a variety of fields including tenancy law, criminal law and credit law. During this time your Honour was one of those who established the Prisoners' Legal Service, together with Justice Basten. It was reported that one of your clients under this scheme was Mr Christopher Flannery who, when not in prison, practised as a killer for hire, although he later himself succumbed to the dangers of this industry.

22 In late 1984, your Honour was admitted to the Bar where you read with Dean Letcher. Between 1986 and 1989, your Honour practised as a Public Defender before returning again to the private Bar. The heart of

your Honour's practice was criminal law but you also appeared frequently in disciplinary proceedings and in anti-discrimination proceedings. From 1994 to 1997, your Honour was one of the counsel assisting the Royal Commission into the New South Wales Police Service that was conducted by Justice Wood.

23 Your Honour took silk in November 1977. In 1999 your Honour was appointed to the Supreme Court and in 2008 your Honour became a Judge of Appeal. During your Honour's time on the Supreme Court, your Honour was a member of the council of the Australasian Institute of Judicial Administration and over the period 2007/2008 your Honour was the President of this body. Your Honour is still the chair of the Advisory Committee of the Law Faculty of the University of Wollongong.

24 Much has been made, perhaps too much, of your Honour's early theatrical career. On this subject, however, it is reported in Justinian and now perhaps in the Herald as well that your Honour remains the artistic director of the Glebe Supper Club. It is also reported that on your Honour's 50th birthday you were carried into the celebrations on a sedan chair by Nubian slaves, presumably not the real thing even in Glebe, where a chorus of persons dressed as cans of Sirena tuna sang "I'm in the Mornay" in reference to your Honour's favourite dish. The choice of brand is of course significant. As aficionados of canned tuna will know, Sirena is far and away the best brand available.

25 It was in this spirit of the demimonde that your Honour spent a year in the 1980s as the presenter of the program 'Late Night Live' on ABC Radio National. I assume that your Honour was not as loquacious as the program's long time presenter, Mr Phillip Adams. I was once interviewed on the program by Mr Adams and I can say that I did not get a word in.

26 Your Honour will be sworn in as a Justice of the High Court for the new term on 3 February 2009. Your Honour will then take your place as one of the seven grand inquisitors in Canberra. It was, I think, your predecessor

Justice Kirby who said that argument in the High Court consisted of questions by the judges with occasional interruptions from counsel.

27 Your Honour will bring to the High Court, as your Honour brought to the Court of Appeal, many years of experience as a trial lawyer. This is always an important element in the composition of appellate tribunals, because trial lawyers have a particular appreciation of the vagaries of a trial and why its results should not be easily overturned in the absence of a real miscarriage of justice.

28 Your Honour's record since the time of your admission to practice has been almost entirely one of public service. You now face a further and even more demanding contribution to the Australian community. The government of New South Wales and the Bar of New South Wales wish your Honour many productive years in this new and well deserved phase of your Honour's career. If the court pleases.

29 **MR H MACKEN PRESIDENT LAW SOCIETY OF NEW SOUTH WALES:** May it please the court. Whilst you are leaving this court is, at first blush, a very sad occasion, this is in fact a wonderful day, a red letter day for the profession, for women, for the State of New South Wales and indeed for Australia. The solicitors of New South Wales are very, very pleased that you leave this court in such circumstances.

30 In regard to your forthcoming appointment to the High Court, if anyone has the capacity to take on the position of such power, privilege and prestige with the level of awareness, understanding and enthusiasm necessary to fulfil this duty, it is your Honour. Whether this new role calls for any reining in of your Honour's theatrical bent or your humour and wit for which you are renowned, remains to be seen. I hope not and I doubt if it will.

31 While your Honour has dallied in journalism and theatre sports and would have excelled in both these worthy pursuits, your heart and soul obviously lay firmly with the law and all that can be achieved through it. That is not

to say these considerable attributes have not come into play from time to time during your legal career, where you have successfully harnessed both your radical sympathies and conservative values to deliver justice in accordance with the law. That could equally be conservative sympathies and radical values. However, not all of your pursuits have proved so successful. One long-time friend who shall remain nameless so that he or she can continue to be considered a friend, described your Honour as an appalling cook. As mentioned earlier, your one and only claim to fame in the culinary department is the dish tuna mornay. On the other hand, it can be said that you are a great consumer of what others dish up. Some of them are here today.

32 As the daughter of a naval captain your Honour moved around, attending schools in Sydney, Brisbane and London. The bulk of your schooling was at SCEGGS in Darlinghurst where academically you excelled. However, adherence to the school motto 'Let your light shine' was sadly missing when it came to your sporting prowess. As Margaret Hole noted in your swearing in ceremony in this court in 1999, Thursday afternoon sport was to be avoided at all cost. Your Honour, with you in sport, the light was out. On the dinner circuit your Honour was far more engaging. Some of your famous or infamous speeches involved discovering and then exploding traditions which your Honour felt needed addressing. These included the lift rule at Wentworth Chambers where you mourned the advent of women to the bar for muddying the waters in terms of the strict order of seniority in which counsel entered and left the building.

33 David Marr, Sydney Morning Herald feature writer, describes your Honour as loyal, wonderful, wise and a demanding friend but a living disappointment to your journalistic friends for your failure to reveal information and so dubbed you 'Madam Oyster Mouth'. A client said to me once "if you keep my secrets, I'll keep yours". He said that your Honour's trademark in both public and private life is your ability to deliver a unique combination of severity and good humour, someone who observes the rules and maintains her strong roots to fundamental values. To this day,

David says he still does not know whether you were joking when you tried to dissuade him from writing the biography of the late Sir Garfield Barwick in the 1970s in favour of the retailer, Joyce Mayne.

34 New South Wales public defender, Andrew Hasler SC, was quoted this week in The Australian as saying "In every generation there is a barrister about whom judges say if I murder my wife or husband I want them to represent me. When she was at the bar, that person was Virginia Bell". In fact, rumour has it that your Honour has been immortalised in a song by the punk rock group Mutant Death, a verse of which goes "The police they came and got me, they threw me in a cell, they said I had one phone call, I rang Virginia Bell". I also heard that when the band performed that song at the Redfern Legal Centre, the rendition was so awful that colleagues pulled the plug on the PA system. Notwithstanding that, your Honour's reputation as a tireless worker for the underdog saw many prospective clients pick up the phone and call Virginia Bell.

35 Coming from a loving and supportive family, your Honour was keenly aware of having been afforded advantages that many people had not been fortunate enough to have been given. Your mother recalls visiting your Honour during the time you were working as a volunteer at the Redfern Legal Centre. Your only pair of shoes had worn through, there was no food in the fridge and yet you were more concerned about helping those worse off than yourself. It is a measure of the woman you are and reflective of the service you give to all.

36 Your Honour is a strong advocate for prison reform and was a driving force behind the prisoners' action group, Women Behind Bars and active in Guthrie House, a community base residential rehabilitation and transition service for women involved in the criminal justice system in New South Wales.

37 Your Honour, as has been mentioned, has presided over many high profile cases and made history in some controversial civil liberty cases. Your

judgments, whilst occasionally not unanimous, are always well reasoned and considered and respected. Both your parents John and Mary, are extremely proud of your Honour as is your older brother Chris, not so much for your appointment to the High Court, although they are delighted, but more for your enormous capacity for compassion, kindness and loving care. Describing you as a 'lively little devil', Mary said you never held grudges, never asked permission to do something, you just went ahead. Like your late grandfather used to say, "That little pet will do anything that she wants to do" and indeed you have from barrel girl, journalist, presenter, thespian, fighter for the underdog, the self perpetuated rumour of a former go-go girl, maybe that is go girl go. We are very proud to claim your Honour as Australia's Virginia Bell.

38 On behalf of the solicitors of New South Wales, I wish you every success in your new role and take this opportunity to wish you and your family a happy and safe festive season. Your departure from this court is a little like Santa Claus' departure, a little sad but with a promise of so much more joy to follow. As the court pleases.

39 **BELL JA**: Thank you Chief Justice, Mr Solicitor, for your generous remarks and Mr Macken, thank you for yours. I feel bound to say that given some of the material, I feel you have let me off lightly.

40 A week, as I am sure H L Mencken must have said, is a long time in the law. This time last Friday I was comfortable in myself, as they say, if looking ahead with a certain sense of longueurs that affects judges facing the prospect of the vacation and that long six weeks with not a single damages appeal to engage their restless intellects.

41 The prospect of my new role has had an unsettling effect on me which is hard to understand since, as early as my days at the Redfern Legal Centre, I had no difficulty in perceiving the errors of principle made by the High Court and in seeing how readily they could be corrected.

42 Age has brought a degree of circumspection and despite the breadth of the work that my time on the Common Law Division has exposed me to, there remain a couple of pockets of the law with which I have had little acquaintance and which I fear may start to intrude on me in my new role.

43 Many of you will be relieved to know that I studied constitutional law under Professor Pat Lane, who had that extraordinary ability when he raised his forehead from between the thumb and middle finger to distil principle from the great cases with such penetrating clarity that in that moment, in that room, you thought you understood it. That was in 1971. I rather understand from something that Justice Gummow said to me yesterday there have been some developments in that area. To face the prospect of coming to terms with new law, just at a time when the Council of the New South Wales Seniors' Week approached me to become an Ambassador for Seniors is rather daunting. Generally it is thought enough to try taking on a new language.

44 I can only hope that I come to enjoy my new role as much as I have enjoyed my nearly ten years as a judge of this court. The range of work in the Common Law Division has been varied and challenging. Inevitably, as the Chief Justice has pointed out, the legal profession is becoming more specialised and judges like myself reflect that fact. I have had the advantage of working with judges who will forgive me if I describe them as being from the 'old school', who, in the course of their successful practices at the bar, covered the entire range of work of the Common Law Division. The Honourable Timothy Studdert, who is here today and whose presence so touches me, and many like him, have been magnificent exemplars for me in learning how to be, I hope, a good trial judge.

45 In the first half of my time at the court, the Chief Judge of the Common Law Division was the Honourable James Wood who also touches me by his presence here today. I was one of his counsel assisting throughout the Royal Commission into the NSW Police Service. His encouragement and

support of me at the Commission and throughout my time and his on the court has been unfailing and is very much appreciated.

46 In more recent years I have enjoyed the support and the friendship of Chief Judge McClellan and I thank him for his good counsel.

47 I have not had the length of experience of the great Common Law judges with whom I have served on this court, but I believe that I have acquired an appreciation of the role and the difficulties that confront trial judges in the conduct of cases including jury trials and I trust that that will be of value in my new role.

48 Jury trials of course have been very much my stock in trade. What was new to me as a judge, and at first somewhat bemusing, was the 7A defamation jury trial. A curious procedure to me and I felt at times to the jury. No evidence, just barristers talking seemingly endlessly about the attributes of the ordinary reasonable reader and always in metaphors drawn from the English cases that predated *Youssoupoff v MGM*, "The ordinary reasonable reader does not live in an ivory tower"; "He or she is not a Pollyanna"; I used to think to myself 'lucky for him', and my favourite, "He or she is not avid for scandal". It is the marvellously evocative language of England between the wars. I can only hope that under the 2005 Act, a new generation at the defamation bar will keep up this tradition and of course for a part time medievalist, as I am, there has been nothing as nice as those questions that arise with respect to the pleading of imputations. Nothing since the early days of the University of Paris in the late 12th century quite rival the NSW defamation list.

49 Apart from developing all these new skills as a lawyer, the other very pleasing discovery when I came to the court was how nice judges are. This is something of which the public, and some members of the profession, have an insufficient understanding. At a social event some time ago across the way in the old Hospital Road complex, with Rachel Whealy and her quartet playing a sort of an up-tempo cantata if you can

have such a thing, Justice Einstein put his arm around me in a manner which I did not judge to involve too great a degree of workplace harassment. He surveyed the group and said to me smiling, "We're a happy court". It was and is a true remark, much of it reflecting the ambience that you, Chief Justice, have created. We are a court in which judges are drawn from a range of backgrounds with differing experiences, a circumstance in which I know you take pleasure. The Chief Justice is fond of observing that we are a broad church. I should add that it is a remark that he tends to make more frequently when I am in the near vicinity. I must thank the Chief Justice for the privilege of working with him. As a dilettante medievalist, it is a pleasure to have been in his outer orbit. That he can write the judgments of the quality that he writes while completing a scholarly history of Becket among his many intellectual pursuits, can dazzle lesser mortals. His move into the 17th century with Lord Ellesmere and Coke is a lapse into modernity with which I have come to terms.

50 I have spent this year in the Court of Appeal, the busiest intermediate Court of Appeal in the country. Those who entertain the view that judicial life permits one to lead the lives of gentlemen and women have little idea of the workload of the Court of Appeal. It would be impertinent of me to say anything about the judges of appeal, beyond to record my respect and my admiration for them, for their very superior legal and practical forensic skills. It has been a great privilege to be part of that court even for a short time.

51 When I started, the Honourable Keith Mason was President of the court and he does me the great honour of being present today. It is not for me to say what a marvellous President of the court he made, but to acknowledge his kindness to me. In June of this year Justice Allsop took over the rudder. I always endeavour to speak of Justice Allsop, who many of you would know still lectures in maritime law, in the language of the merchant marine, because it is the one platform on which we can speak on terms of equality. He is a superb lawyer and I wish to thank him for his

personal generosity to me and to say how much I will miss his companionship.

52 I think in the enthusiasm of the moment, I may have said “very superior”. This is because I am speaking in an almost ex-tempore fashion and Justice Simpson has not had the opportunity to correct my work. It will be difficult for me, and for any who have to read me, without that assistance. Justice Hislop has always assumed the larger role of advising me on my language and that counsel will also prove hard to replace. I need not worry about losing contact with Justice Howie since I expect to be berated at every turn by his Honour about any matter touching on the criminal law over the entire body of which, as a number of you will appreciate, he claims exclusive intellectual property.

53 When Justice Heydon was in this seat making this speech in similar circumstances, albeit I suspect feeling a little more relaxed and comfortable than I, he made generous reference to the quality of the advocacy of the members of the criminal bar in the conduct of appellate work in this court. I would wish to join in those remarks. I am proud to have been a public defender and while skill in criminal advocacy is not confined to the public defenders, they are conspicuous both at appellate and trial level for their forensic ability.

54 Earlier this week a message was left for me by a solicitor working in the Legal Aid Commission who has worked there for many years. She was out of the office when I returned her call. The message left details about whom was to be contacted in her absence since it was her day off, but it also included her mobile phone number for those clients who were anxious and wanted to be able to speak to her. After more than twenty years working with the Legal Aid Commission it was eloquent of her dedication which is the attribute of many solicitors working in legal aid, something that is deserving of recognition on an occasion such as today.

55 It remains for me to thank all the court staff, the court reporting branch, the library staff who are so helpful to all the judges and so forgiving of those small lapses with the "judge only overnight loans". Many of my tipstaves are here today and I thank them for all their assistance. Stephanie Betar, my long-term associate, the nicest and most well-liked of people in the court, has agreed to forsake the congeniality of the Court of Appeal and walk with me on the journey to the unknown, and for that I am very grateful.

56 I would like to thank everyone who has done me the honour of attending this ceremony today. I am deeply conscious of the great honour of being appointed to the High Court. It need hardly be said that I will do my best to acquit myself in this new role. It is a somewhat daunting prospect and I will be very grateful for the odd friendly face from the New South Wales bar across that cavernous divide in Canberra.

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1 Rudyard Kipling *The Childrens Song.*

2 See *R v Darwiche & Ors* [2006] NSWSC 1167. See also *R v Darwiche* [2006] NSWSC 848, 878, 922, 923, 924. 926, 927, 928 and 929.

3 *R v Halmi* (2005) 62 NSWLR 263.

4 *R v Iannelli* (2003) 56 NSWLR 247.

5 See *R v Tillman* [2007] NSWSC 528; *Attorney General for the State of NSW v Tillman* [2007] NSWSC 605.

6 *Correll v Attorney General of NSW* [2007] NSWSC 1385.

7 *R v Sengsai-Or* (2004) 61 NSWLR 135.

8 *BT v Oei* [1999] NSWSC 1082.

9 *Rivkin v Amalgamated Television Services Pty Ltd* [2001] NSWSC 432.

Law and Justice Address

29 October 2008

Virginia Bell

It is an honour to be invited to make the Law and Justice Foundation's annual Justice Address, if a little surprising. I'm an after dinner speaker. The essence of after-dinner speaking is being inconsequential, which I've never had a problem with. Previous speakers have included two former Chief Justices of the High Court, who it must be said, had advantages over me: they were in the habit of thinking in big picture terms, whereas I'm at the coal face level of the hierarchy. Moreover, they were *former judges* when they delivered the Justice Address. The only thing the public asks of serving judges is that they express no views on any topic of controversy and generally contrive to be dull. In the past I believe judges were allowed to have an interest in military history but I think nowadays that may be politically incorrect.

Much of my career has been involved with the criminal law and, within the constraints of being a serving judge, I thought I would speak about criminal justice since it is the area of the work of the courts, which is the most controversial and frequently misunderstood.

A recent report by the *Bureau of Crime Statistics and Research* contains the results of a survey designed to measure the level of public confidence in criminal justice (*Crime and Justice Bulletin*, No 118, August 2008). Respondents expressed high levels of confidence that the system respects the rights of accused persons and treats them fairly. On the other hand there was a low level of confidence that the system addressed the needs of victims of crime. The survey did not ask the respondents whether they thought that respecting the rights of accused persons and treating them fairly were desirable goals. Given the low level of confidence on other measures, it may be that some of the respondents who expressed confidence in these

measures, considered that it was a reflection of a bias against the interests of victims of crimes: A common enough view, which assumes that the one can be set off against the other.

Respect for the rights and fair treatment of those accused of crime are central to our system of criminal justice and on an occasion such as to-night's dinner it's worth reflecting how fortunate we are that is so.

Five years before the apology offered by the Commonwealth Parliament to Aboriginal Australians a reconciliation ceremony took place in the Supreme Court building in Darwin, in which the Yolgnu people of east Arnhem land thanked the High Court for a decision which remains a landmark in our criminal law: *R v Tuckiar* [1934] HCA 49; (1934) 52 CLR 335. Tuckiar, the name by which the appellant was known, is a corruption of his name, Dhakiyarr Wirrpanda. He was a Yolgnu man convicted of the murder of a white policeman named Albert McColl. The story is a tragic one in a number of respects but the judgment stands as a moment in our history of which we can all be proud. It speaks to the value which we as a community place on fairness. Many lawyers here tonight will be familiar with *Tuckiar's* case, but some of you may not be, so bear with me while I sketch some of the history.

In 1933 a small party of police were despatched to Woodah Island in the Gulf of Carpentaria to investigate the murder of several Japanese fishermen. Constable McColl was one of the party. The police came upon a group of Aboriginal women whom they took into custody, handcuffing them together, and taking them back to their camp so as to interrogate them. A group of Aboriginal men were observed setting off in a boat and the main body of the police party headed off in pursuit; leaving Constable McColl to superintend the Aboriginal women. On their return the police found that Constable McColl and the women were missing. His body was found the next day not far from the

camp. His pistol was lying nearby. Three shots had been fired from it, the third a misfire. He had been speared through the heart.

Tuckiar and another Yolgnu man named Parriner and some others were persuaded by a white fisherman with whom they were on good terms to go to Darwin to sort the matter out. Three of the aboriginal women whom the police had seized were said to have been "Tuckiar's women". He was charged with the murder of Constable McColl. The only evidence against him presented at his trial was of confessions which he was alleged to have made. One was to Parriner and the other to an Aboriginal boy named Harry. Tuckiar spoke no English and the evidence was given through an interpreter who relayed it to the court in pidgin. Tuckiar was alleged to have told Parriner that he had hidden in the bushes and given a signal to the woman handcuffed to Constable McColl to move away and that when she did so he had speared him. Harry's evidence was that Tuckiar said he had seen Constable McColl having sexual intercourse with his wife and that, after this, McColl had seen Tuckiar and fired at him. It was against this background that Tuckiar had thrown the spear.

The Protector of Aborigines arranged for counsel to appear for Tuckiar. Unfortunately both the trial judge and Tuckiar's counsel appeared more concerned to protect Constable McColl's reputation than to ensure that Tuckiar had a fair trial. Evidence was led to show that Constable McColl was a man of good moral character who had been known to behave with decorum including when he was in the company of half-caste girls.

At the conclusion of Parriner's evidence, the judge asked counsel in front of the jury whether he had obtained instructions from Tuckiar about what Parriner had to say. Counsel said that he had not. The judge adjourned the trial so that counsel could speak with Tuckiar. On the resumption of the trial, counsel asked if he could speak with the judge in chambers because he had

been placed in the most difficult predicament of his life. There followed a further adjournment during which counsel and the Protector of Aborigines conferred with the judge in chambers. The trial resumed. No evidence was called on Tuckiar's behalf.

The jury was troubled by the lack of evidence and they sent a note asking, "if we are satisfied that there is not enough evidence, what is our position?" The judge answered their question, saying among other things, that they should not be swayed if they thought the Crown had not done its duty, he reminded them that if they brought in a verdict of not guilty Tuckiar would be freed and could not be tried again no matter what evidence may be discovered in the future.

In his summing up the judge told the jury, "you have before you two different stories, one of which sounds highly probable, and fits in with all the known facts, and the other is so utterly ridiculous as to be an obvious fabrication". He went on to comment that Tuckiar had not given evidence and that the jury could draw any inference that they cared to draw from that circumstance.

Tuckiar was convicted and sentenced to death.

After the jury returned their verdict, Tuckiar's counsel informed the Court that he had spoken with Tuckiar, with the assistance of the interpreter, putting to him that he had told two different stories and asking him which was true. Tuckiar had said that the true account was the one he had told Parriner.

Tuckiar appealed to the High Court. The case was heard by five justices. The history of the trial was set out in the joint reasons (Gavin Duffy CJ, Dixon, Evatt and McTiernan JJ) and their honours observed that for more than one reason the verdict could not stand. The trial judge's comment on Tuckiar's failure to give evidence was a clear misdirection. Moreover, the jury had

witnessed the spectacle of Tuckiar's counsel retiring, at the judge's suggestion, to discuss the evidence of the principal witness against him and that after this counsel had asked to see the judge because he had been placed in "[t]he worst predicament" of his career. The judge's direction that the jury could draw such inference as they liked from Tuckiar's silence was in the circumstances an invitation to presume his guilt. Their Honours said that it had been wrong to admit the evidence of Constable McColl's good character because, "the purpose of the trial was not to vindicate the deceased constable, but to inquire into the guilt of the living Aboriginal" (at 345). They were trenchantly critical of counsel. It was not clear why he had perceived himself to be in a predicament; he had a plain duty to press such rational considerations as the evidence fairly gave rise to in favour of a complete acquittal or a conviction for the lesser offence of manslaughter (at 346):

> Whether he be in fact guilty or not, a prisoner is, in point of law, entitled to an acquittal from any charge which the evidence fails to establish that he committed, and it is not incumbent on his counsel by abandoning his defence to deprive him of the benefit of such rational arguments as fairly arise on the proofs submitted.

Justice Starke wrote separately. He pointed out that the judge had directed the jury that if they accepted Parriner's account it was a case of deliberate murder. His Honour considered that this overlooked the effect on Tuckiar of what he had seen happen (at 352):

> It was, no doubt, necessary for the police to capture and handcuff the lubras if they were to achieve the object of their expedition, but the rules of English law cannot be cited in support of their action. To uncivilized aboriginals, however, and particularly to the prisoner, the conduct of the police

> party may well have appeared as an attack upon the lubras and themselves, and provoked or led to the attack upon the police in their own defence. A finding of not guilty, or of manslaughter, was quite open to the jury on the evidence.

All of the justices were agreed not only that the appeal must be allowed and Tuckiar's conviction set aside, but on the consequential order. In the ordinary course one would have expected the Court to order a new trial. However, the publicity given to the statement made by Tuckiar's counsel had been widespread throughout the Northern Territory and in the extraordinary circumstances of the case it was considered that it would not be possible to afford Tuckiar a fair trial. The Court directed that a verdict and judgment of acquittal be entered. Justice Starke expressed his expectation that the Commonwealth authorities would ensure Tuckiar's safe return to his country.

The language of the judgments is the language of another era, which to our ears may sound prejudiced and condescending. The Yolgnu people are described as "uncivilized Aboriginals". The women are referred to as "lubras" and their children as "picaninnies". The judges who decided the case were all white, they all happened to be men and they all led lives of relative privilege. There is no reason to think that they did not share the prejudices that were common to privileged professional men of their time. But what counted was their intelligence and fidelity to the principles of the common law. The judgment was handed down on 8 November 1934: In that year Hitler assumed the office of Fuhrer of the German people and German judges were applying the Nazi regime's eugenics laws; the Department of Justice in the United States was offering a $25,000 reward for the capture of John Dillinger *dead or alive*; and in Australia the High Court entered a verdict of acquittal in the case of an Aboriginal man who had speared to death a white policeman, because the court that tried him had not given him what the law demanded, which was, a fair trial according to law.

There is, as many of you would know, a grim postscript to Tuckiar's story. After his release from Fannie Bay Goal, Tuckiar disappeared. His fate is unknown. The probability is that he was murdered by those who did not agree with the verdict. While the habits of the lynch mob had not died in some quarters of our society in 1934, it is worth noting that the High Court's decision was not greeted with storms of protest. The unfairness of aspects of Tuckiar's trial had been reported and there was a groundswell of public concern about his conviction and the imposition of the death penalty. The organised labour movement and the church had been active in petitioning the Commonwealth Government for clemency. Among the petitions was one from the Ipswich Railway Workshop Workers, who presented it to the Prime Minister, Joe Lyons. The *Sydney Morning Herald* (11 August 1934) reported that the Prime Minister had responded:

> You may be assured that the Cabinet will approach the matter with very great sympathy. On the general question of control of Aborigines, I feel that some more permanent and satisfactory method should be evolved. My personal view is that these unfortunate people deserve some consideration. They were the owners of the country before we came.

The *Sydney Morning Herald* and *The Age* gave extensive, fair, coverage to the decision of the High Court quoting large sections from the judgment. The quality of the legal reporting in the newspapers of record at that time is impressive and in marked contrast with the coverage of important decisions of the Court today.

Those for whom the court is required to ensure a fair trial will often be individuals who are accused of heinous offences or who, for other reasons, are the subject of public odium. It is a mark of our civilisation that courts are

insistent on the fair treatment of the accused even if the content of a fair trial seems to some commentators to be a costly and unnecessary luxury.

So it is encouraging to see that the respondents to the Bureau's survey rated the courts favourably on what I will broadly describe as the fair trial measures. The low level of confidence in the ability of the criminal justice system to meet the needs of victims of crime is a cause of concern to those of us involved in the administration of justice. I hope that at least to some extent the responses on this measure reflect a popular understanding of how things were, more than how they are. I say this because over the course of my professional life I have seen a number of changes, which I believe have made the experience of court less of an ordeal for complainants and for the families of victims. We have come a long way from the days that I recall when the complainant in a sexual case was left sitting by herself in the draughty corridors of the Darlinghurst complex as she waited to give evidence.

The use of closed circuit television as a means of taking the evidence of complainants, to say nothing of the provision of waiting facilities designed to prevent the complainant from rubbing shoulders with the friends and family of the accused, are measures which relieve some of the stress of being a witness in a criminal case. Equally important is the support that the Witness Assistance Service of the DPP provides to complainants. Having a person present who is familiar with the court process and who is able to provide support and information is a very practical way of helping complainants and family members to deal with the trial process.

The law now requires the court to disallow questions put to a witness in cross-examination that are intimidating, offensive or humiliating: s 275A of the *Criminal Procedure Act* 1986 (NSW). More recently, provisions were introduced into the *Criminal Procedure Act* to provide a mechanism to deal with sensitive evidence: ss 281A – 281F. Sensitive evidence includes, for

example, certain types of photographs, images of alleged victims of sexual offences, and the like.

All of these are sensible measures which do not detract in any degree from the court's ability to provide a fair trial to the accused.

There remains a widespread belief in the community that complainants in a sexual assault trial can expect to be asked intrusive questions about their sexual history and reputation. The law does not allow it and has not allowed it for years: s 293 of the *Criminal Procedure Act* and before that s 409B of the *Crimes Act* 1900. But the experience of complainants dating back nearly a generation, who were subjected + to their sexual history being paraded for public view, lives in our collective memory. I hope that with time the public perception of the system's treatment of the victims of crime will reflect what I believe is a more positive picture.

I am conscious that tonight is an occasion to celebrate the work of the individual nominees and the organisations for whom they work for the contributions that they have all made to improving the quality of and access to justice in our society. I would like to pay my respects to all of you and get off my soap box and let everyone enjoy the night.

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How to Preserve the Integrity of Jury Trials in a Mass Media Age

How to Preserve the Integrity of Jury Trials in a Mass Media Age

Supreme and Federal Courts Judges' Conference - January 2005
Virginia Bell

The House of Lords recently considered two appeals in criminal cases in which it was sought to challenge the verdict on the ground that one or more jurors were partial and had failed to try the case on the evidence. In one case it was suggested that members of the jury had been actuated by racial prejudice and in the other that members of the jury were unwilling to take the time to arrive at a true verdict[1]. Their Lordships identified the features of jury trial that serve to ensure its integrity. These include (i) the random selection of jurors, (ii) the rules of evidence, (iii) the trial judge's directions to the jury (including that they put out of their mind considerations of prejudice and determine their verdict solely on the evidence) and (iv) the trial judge's broad powers to deal with matters that may cause prejudice - by direction and, if need be, by discharge of the jury.[2]

It is acknowledged that publicity concerning the accused or the offence may prejudice a fair trial. The law of sub judice contempt seeks to protect the fair trial when criminal proceedings are pending. We act on the assumption that publicity generated at the time of the offence fades in the public memory over a relatively short period and is not likely to prejudice the trial of an accused that takes place at least some months later. In the event of prejudicial publicity close to the trial the trial judge's powers include staying the proceedings or adjourning the trial.

Articles published in the press at the time of the offence may be accessed months or years later on the Internet. Spigelman CJ in John Fairfax Publications v District Court of NSW observed that the trial judge's ability to order a stay or adjournment of proceedings to ensure a fair trial has been substantially attenuated by "the immediate accessibility of information on the Internet with an efficiency that overrides the practical obscurity of the past"[3]. His Honour also noted the tension that exists between the principles of open justice and those of fair trial in the context of the publication of reports of committal proceedings[4].

In recent years research has been carried out in New Zealand and New South Wales on aspects of the way in which juries in criminal trials carry out their duties. In 1997 the Law Commission of New Zealand collaborated with the Victoria University of Wellington in undertaking a research project on jury decision-making. The results of the research were published in November 1999[5] (the New Zealand study). In New South Wales the University of New South Wales and the Law and Justice Foundation commissioned an empirical study of the effect of prejudicial publicity on juries in criminal trials[6] (the New South Wales Study). The results of both studies, in so far as they deal with the influence of prejudicial publicity on jurors, are consistent and support the assumption that jurors are unlikely to recall, and thus be prejudiced by, the detail of pre-trial publicity[7]. The New South Wales study suggests that lawyers' concerns about the potential for the reports of committal and other interlocutory proceedings to prejudice the later trial may be exaggerated[8].

Perhaps unsurprisingly the studies suggest that members of the public become sensitised to publicity about a case when they are empanelled to try it.

The New Zealand study found that overall jury decision-making was characterised by a very high level of conscientiousness in following the judge's instructions and in endeavouring to understand the law and to apply it to the facts fairly [9]. Nonetheless both studies found that it was not uncommon for jurors to seek out publicity about the trial and to conduct their own investigations[10]. These findings suggest the need for somewhat more detailed instructions at the commencement of the trial directed not only to the requirement that the case be decided solely on the evidence led at trial but also to the reasons why that is so. In New South Wales as the result of two recent cases, that are discussed below, a model direction has been formulated by the Court of Criminal Appeal.
The potential for the Internet to threaten the integrity of jury trials was raised acutely by the promotion of CrimeNet in May 2000[11]. The CrimeNet site now requires that a person searching its criminal records database open an account. This is done by the supply of credit card details. The subscriber

must agree "not to search for details of any person whilst I am a juror in a trial of that person, in a jurisdiction that prohibits such information."[12]
In R v Long[13] the appellant contended that his trial had miscarried because highly prejudicial articles published in the immediate aftermath of the Childers Backpacker Hostel fire, strongly suggesting his guilt and depicting him as an arsonist with a record for offences of violence, were posted on the Internet. This material was only available to subscribers on payment of a fee. There was no evidence that any juror had in fact obtained access to it. In these circumstances the Court concluded that there had been no miscarriage.

In R v K [14] the appellant was convicted of the murder of his first wife. He had earlier been charged and acquitted of the murder of his second wife. Both wives were from the Philippines. There was information on the Internet concerning the fact that K had been charged with the murder of his second wife, including highly prejudicial material on a website maintained by a group called the Solidarity Philippines Australia Network. In K the Court received evidence that a number of jurors had conducted searches on the Internet and had come to learn that K had been charged with the murder of his second wife. His appeal was allowed and a new trial was ordered.

The trial judges in Long and K raised with counsel the question of whether the jury should be instructed not to make investigations about the case on the Internet. In each case counsel submitted that the preferable course was not to direct the jury in terms that drew attention to the possibility that material about the trial might be available on the Internet. The underlying assumption (that without prompting no juror would think to conduct an Internet search relating to the case) seems to me to be dubious in light of the widespread access to the Internet and the ease of conducting searches on it. As Wood CJ at CL observed in K[15]:

"It may well become the case, as a matter of habit arising out of the way that ordinary affairs are conducted, that the inevitable reaction of any person who is summonsed as a juror, will be to undertake an online search in relation to the case, to ascertain what it may involve."

The New South Wales study, which examined forty-one trials conducted between mid- 1997 and mid-2000, reported that in three cases jurors admitted to having carried out Internet searches relating to the case. They had obtained information in each instance of which the parties were unaware.

While there is reason for confidence that jurors are able to identify and put to one side inaccurate or biased reporting of the trial[16], we work on the assumption that the publication of information such as that the accused has prior convictions is likely to prejudice jurors in their decision-making[17]. The research suggests that assumption to be a reasonable one[18].

The ready availability of information, including archived press reports, on the Internet poses a problem for the fair trial of an accused in cases that have attracted publicity. This is in addition to a more general problem: the Internet is a powerful resource for jurors who wish to research the legal issues raised by the case or investigate some aspect of the evidence. The New Zealand study found that in five of the forty-eight cases studied, despite the judge's instructions, jurors had conducted their own inquiries[19]. While the risk has always existed that jurors may carry out research, at libraries or otherwise, the access that the Internet affords to information across a range of specialist fields makes this risk more likely to eventuate.

The solution adopted in Queensland and New South Wales has been to make it an offence for jurors to conduct investigations including by means of the Internet. The Queensland provision was introduced in July 2002 in the aftermath of the concerns generated by CrimeNet.

Section 69A of the Jury Act 1995 (Qld) provides:

"69A Inquiries by juror about accused prohibited

(1) A person who has been sworn as a juror in a criminal trial must not inquire about the defendant in the trial until the jury of which the person is a member has given its verdict, or the person has been discharged by the judge.
Maximum penalty - 2 years imprisonment.

(2) Subsection (1) does not prevent a juror making an inquiry being made of the court to the extent necessary for the proper performance of a juror's functions.

(3) In this section - "inquire" includes -
(a) search an electronic database for information, for example, by using the Internet; and
(b) cause someone else to inquire.

In K Wood CJ at CL proposed that the NSW Act be amended to introduce an offence comparable to s 69A but in wider terms to embrace not only inquiries concerning the background of the accused but also any other matter relevant to the trial, including the history of the offence, its investigation and the proceedings themselves[20].

Shortly after K the New South Wales Court of Criminal Appeal dealt with another appeal involving juror misconduct: R v Skaf[21]. In that case during the course of their retirement two members of the jury visited the park at which the offence was alleged to have occurred and carried out tests on visibility. Identification was the central issue in the trial. The appeal was allowed and a new trial ordered.

As the result of the decisions in K and Skaf (and in light of the discharge of a jury after a 24 day trial in the District Court because jurors had accessed the Internet in disregard of the judge's explicit direction not to do so) the Parliament introduced amendments to the Jury Act 1977 (NSW) making it an offence for jurors to conduct their own investigations with respect to the trial. The provision is in these terms:
68C Inquiries by juror about trial matters prohibited
(1) A juror for the trial of any criminal proceedings must not make an inquiry for the purpose of obtaining information about the accused, or any matters relevant to the trial, except in the proper exercise of his or her functions as a juror.
Maximum penalty: 50 penalty units or imprisonment for 2 years, or both.
(2) This section applies in respect of a juror from the time the juror is sworn in as a juror and until the juror, or the jury of which the juror is a member, is discharged by the court having conduct of the proceedings.
(3) This section does not prohibit a juror:
(a) from making an inquiry of the court, or of another member of the jury, in the proper exercise of his or her functions as a juror, or
(b) from making an inquiry authorised by the court.
(4) Anything done by a juror in contravention of a direction given to the jury by the judge in the criminal proceedings is not a proper exercise by the juror of his or her functions as a juror.
(5) For the purpose of this section, making an inquiry includes the following:
(a) asking a question of any person,
(b) conducting any research, for example, by searching an electronic database for information (such as by using the Internet),
(c) viewing or inspecting any place or object,
(d) conducting an experiment,
(e) causing someone else to make an inquiry.

In Mirza Lord Hope observed that[22]:

"...The system would be strengthened if jurors were told before the trial begins that they are under a duty to inform the court at once of any irregularity which occurs while they are deliberating".

As the result of the judgment in Mirza a Practice Direction was formulated instructing jurors that it is their duty to bring to the attention of the court "any behaviour among the jurors or by others affecting the jurors, that causes concern"[23]. The Court in Skaf considered that there was a risk that the generality of this direction might lead to inappropriate matters being brought to attention (such as the forceful expression of views by some members of the jury)[24]. The Court proposed a more detailed form of direction. This has since been included in the Criminal Trial Courts Bench Book published by the Judicial Commission of New South Wales. A copy of it is annexed to this paper together with a copy of the English Practice Direction.

The English direction warns against the judge being seen to threaten the jurors with contempt of court. In Skaf the Court favoured the view that if an offence, modelled on s 69A of the Qld Act but expanded to include private inquiries, views and experiments, were to be introduced into the NSW Act the judge should in the course of his or her opening directions warn the jury of that fact[25]. The amendments to the NSW Act creating the offence only came into operation on 15 December 2004. The model direction will, no doubt, be adapted to draw attention to the provisions of the section.

While there may be no certain mechanism to ensure that jurors obey the judge's instruction not to conduct investigations on the Internet or otherwise, the provisions of s 68C and directions along the lines of those proposed are likely to substantially reduce the risk of such conduct. The research suggests that jurors are impressed with the solemnity of their task and endeavour to abide by the judge's directions. It is reasonable to assume that most jurors would not engage in conduct which they have been told constitutes an offence. To the extent that any do, the expanded directions proposed make it unlikely that they would share any information thus obtained with their fellow jurors.

In line with the observations of the Court in Skaf, the model direction endeavours to explain to the jury why it is that they are not permitted to make their own inquiries. This seems to me to be an important matter to emphasise. It may not occur to essentially fair-minded, conscientious jurors, who are instructed that they have the sole responsibility for deciding the facts, that the conduct of their own inquiries works unfairness. The foreman of the jury carried out the informal view in Skaf. In his affidavit he said, "I only went to the park to clarify something for my own mind. I felt I had a duty to the court to be right."[26] The New Zealand study reported that, in addition to the five cases in which the jury had obtained additional information on factual issues, jurors commonly sought out additional information on the law. In the course of their interviews with the researchers the jurors gave no indication in any of these cases that they thought their investigations improper[27]. The researchers reported that[28]:

"By and large, juries simply did not seem to appreciate the importance, or did not understand the logic, of restricting themselves to the information presented by the parties and the judge".

In the cases in which jurors reported accessing the Internet referred to in the New South Wales study neither counsel nor the trial judge was aware of the material. However, it appears that in both Long and K the parties were aware that prejudicial material about the case was posted on the Internet. In neither case was the Internet service provider asked to remove the material pending the completion of the trial.

The publication of material that has a real and definite tendency to prejudice a trial is a contempt[29]. To the extent that articles with that tendency are available to the public on a newspaper or broadcaster's website the publisher may be liable to conviction for contempt [30].

The difficulty arises with material published on the Internet by individuals and interest groups who may be difficult to trace or, in widely publicised cases, by the publication of prejudicial material on the Internet by persons outside the jurisdiction.

The New South Wales Law Reform Commission (the Commission) considered the liability of Internet service providers (ISP's) and Internet content hosts (ICH's) in its report Contempt by Publication[31]. In this connection it noted that identifying responsibility for Internet publications can be complex and uncertain and that the liability of ISP's and ICH's for carrying or hosting material that breaches the sub judice principle had not at the date of publication been considered by any Australian court[32].

The Broadcasting Services Act 1992 (Cth) provides in cl 91 of Schedule 5 that a law of a State or Territory, or a rule of common law or equity, has no effect to the extent to which it would subject an ICH or ISP to civil or criminal liability for hosting or carrying content where it was not aware of its nature. Schedule 5 was introduced into the Broadcasting Services Act by the Broadcasting Services Amendment (Online Services) Act 1999 which was designed to provide a framework for the regulation of offensive content on the Internet. It establishes a complaints based regime with respect to offensive content requiring ICH's and ISP's to remove the content in cases in which they receive a notification from the Australian Broadcasting Authority. In this context it was recognised that ISP's and ICH's cannot be expected to be aware of all material accessed through their service nor can they be expected to be responsible for offensive material unless it is brought to their attention[33].

A practical first step is for the Crown in any pending case to carry out searches on the Internet and, in the event that prejudicial material is identified, to request any Australian based website to remove it until the trial is completed[34]. The publication of prejudicial material relating to the pending trial of a prominent business identity was removed from the website Crikey.com.au at the request of the Supreme Court's Public Information Officer[35].

Courts are now conscious of the risk that judgments published on their websites, AustLII and other legal databases may prejudice forthcoming trials[36]. In New South Wales the Supreme Court no longer publishes interlocutory judgments in criminal cases on the Internet. In some cases judgments of the Court of Criminal Appeal are withheld from publication on the Internet pending the completion of

the trial or re-trial.

There have been a number of cases in which appellants have sought to overturn their conviction on the basis that prejudicial information about their case was available on the Internet at the time of trial: Cogley; Long; Crowther-Wilkinson. In none of these was there evidence that any juror had in fact accessed the offending material. The trials were not found to have miscarried.
In K there was evidence that at least three members of the jury had independently conducted Internet searches and as the result become aware that the appellant had been charged with the murder of his second wife. The admissibility of the evidence of the jurors raised a difficult preliminary question.

The integrity of trial by jury has been fostered by the rule that precludes the court from receiving evidence of the deliberations of the jury[37]. The rule is subject to the exception that evidence of an irregularity that is extrinsic to the deliberative process may be admitted. Thus courts have received evidence that prejudicial material not in evidence was sent into the jury room; that a sheriff's officer had participated in the jury's deliberations and expressed the opinion that the accused were guilty; that a jury bailiff had suggested to the jury that the accused had previous convictions; that a juror was drunk or unable to speak English or refused to participate in the deliberations. The cases in this respect are collected in the judgment of Gleeson CJ in Minarowska[38]. His Honour observed in that case that the dividing line between proof of a jury's deliberations and proof of an irregularity in their conduct or procedures may, on occasions, be difficult to draw.

The rationale for the secrecy rule includes that jurors should be free to express their views frankly without fear of being held up to ridicule or hatred, and that they should not be exposed to harassment after verdict by those with an interest in overturning it. The rule serves to protect the jury that acquits an unpopular accused as much as the jury that convicts an accused.

The evidence in K was that after the return of the verdict a number of members of the jury visited a nearby hotel. The appellant's counsel and solicitor happened to also be at that hotel. The lawyers spoke with the jurors and in the course of this discussion it emerged that some jurors were aware of the earlier proceedings brought against K. The matter was drawn to the attention of the Office of the Sheriff who conducted an investigation. The appellant's solicitors did not play any role in obtaining evidence from the jurors. Wood CJ at CL, with whose judgment Grove and Dunford JJ agreed, considered the admissibility of the evidence in K to be very much in the area of uncertainty to which Gleeson CJ had referred in Minarowska[39]. In favour of admission was the circumstance that the material had been volunteered by the jurors, it was presented to the court by way of direct evidence obtained by the Office of the Sheriff. The evidence of the fact of the Internet searches and the nature of the information gathered was received by analogy with the cases in which documents not in evidence were found to have been sent into the jury room. The Court did not receive the evidence of any discussion between the jurors concerning the material nor of the effect if any of the material on their deliberations[40]. The Court found that the fact of the Internet searches and the nature of the material that those searches revealed constituted an irregularity in the conduct of the trial. Having regard to the nature of the material the Court was not able to be satisfied that the same verdict would have been returned had the irregularity not occurred and for this reason the appeal was allowed and a new trial ordered.

In Minarowska there was evidence that some members of the jury were puzzled by the fact that neither of the two accused who had given dock statements had been cross-examined. One member of the jury brought a magazine into the jury room that contained an article which was critical of the use of dock statements and discussed the proposal for their abolition. The evidence did not establish whether the juror produced the magazine to her fellow jurors to read or whether she relayed its contents to them. Gleeson CJ observed that there would be no question of the admission of the evidence had the juror not brought the article into the jury room but merely referred to its contents in the course of deliberations. His Honour considered that the ground of appeal in this case involved an impermissible attempt to lead evidence of a kind that the courts have for reasons of sound public policy rejected[41].

The secrecy rule was recently confirmed by the House of Lords in Mirza. The appellant was a Pakistani man who had lived in England since 1988. During the trial the jury asked questions concerning his use of an interpreter. The jury returned a majority verdict convicting the appellant. Thereafter a juror wrote a letter asserting that her fellow jurors had been motivated by racial prejudice and, contrary to the judge's directions, had drawn an inference adverse to the appellant from the fact of his use of the interpreter. The grounds of appeal raised a question of whether s 8 of the Contempt of Court Act 1981 (which makes it an offence to disclose statements made by members of a jury in the course of the jury's deliberations) when read in the light of s 3 of the Human Rights Act 1998 and

article 6 of the European Convention on Human Rights (which confers a right to trial before an impartial tribunal) would prohibit the admission into evidence of a statement from a juror which, if admitted, would provide prima facie evidence of partiality in breach of article 6. In the event, the Court was unanimously of the view that s 8 of the Contempt of Court Act did not operate to confine its jurisdiction to receive evidence about statements made in the jury room. The appeal was decided by adherence to the common law rule of secrecy.

Lord Steyn dissented, observing[42]:

"The effect of the ruling of the majority will in the long run damage the jury system. Leaving aside the jury, we have reached a position where it is recognised that all actors in the criminal justice system, and notably the judge, prosecuting counsel, defence counsel, police, expert witnesses, as well as lay witnesses, can be the cause of miscarriages of justice . But the consequence of the ruling of the majority is that a major actor, the jury, is immune from such scrutiny on the basis that such immunity is a price worth paying. This restrictive view will gnaw at public confidence in juries. It is likely in the long run to increase the pressure for reducing the scope of trial by jury. A system which forfeits its moral authority is not likely to survive intact. The question will be whether such a system provides a better quality of justice than trial by professionals."

Lord Hobhouse noted that mistakes may occur in any human system and suggested that the remedy should be seen to lie in the mechanism of appeal, which among other things provides for an objective review of the sufficiency of the evidence to prove guilt[43]. His Lordship observed that the issue raised in Mirza had acquired significance only since the introduction of majority verdicts[44]. The juror who wrote the letter was a dissentient. Somewhat argumentatively she had written that, "I was the only juror with any insight into the defendant's culture". His Lordship observed that jury deliberations may be stormy. He placed considerable weight, as did the other members of the majority, on the need to protect jurors by adherence to the secrecy rule. In his Lordship's opinion, given the provision for majority verdicts, the removal of the rule would undermine the integrity of jury trial[45].

The secrecy rule was not in question in K or Skaf but rather the limits of the imprecise exceptions to it. Wood CJ at CL sounded a note of concern at the prospect of lawyers after verdict seeking to flush out evidence of some irregularity. The practice of lawyers, police and jurors fraternising after a trial was one that he suggested did little to enhance the image of the justice system[46]. The recent amendments to the Jury Act 1977 (NSW) include an expanded offence of soliciting information from or harassing a juror or former juror to obtain information about not only the deliberations of the jury but also how a juror or the jury formed any opinion or conclusion in relation to an issue arising in a trial [47].

One way of endeavouring to ensure that prejudicial publicity does not influence jury decision-making, as the authors of the New South Wales study observe, is to assist jurors to focus on the issues in the trial[48]. The New Zealand and New South Wales studies both identified common issues raised by jurors which affect their ability to do this. Justice Young of the High Court of New Zealand has proposed modifications to the way in which we direct juries in light of the findings of the New Zealand study[49]. These include the content of directions including the direction on the standard of proof; the timing of the giving of directions and the desirability of greater use of written directions and other written aids. It is also worth reflecting on the fact that it appears common for juries to spend a deal of time trying to recollect what the evidence is (and for there to be side issues about the accuracy of jurors' notes)[50]. Perhaps it is time for the jury to be supplied with the transcript as a matter of course.

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Model direction opening remarks to Jury - Criminal Trials Bench Book, Judicial Commission of New South Wales

(In a case where there has been prior media publicity in relation to the accused)
This particular trial commences against a background of considerable publicity. You will all, no doubt, have heard references to the trial or the background giving rise to the trial on television or radio or read references to it in the newspapers.
It is of fundamental importance that you put any such publicity right out of your minds. You must, to be true to your oath or affirmation, decide this case solely by reference to the evidence presented in open court and, of course, the directions of law which I shall give you at the conclusion of the evidence. If you were to do otherwise you would not be true to the oath you took or the affirmation which you made.
You must also put out of your mind completely any reference you may have heard or read in any

context whatsoever in relation to the accused. So it is not only publicity concerning this trial that you must put out of your mind.
Importantly, you must not, during the course of the trial, use any material or research tool, such as the Internet, or otherwise, to access legal databases, earlier decisions of this or other courts, and/or any other material of any kind relating to any matter arising in the trial.
The reason you must not undertake any such inquiries is that you must be true to your oath or affirmation. To be true to your oath or affirmation you must decide this case solely by reference to the evidence presented in open court and, of course, the directions of law which I shall give you at the conclusion of the evidence.
You are not permitted to have computers with you in the jury room, and you are requested not to take mobile phones into the jury room. If you have brought a mobile phone with you, you are requested to leave it with the Sheriff's officer. If it is necessary, as a matter of urgency, for any of you to have access to your phone during the course of the trial, then arrangements can be made with the Sheriff's officer.
It is of vital importance that you do not discuss the case with anyone other than with other jurors in the privacy of the jury room. In fact, it is an offence (under s 68B(1) of the Jury Act 1977 (NSW)) for a juror to wilfully disclose, during the course of the trial, information on the deliberations of the jury to any person.
You should, even at the expense of appearing to be rude, avoid speaking to any person in the precincts of the court. This is because you may inadvertently speak to a person waiting to give evidence in the trial; a legal representative of one of the parties; or some person otherwise associated with the conduct of the trial. If this were to occur, it may mean that you would not be able to continue as a juror in this trial. It could even mean that it would be necessary for me to discharge the whole jury. This would, of course, be a most undesirable outcome.
You should not, either individually or as a group, make any private visit to the scene of the alleged offence, or attempt any private experiment concerning any aspect of the case. The reason is that to do so would change your role from that of impartial jurors to investigators, and lead you to take into account material that was not properly placed before you as evidence, of which those representing the Crown and the accused would be unaware and unable to test. Such material might require expertise in order to ensure that the inspection or experiment was properly conducted.
The only circumstances in which views or experiments are permitted, and are available by way of evidence, are those which occur in the presence of all jurors, the legal representatives of the parties, and myself. Those circumstances involve safeguards being taken to replicate the conditions, which were in existence at the time of the relevant events, and if there are any relevant differences in the alleged crime scene or in the circumstances of the experiment, they can be pointed out to you in the course of the evidence.
The restriction concerning jurors making their own inquiries about any aspect of the case, inspecting the site, or carrying out experiments, extends not only to individual jurors but also requires that none of you causes or requests anyone else to do any of those things.
In the event of it becoming apparent to any of you, in the course of the trial, that another of your number has made any independent inquiry in relation to any aspect of the case, then it should be brought immediately to my attention. This includes making an inquiry about the accused or the background of the offence, or making a private inspection or conducting a private experiment; or causing anyone else to do any of those things; or discussing the case with anyone other than remaining members of the jury.
In the event of it becoming apparent to any of you in the course of the trial, that any matter which is not in evidence has found its way into the jury room, then that should similarly be brought to my attention.
The reason it is necessary for any such matter to be brought to my immediate attention, is that, unless it is known before the end of the trial, it may not be possible to put matters right. In which case an injustice may possibly have occurred, requiring me to discharge the jury and direct a retrial.
If you have any query about the evidence or the procedure during the trial, you should direct such a query to me, and to me alone. The Sheriff's officers, who will attend to your general needs, are not there to answer questions about the trial itself. Should you have any questions about the evidence or the procedure, please make a note and give it to the Sheriff's officer. The note will be forwarded to me and, after I have discussed the matter with counsel, I shall deal with the matter."

England and Wales: Practice Direction (Crown Court: Guidance to Jurors)

Trial judges should ensure that the jury is alerted to the need to bring any concerns about fellow jurors to the attention of the judge at the time, and not to wait until the case is concluded. At the same time, it is undesirable to encourage inappropriate criticism of fellow jurors, or to threaten jurors with contempt of court.

Judges should therefore take the opportunity, when warning the jury of the importance of not

discussing the case with anyone outside the jury, to add a further warning. It is for the trial judge to tailor the further warning to the case, and to the phraseology used in the usual warning. The effect of the further warning should be that it is the duty of jurors to bring to the judge's attention, promptly, any behaviour among the jurors or by others affecting the jurors, that causes concern. The point should be made that, unless that is done while the case is continuing, it may be impossible to put matters right.

The judge should consider, particularly in a longer trial, whether a reminder on the lines of the further warning is appropriate prior to the retirement of the jury.

1R v Mirza [2004] UKHL 2; 2 WLR 201
2 ibid per Lord Slynn at 220, [50]; Lord Hope at 222, [60]; Lord Hobhouse at 246, [140]; Lord Rodger at 251,[154]
3 John Fairfax Publications Pty Ltd & Anor v District Court of NSW & Ors [2004] NSWCA 324 at [64]
4 at [17] - [20]
5 Law Commission, Preliminary Paper 37, Volume 2, Juries in Criminal Trials - Part Two, November 1999
6 Chesterman, Chan and Hampton, Managing Prejudicial Publicity, Law and Justice Foundation of New South Wales, February 2001
7 New Zealand Study at [7.51] and New South Wales study at [168] - [179]
8 New South Wales study [173], [182]
9 at [7.11]
10 New Zealand study at [7.54] - [7.57], New South Wales study at [214]
11 R v McLachlan [2000] VSC 215; R v Cogley [2000] VSCA 231
12 www.crimenet.com.au
13 R v Long [2003] QCA 77; 138 A Crim R 103 at 112-113
14 R v K [2003] NSWCCA 406; 59 NSWLR 431
15 at 449, [81] - [82]
16 New Zealand study [7.54] - [7.57]; New South Wales study [239]
17 Hinch v the Attorney General (Vic) (1987) 164 CLR 15 per Mason CJ at 28
18 New South Wales study at [254]
19 New Zealand study [7.41] - [7.45]
20 at 449-450, [87] - [88]
21 R v Skaf [2004] NSWCCA 37; 60 NSWLR 86
22 at 241, [126]
23 Crown Court: Guidance to Jurors [2004] 1 WLR 665
24 at 106, [286]
25 at 106; [285]
26 Skaf at 92, [204]
27 New Zealand study [7.44]
28 ibid [7.45]
29 Hinch at per Wilson J at 34
30 Dow Jones & Company Inc v Gutnik [2002] HCA 56 per Callinan J at [201]
31 New South Wales Law reform Commission, Contempt by Publication, Report 100, June 2003
32 at [2.62], [2.65]
33 Richard Alston, The Government's Regulatory Framework for Internet Content, (2000) 23(1) University of New South Wales Law Journal 192
34 R v Burrell [2004] NSWCCA 185 at [39]
35 John Fairfax v District Court at [11]
36 R v Weiss [2002] VSC 153; R v Crowther-Wilkinson [2004] NSWCCA 249
37 Vaise v Delaval [1785] 1 TR 11; 99 ER 944; Ellis v Deheer [1922] 2 KB 113
R v Minarowska (1995) 83 A Crim R 78
38 at 85
39 at 444, [53]
40 at 444, [54]
41 at 88
42 at 212, [22]
43 at 243, [133]
44 at 243, [134]
45 at 247, [143]
46 at 450, [93]
47 s 68(1) Jury Act 1977 (NSW)
48 New South Wales study at [531] - [532]
49 William Young, Summing-up to Juries in Criminal cases - What Jury Research says about Current Rules and Practice [2003] Crim L R 665
50 New Zealand study [3.5] - [3.6]; New South Wales study [464] - [471]

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Swearing In Ceremony of The Honourable Virginia Margaret Bell, SC as a Judge of the Supreme Court of NSW

Spigelman, CJ
and the Judges of the Supreme Court

Thursday 25 March 1999

BELL J: Chief Justice, I have the honour to announce I have been appointed a Judge of this Court. I present to you my Commission.

SPIGELMAN CJ: Thank you Justice Bell. Please be seated whilst the Commission is read. Principal Registrar, would you please read the Commission.

(Commission read.)

Justice Bell, I ask you to rise and take the oath of office, the oath of allegiance and the judicial oath.
(Oaths of Office taken.)

Prothonotary, I hand to you the oaths to be placed amongst the Court's archives. Sheriff, I hand you the Bible so that you may have the customary inscription inserted so that it may then be presented to Justice Bell as a memento of this occasion.

Justice Bell, on behalf of the Judges of the Court and on my own behalf I welcome you as a Judge of this Court. I have witnessed the lash of your wit. In your new role I look forward to its continuing deployment towards others.

IAN BARKER ESQ QC, PRESIDENT, NEW SOUTH WALES BAR ASSOCIATION Your Honour Justice Bell, the Bar applauds your appointment. At the same time we regret losing one of our more skilful and entertaining members.

I have to confess a personal interest in what I say as for some years I was on your floor at Frederick Jordan Chambers and therefore an occasional target of the notorious wit to which the Chief Justice has already alluded and also a victim of some of your spontaneous hospitality.

Your elevation was inevitable. A regrettable consequence is, of course, that senior women barristers remain an even scarcer commodity; not as scarce, I must say, as in 1902 when Ada Evans graduated in law and spent the next 16 years attempting to gain access to a profession for which it was said she had every qualification but masculinity. Her pioneering efforts led to the passing of the Women's Legal Status Act which provided that a person was not by reason of sex - these days politely called gender - deemed to be under any disability to be appointed a Supreme Court or District Court Judge, Magistrate or Justice of the Peace.

I understand that the first woman to actually practise at the Bar of New South Wales was Sybil Morrison and in 1924 the Sydney Sunday News reported that “the advent of lady barristers will probably make their male colleagues more careful in the matter of adjusting their dress and wigs. It was noticeable that Mrs Morrison's little white bib fitted her exquisitely and her dark hair, arranged softly at the sides, set off her wig to perfection”

I say all this, your Honour, perhaps to contrast the once awful patronage, if not overt hostility to women barristers with the great respect and affection accorded to you by the Bar and which you deservedly attracted. Admitted as a solicitor in 1977, you spent six years at the Redfern Legal Centre practising what you call “poverty law” and where, as one of your colleagues said, you were witty, brilliant, thorough, conscientious and consistently took a stand on matters

where the rights and privileges of the underdog were at stake. Admitted as a barrister in 1984, you were for two years a public defender and thereafter practised at the private bar whilst you were not doing other things such as being the ABC's radio Late Night Live presenter. Your practice at the criminal bar was very extensive. Your approach to trials and to the cab rank rule was uncompromising. I think one can fairly say of you as was said of Clarence Darrow, that from time to time you were the attorney for the damned.

You bring to the Bench a long experience in law, life and ordinary people.

As to your personality, I suppose I would have to agree with your own assessment of it, that is to say you are a very, very private extrovert. Of course, being enigmatic can be an attractive quality in a judge. You are, I think, a bit like your beloved Siena, which it is said is both passionate and contemplative, clear and at the same time obscure. As the inscription on the Porta De Camollia reads, "Siena opens up its heart more than any other place".

We regret your leaving the Bar, I personally regret your leaving our chambers. At the same time, we look forward to your judicial career with anticipation. Your Honour may safely say, if I may quote Gilbert and Sullivan,

"For now I am a judge and a good judge too."

MS MARGARET HOLE, PRESIDENT, LAW SOCIETY OF NEW SOUTH WALES: Your Honour, on behalf of The Law Society of New South Wales may I congratulate you on your appointment to the Bench of the Supreme Court of this State.

Raised for the most part in Sydney, your Honour attended SCEGGS Darlinghurst where, by all reports, you performed in accordance with the school motto, "luceat lux vestra" - let your light shine. Indeed, I am told you excelled in all subjects and in year 11 were awarded a special academic prize. You were also a regular in the SCEGGS house plays and there were those who wondered whether you would become an actress, such were your talents. However, your participation in school sports was a very different story. According to SCEGGS records, your Honour and two friends formed the Rushcutters Bay Circle and declared that members would, and I quote,

"Resist by force of argument and instinctive cunning, participation in the Thursday afternoon activity frequently referred to as sport."

Even then your Honour displayed a passion for defending the rights of those without power, something that has characterised your professional career.

After finishing school, your Honour studied law at Sydney University, graduating in 1976 and in 1977 you were admitted as a solicitor of New South Wales.

At that time the Redfern Legal Centre was less than a year old. The centre was a pioneer of community legal services in New South Wales and an exciting place to work. You applied to work at Redfern, but there were insufficient funds to employ you, so you simply volunteered. Your Honour's brilliance, hard work and total commitment were instantly recognised by colleagues, along with your now legendary comic ability. After several months you were put on the payroll. Your Honour was also a highly skilled administrator who could create order amidst the great disorder that sometimes existed in those early days at the Redfern Legal Centre.

The Redfern Legal Centre was a sort of heaven for young, spirited lawyers such as yourself. It offered a fast learning curve, freedom from more bureaucratic constraints, autonomy and camaraderie. During your seven years at Redfern you achieved a great deal. The centre was known for taking cases that few others would. This includes the now historic civil liberties case involving those arrested at the first Gay Mardi Gras in mid 1978.

You were also a driving force in formalising the Prisoners' Legal Service.

As we have heard, you went to the Bar in 1984, joining Frederick Jordan Chambers. You were

appointed a public defender in 1986, returning to Frederick Jordan and private practice in late 1989. Your areas of practice have included criminal work, discrimination matters and professional disciplinary matters. As we have heard, you were also one of the counsel assisting the Wood Royal Commission into the New South Wales Police Service between 1994 and 1997.

In November 1997 you were appointed Senior Counsel, much to the delight of all those who had worked with you.

Solicitors who have briefed you over the years describe you as a tremendous advocate with a great forensic mind. In fact, in one instance I understand your Honour demolished the case against your client after detecting cigarettes in one of 50 photographs that countless others had poured over without discovering this vital piece of evidence.

While regarded as a formidable advocate, your Honour is said to never shout or belittle during cross-examination. Instructing solicitors also speak of your honest approach in court which has earned you much respect from the Bench.

You have participated in many areas of professional life outside your own practice. For instance, between 1982 and 1984 you were a member of the Board of Governors of the Law Foundation. More recently, you have been a member of Bar Association bodies such as its criminal law and EEO committees.

Your Honour is also known for showing great patience and generosity when passing on your considerable knowledge to students and young lawyers.

Over the years your Honour has been a popular speaker at many events supporting community legal services. You were admired for your clear-eyed approach to defending the underdog.

Your Honour has a reputation as a passionate and some say front line veteran who has never succumbed to cynicism. The community will be well served by your inspiring support of the principle that justice should truly be available to us all equally.

On behalf of the Law Society, may I wish you many rewarding years on the Bench.

BELL J: Chief Justice, your Honours, Mr Barker, Ms Hole, members of the profession, ladies and gentlemen, thank you Chief Justice for your words of welcome.

I am conscious that it is only a little over three weeks ago that at the swearing in of Justice Bergin you expressed your pleasure that her appointment, among other things, helped to redress the gender imbalance of the Court. Redressing that concern might now be thought to have acquired something of the velocity of the very fast train. I am pleased to be a part of that process. When I was first in practice as a solicitor doing a great deal of my own appearance work, there were no women judges on the District or the Supreme Court. That had the capacity to make women advocates feel somewhat exotic, even if they weren't rumoured to be go-go dancers.

I still recall walking into number 6 court at Darlinghurst on a morning in the early 1980s to find the short matters list being called over by her Honour Judge Mathews, as she then was. The effect of a woman presiding over a court in those days would for those steeped in the language of modern literary criticism probably be described as subversive. Happily, that is no longer so and we now have a number of women on the District Court and on this Court.

I would like to take the opportunity to say how important figures such as Justice Mathews, Justice Gaudron, Justice O'Connor, to name some of the long-standing women judges in this state, have been, not just because they have served as role models, although that is important, but particularly for their personal qualities of unfailing warmth and support to women members of the profession. I have been a beneficiary of it and I am grateful and I thank them for it and I would like to say in more recent times for very much the same reasons I thank Justice Simpson.

I am mindful that the women judges of whom I speak are all very distinguished lawyers and I can't help but notice that the thing most consistently said of me is that I am likely to recognise a

joke if someone tells it. I have started to think it is a pity that that is a quality rather peripheral to the business of judging. I bear in mind that the Chief Justice of Australia when Chief Justice of this state said words to the effect that if a judge is burdened by a sense of humour, it would be rather a good thing if he or she did not demonstrate that fact from the bench.

As to my other attributes, they were rather strikingly drawn together in a letter I received from a friend who is a Crown Prosecutor who recalled our days together at Sydney University in 1971 in Professor Pieden's commercial law class. Professor Pieden was then trialing a form of enforced class participation which in the heady atmosphere of university campuses in the early 1970s was quite a high risk teaching approach. A number of the fellow members of our class dealt with that challenge by sitting in their assigned seats but using pseudonyms. The Crown Prosecutor recalled that I did not resort to an assumed name. In a tone that he still remembers as loud and resonant, I replied to every question asked of me, "I don't know". The Crown Prosecutor cited that as an instance of my forthright honesty, an important quality in a judge, but I realise that there might be a view that it is a rather singular way for one's confrères to sum up a university career, so when I bear that in mind, together with the Chief Justice's caution as to the matter of humour on the bench, it commends to me a view that I might make a quiet style of judge and I could take comfort in the fact that that is a judicial attribute I have always found most endearing in the judges before whom I have appeared.

I would like to thank you, Ms Hole, for your very kind words and you, Mr Barker, for your very - I was going to say kindish, but indeed I would characterise them as kind words. My career as both a barrister and a solicitor has been a very satisfying one. I have had the great pleasure of working with and forming friendships with lawyers who are people of great goodwill and who have seen the practice of law as a useful means of seeking to make a contribution to a just society.

I did start work at Redfern Legal Centre almost at the time of its inception. It was then the only community legal centre in New South Wales. In the more than 20 years since that time the community legal centre movement has proliferated. There are generalised centres like Redfern throughout the state and also a number of specialist community legal centres catering for diverse needs from those with intellectual disability to welfare recipients, those living in aged care accommodation and so forth. Historically the community legal centre movement owes a great deal to the remarkable talent and idealism of a group of academics who were then attached to the Faculty of Law at the University of New South Wales in the mid and late 1970s. Notable amongst them is John Basten of Queen's Counsel, who has been an inspiration to a generation of public interest lawyers and who has been a marvellous friend and source of counsel to me and I thank him.

When I look back to the beginning of my career, one of the most important events that I recollect is the publication of Mr Justice Nagel's report into the state of prisons in New South Wales. I was an adherent of prison reform. I attended many sessions of that Commission and I saw the report as a very powerful document that brought about far-reaching social change in the administration of prisons.

Years later it was an immense delight to have the opportunity to work as one of the counsel assisting Justice Wood in his Royal Commission into Police in New South Wales. It would have been possible for that Commission to investigate what I might describe as corruption simpliciter. Mr Justice Wood explored additionally what he described as process corruption, the systematic placing of evidence that is false in some particular before courts. In the course of that Commission's work and by his report, Justice Wood has succeeded in achieving far-reaching change and in preserving the integrity of the criminal law. It was a very great privilege to work with him.

The practice of criminal law, which has been very much my background, is one in which one can't help but be confronted by a great deal of sadness and awareness of one sort of deprivation that some people are subject to in their lives. I, like I think many people who are here today, have had the great benefit of growing up in a happy family, in my case, a conspicuously happy family. It gives me enormous pleasure to see both my parents and my brother Chris here today and to be able to say publicly what they well know, which is that I could not imagine having more loving or better parents. Criminal practice has made me very, very conscious that that is a real form of privilege.

Perhaps finally I should just make this observation. Mr Justice Sully has on occasions found it

necessary to take me to task for a certain want of depth in my classical allusions in advocacy. I felt I couldn't continue to let him down in my new role, so I took the time to determine what, if any, classical associations there may be about today and I discovered that 25 March marks the ancient Roman Festival of Hilaria. I am mindful that there is a latent ambiguity in that, but I propose viewing it as a favourable portent.

I would like to thank you all for taking time from your I know busy schedules to be present on this occasion. Thank you.