

INDEPENDENCE OF THE BAR AND THE RIGHTS OF THE INDIVIDUAL

1 In India in 1959, there was a declaration, which became known as the Declaration of Delhi. This declaration stated that the Rule of Law involved

- 1 The right to representative and responsible Government.
- 2 That a citizen who is wronged by the government shall have a remedy.
- 3 That certain minimum standards or principles of law (those contained in the universal Declaration of Human Rights 1948) and the European Convention of Human Rights 1950) including the freedom of religion, freedom of assembly and association, the absence of retro-active penal laws.
- 4 The right to a fair trial, which involves:
  - certainty under the criminal law
  - the presumption of innocence
  - reasonable rules relating to arrest, accusation and detention,
  - the right to legal advice,
  - public trial,
  - the right of appeal,
  - the absence of cruel and unusual punishment.
- 5 the independence of the judiciary including proper grounds for the removal of judges.

2 What do these declarations have to do with the independence of the bar? There will always be disagreement with the interpretation of this declaration but fundamentally it reinforces the notion that all people are free and there is a presumption of innocence to be invested in all people.

3 If the presumptions of freedom and innocence and the right to a remedy where a citizen is wronged by the government are to be upheld as part of the Rule of Law, then the independence of the class of persons who would uphold those presumptions and rights is paramount.

4 That class of persons is the Bar. The Bar must be independent of fear of retribution and independent of the favour of the few in fighting for the rights of the individual.

5 Take away the independence from the bar there is only the independence of the judiciary to stand between the State, the powerful, the rich, and the individual whose rights are impugned. And whilst the duties of the two overlap, their functions are very dissimilar.

In the end, one branch fights for rights of the individual and the other adjudicates upon the rights of the individual.

6 Note well that the only branch of the law which is referred to in the declaration of the Rule of Law is the criminal law. It is the concept of freedom which is the foundation stone of the Rule of Law. It is the concept of innocence which is the corner stone of the criminal law. It therefore follows, as the night the

day, that if you are innocent of wrong doing, then theoretically, you can never be punished or have your other liberties taken from you.

7 So far as I am able to state it, the criminal law, the independence of the Bar and the rights of the individual, will always walk hand in hand.

8 If, for example, I reversed the title of this paper and substitute the Rights of the Bar and the Independence of the Individual. The only thing missing is that you would have to add the word "duties" to the Bar and you would have the same sort of solution which is created by an independent Bar. It is the very independence of the individual which is secured by the rights and duties of a Barrister, to say nothing of an independent judiciary.

9 Have you any concept of the difficulty of this topic for a Barrister?

It's like being asked to make a speech on "What a Great Chap I Am", I obviously can make such a speech. I have heaps of material (references written by my teachers, priests, and the owner of the local two-up school, which was a butcher shop during the day - poems written by my kids; why, if you just look at what it says on my

67 The Bar is beholden to none. And in its present independent state, it enables barristers to maintain a professional objectivity and detachment which a solicitor may not have by reason his closer involvement with the clients affairs.

68 The tradition of the bar ensures the right of the people to have access to the Courts and therefore to justice. The tradition of the independent bar is the exertion of pressure on its members, by its members, to behave commendably and honourably. And there are positive benefits which flow from an independent Bar.

69 In his key note address, to the 1992 conference of the English, Scottish and Australian Bar Associations, London, for July 1992, Sir Anthony Mason C.J stated

"...the standard of advocacy in a fused profession does not match that of an independent Bar. My firm conviction on that score is the outcome of hearing arguments presented in the High Court of Australia over many years."

70 His Honour went on to describe how the fused professions of South and Western Australia have developed a much greater proficiency in court work because they formed within that fused profession independent Bars. He went on ....

Wedding Anniversary cards alone.....but I cannot deny that it does sound a little bit like a special pleading.

10 Incidentally, in a book called "Jesting Pilate" the former Chief Justice of Australia, Sir Owen Dixon, indicated that he regarded the advocates role as transcending the importance of the contribution made by the Judge. Upon reading this, I took time to reflect upon what a wise Chief Justice Sir Owen really was. And having regard to my career path, I am unlikely to change in my opinion.

11 How does the Independence of the Bar relate to the criminal law? First and foremost in this question, as some of you may have noticed, we have laws. These laws breed like rabbits on fertility pills. These laws regulate more and more the smaller and smaller areas of our lives until they will regulate everything about nothing. But, mark you, we are a free people. We are free to do great things and free to make mistakes. And the reason that we have that freedom is because of the Criminal jurisdiction.

12 The criminal law does not exist to capture crooks and thugs and punish them. That is merely its by-product. The criminal law exists to ensure our freedom. And

without the freedom that we allegedly cherish (despite the fact that every three years we continue to elect politicians to govern us) there can be no other laws which matter a damn. If we do not have the freedom to exercise what we perceive our rights to be, then we have nothing...

13 The criminal law exists to ensure that we do not live under the burden of the whim of the two faced, tight fisted and avaricious State. There must be due process of law. It exists to ensure that we, as a people in our individual states, do not live at the hands of arbitrary decisions with respect to our freedom.

14 Many years ago - about as much as you'd get for import heroin - I was in Parramatta Court, waiting to say something.

There was a fellow there on a breach of bond. His breach was that he was either late for or missed all his appointments with the Probation and Parole Officers.

The Court Orderly called his name, he was either late or even missed his appearance in Court. The name was called again and a third time. You could hear his voice waveringly echo further and further away.

15 His advocate stood up and said, "He's definitely here, your Honour, I spoke to him myself this morning. He can't be far."

16 His Honour sat back, stared at the door and the Court went silent. It stayed that way for about five minutes. The silence was finally broken by the Judge saying, "You need not go into the details of this case, Mr. Crown, I can see for myself." Then the lag came into Court. The Judge gave him a telling off: pointed out his short comings and dwelt a bit on his long comings, and as a matter of fact, polished off with a general cuss and sent him on his way.

17 We then broke for morning tea. I was back in place for resumption of play and I was much surprised to see the defaulter still in Court, his advocate looking puzzled and Mr. Crown looking mighty grim indeed.

18 The Crown said that he wished to deal further with the matter of the late comer and he called the Court Attendant.

"You are the Court Attendant? - Yes  
You called the Respondent three times outside this Court room? - Yes

And then...

I went to the seyer, called his name and he wasn't there. (by this time we were all looking

questioningly at each other and shrugging our knowledgeable shoulders.)  
What happened then?

I went downstairs and called again. He still wasn't there. I went outside and called his name outside the Court House, but there was no response. Then I thought he might be having a cup of tea, so I went down to the cafe and I saw him there having a cup of tea. I then walked up to him and said to him, "The Judge is waiting for you Mr. Smith".

What did he say?

The Court Attendant braced himself: You can imagine he'd not done this sort of thing before. He paused, seemed to swell, and then loudly and clearly said

Mr. Smith said, "Fuck the Judge. The bastard can wait"

Well you could hear the eyeballs click. Witness Judge. Respondent Judge. Counsel Judge. Then over to the miscreant's lawyer.

19

Now this young bloke was a fattish pale looking fellow who then took it upon himself to turn a whiter shade of pale. And as he struggled to his feet, I waited for the usual speech. "Client particularly stupid, deeply regrets, lots of pressure, incredibly silly thing to say, don't know what came over him, stupid, stupid, stupid....." the usual thing.

You've all heard the speech. I call it the "cut and run speech." It's where you're deserting your client and running away and as you do, you call back over your shoulder to the Judge some watered down, bull-shit plea of insanity.



20

But I was wrong. First of all, he roasted the Attendant for being a dobber; then a series of sarcastic wandering questions at why the Crown had done it, and then counted out loud the other practitioners in court and suggested what a waste of their time this was. And then this pale faced young chap, warned the Judge not to be thin skinned. He worked himself into a volcanic oration, and asked again if this is what we were supposed to be wasting our time on. A bit of stuff about people who are being shamed and publicly embarrassed saying things to keep a bit of self respect - after all his client never knew the Judge - this was a remark addressed to ALL his captors, etc, etc, He then launched into another "Don't - take - it - personal - Judge - speech." Then he was cut short.

21

Essentially, the Judge said to the defaulter, who was looking mighty sick, "I am not thin skinned, but if you come the raw prawn again, you will be sorry."

22

I was very proud of my profession that day, and I still think with pride of that moment.

23

Now I thought of those incidents when the topic was broached and thought fleetingly of old books where similar incidents were recounted. Lord Erskine, Hastings - There is plenty of them but they miss the

point.

24 The Independence of the Bar, has nothing to do with individual acts of courage. Even if the entire Bar was composed of rabbit hearted, chicken gutted, bird brains, I would still speak of, encourage, and defend, the Independence of the Bar.

25 And the Independence of the Bar has little to do with other independences. If the Independence of the Bar meant the same as the Independence of the Judiciary, I would have it in a trice. Imagine a guaranteed income, long breaks, secure tenure, and everyone laughing at your piddling jokes, but the Independence of the Bar has nothing to do with that either.

26 There is a story where a Counsel is reputed to have said

I ask you Mr. Jones do you drink heavily?  
Thats my business  
I see. And do you have any other.

Is that the Independence of the Bar or quick thinking of one Barrister?

27 There is reputed to be a conversation between the great F.E Smith and a judge which occurred when a judge said (in a manner which would be prejudicial to Smith's case.

Poor boy, poor boy, stand him on a chair and let the jury see him.

Perhaps your Honour would like to have the boy passed around the jury box.

That was a most improper remark.

It was provoked by a most improper suggestion.

Mr. Smith, have you ever hear a saying by Bacon, the great Bacon, that youth and discretion are ill wedded companions?

I have, your Honour, and have you ever heard the saying of Bacon, the great Bacon, that a much talking judge is like an ill tuned symbol?

You are extremely offensive, young man.

As a matter of fact, we both are; the difference between us is that I am trying to be offensive, where as you cannot help it.

28

Treasury Counsel at the Old Bailey (says (Mr. Du Cann QC) gave a beautiful opening speech and concluded.

"Members of the jury. I have set the stage. The scenery is in place. Let me ring up the Curtain and the play begin.

And Defending Counsel in that low whisper which carries for miles asked him. "And the Actors? Have they learned their lines?"

29

the Independence of the Bar? No.

30

Speeches marked with such wit, or examples of heroism of individual lawyers such as Donovan the Counsel who defended Rudolf Abels in the USA in 1950 are legion. Donovan was at time in the history of the USA when even to hint, that you thought that there was a faint possibility, that on close scrutiny a tiny chance

existed, that maybe some part of communism as a doctrine could possible contain an atom of relevance, branded you as PINKO and a Fellow traveller. Worse still you were UNAMERICAN!!!

31 The Independence of the Bar deals not with the individual counsel but with the Bar as a whole.

32 the Independence of the Bar deals with the concept that there exists a profession which does not look for favour and employment other than which will come from client. It means an entire group of advocates who are free to say what the Client pleads without any fear of retribution or any expectation of advancement from the mighty and the powerful, or the belligerently stupid State.

33 Brave men and women exist in every profession. There are brave Doctors, Brave Bricklayers, brave hairdressers and you may laugh, brave politicians. Yet none of us talk of the independence of the butchering trade and where we talk of an independent member of Parliament one hears the sort of language which is best used describing a rabid dog or a lift with the cable broken.

34 The Independence of the Bar must be maintained because

it is tied indissolubly with the rights of the individual. It is no good having rights if, when they are trampled on, ignored and disregarded there is no one to insist on them for you. If rights are not insisted on, rights are forgotten.

35 To hear some lawyers speak about Williams v. The Queen you would think that the law regarding arrest and the rights of the individual (which was described by a Justice in that case at the beginning of imprisonment) that the law did in fact arrive yesterday in the DX.

36 The interest which greeted Williams was quite remarkable. One would think that it was stating new law or at least a new principle of law. What happened, however, in my opinion, was that here was a right which had apparently become forgotten. This was not person against person or company against company, this was the State against the individual. Everyday, the State seeks to imprison people, everyday the State imposes its will on the people. Everyday we need independent people who are unafraid to stand up to the State and enforce the rights and freedoms and immunities of the people.

37 Williams said nothing new, but it said it powerfully. The Victorian Supreme Court said the same thing in 1970.

in Banner. Lord Denning saw it in Dallison V Caffery but decided that the Police were a special class of people who's eyes didn't blink. It was OK for them to take your freedom as long as they thought you had done something naughty. The NSW Supreme Court said it in 1935 in Bales V. Parmeter. Blackstone said it in 1765 when he said that personal liberty was an absolute right invested in the individual by the "immutable laws of nature and have never been abridged by the laws of England without sufficient cause." He warned,

"of great importance to the public is the preservation of this personal liberty for once it were left in the power of any, the highest Magistrate to imprison arbitrarily whomever he or his officers thought proper then it would be an end to all other rights and immunities."

38 Mark those words of the last great natural Lawyer:  
"once it is in the power of a man to imprison another arbitrarily then it would be an end to all other rights and immunities"

39 We lucky Australians are immune from arbitrary arrest, arbitrary questionings; we have this wonderful system of laws which guarantee it.

40 You may be familiar with the story of St. Thomas More and the Attorney General, Sir Richard Rich. Sir Richard said to More, "I would break every law in

England to get to the devil." Upon hearing this, More said, words to the effect, "And Sir Richard, after you have smashed every law in England, and chased the devil into a corner, with what laws would you protect yourself when the devil turned on you?"

For the word devil, substitute the word arch criminals. Plural. And when the most avid policeman has cornered his prey, and he only has the smoking ruins and shot out windows of the law behind him, where will he go when the arch-criminals turn on him and bear their fangs and claws?

41 AND if we follow the admonition to King Henry "First, lets kill all the Lawyers." Who will stand up for the King and plead his case when the usurper comes along. Not the Lawyers.....they are all dead.

42 BUT then if all the lawyers are allowed to live, why must they be independent. Why is it that they are to be what does independence really mean. Especially in relation to the Criminal Law.

43 Well I do not pretend to know the full answer but I know the result. The result is that I will defend a person whom I detest and loathe; If I am a Crown I will prosecute a person who has a reputation which I

beyond reproach. I will not fear the enmity nor have the nor have the affection of my fellows as my guide in my representation. I will represent the cause to the law. I will defend the law.

44 It is undoubtedly true that some members of the bar lose sight of, or do not possess the feeling that they constitute the line between the mindless oppression of the unthinking State and the citizen.; Between the malicious expansionism of commercial interests and the citizen; Between the bloody mindlessness of law enforcers and the citizen.

45 They shrink from their duty or maybe they are never even aware of it. They counsel in corners and find settlements where the client thinks not; as one senior counsel remarked to his client,

"If you persist in that version, I will have to throw in my hand to which his disrespectful and aged junior rejoined "Throw in her hand, you mean." Part of our job is to facilitate the access of our client to the Court, not to hinder it.

46 The person who gives that advice is acting as the judge and he immediately assumes the mantle of knowing the price of everything and the value of nothing. He has



become a judge in the guise of a counsel.

47 Take the same sort of situation with a judge who may wish to procure a particular result, directs the jury thusly, "This case has already been explained to you five times, twice by counsel in their openings, twice by counsel in their closing addresses, and once by virtue of the evidence which you have all heard. However, so low is my opinion of your understanding and in view of the bovine stupidity which I see carved upon your faces, I feel it necessary to explain to you again what has happened." The Judge then proceeds to direct the jury towards a result to which he thinks is just.

Such a counsel, as described above, has already forfeited his independence, what is he likely to do now?

48 They fear the advancement of an unpopular line; who has not heard some gutless individual say "No point in attacking the credibility of the Police in old woss name's Court." Who has not dressed up capitulation as a "Best settlement we could get" when the plain facts were that we were tired, played out and reluctant to resume combat?

49

But these individual failings no more weaken the concept of the Independence of the Bar than examples of independence and fearlessness. These are human failures which no more invalidate the Independence of the Bar than the individual priests, who get done for sodomy or simony\* invalidate the concept of Christianity.

50

An Independent Bar is needed because within an independent profession as such, there is the breeding ground for independent thought. An Independent Bar is a breeding ground for independent counsel, it has its folklore, its traditions, its stories, its judgment by its fellows. Of these, its traditions are the stuff of which those who will ever be heroes of the Bar, are the source of part of their heroism.

51

A few days ago, I was with an extremely wealthy client who shouted me lunch at McDonald's, in case any of you are unaware, McDonald's make hamburgers and rip off store owners. However, whilst listening to the scintillating speech of my client extolling the virtues of his quarter pounder, I read that McDonald's, and I quote, "Our commitment to environmentally sound business policies goes back to our beginnings when we insured that litter was regularly picked up in the car park of our first restaurant in Australia (so far so

good. But then they go on to say) WE HAVE BUILT ON THIS TRADITION....."

52 You may wonder how a tradition starts, obviously, McDonald's know how, so does the Australian Rugby League. I read that it started a tradition a mere two years ago. What then is a tradition?

53 In the Crimean War, four thousand Russian cavalry were advancing on Balaclava, it was to be a determined push which would capture the post and cut off supplies. The British and their allies, were unaware of the push until a small single contingent coming down into the valley they first saw an enormous dust cloud made by the 4,000 men and horse. It was a pitifully small brigade which stood in the path. It was immediately made smaller by the desertion of the Turkish contingent. Left facing the Russians, were the 93rd Highlanders and 100 invalides. Sir Colin Campbell said to the men, "There is no retreat. You die where you stand."

54 At his command, they lay down in the long grass, unseen by the Russians. On command, they stood up silently and faced the oncoming Russian cavalry. They made no attempt to run, nor any attempt to charge. Again on command, they fired a volley. Within the Russian

ranks, those behind cried forward, and those before cried back. The entire host paused. Their intelligence was every bit as bad as the British intelligence. The British did not know that the Russians were coming. The Russians did not know who stood in the silent ranks before them.

55 They could see that there were few red coated British soldiers. But they reasoned that there might be an ambush or some other peril before them. They Checked. A second volley tore into them. Surely this was not all there was of the British. It was madness if there were so few. They wavered, Steadied and advanced again. Another volley and the 93rd stood their silent ground. Doubt became for the Russians, certainty. Certainty that they may be defeated. They wheeled and retreated.

56 The 93rd Highlanders was the famous "Thin Red Line."

57 I have no intention of dressing myself in borrowed plumage -- I am a Barrister, not a judge, I make no claim to being a member of the thin black line or so stupid as to claim for the bar the courage of the 93rd. But this I will say.

If today we had the advancing enemy, what would your attitude be if you were a member of the 2/43rd Bullamakanka Fusiliers or a member of the 93rd Highlanders? You know full well what is expected of you as a soldier of the 93rd.

58 Acting on you is the expectations of others who know the reputation and steadfast traditions of the 93rd. You are the inheritor of the gallant traditions of centuries, you have the pressure of your fellows who expect, (and who you believe expect of you) commendable behaviour. It would be a lot easier, no doubt, to justify your lack of courage when there is only one or two present, but it is still there.

59 That group pressure is not restricted to the 93rd. Police have it - Unions have it. they won't let you show the white feather.

60 All over Australia there are St. Vincent de Paul Stores. they are manned by lady volunteers. Laddied by Lady volunteers. Staffed by Lady volunteers who usually work one day per week. and I am instructed that the Tuesday ladies think that the Monday ladies are a bit slack and the Wednesday ladies think that the Thursday ladies need to lift their game.

61 What then can be said to be the tradition of the independent bar.

62 In a draft statement issued by the Bar Association it was said that it is fundamental in the public interest that a strong, independent and separate bar be maintained.

It went on to say what that was in real terms. Ie. Sole practitioners, specialising in advocacy, and who when in private practice, are bound by the cab rank rule, instructed only by solicitors and are responsible to the Bar Association, the statutory Disciplinary Tribunals and ultimately the supreme Court.

63 Amongst these terms is an inkling of the traditions of the bar. The rest are merely rules. The terms to which I refer are the cab rank rule and the responsibility to the Supreme Court. The NSW Bar motto is "Servants of all, yet of none."

64 The Cab-rank rule, in my opinion, is the great tradition of the Bar and its observation by the members of the bar inevitably makes it responsible to the Supreme Court. Its importance to the efficient administration of Justice cannot be overemphasised.

65

This rule (which reflects Sir Thomas Erskine's statement when he took up the very unpopular cause of defending Thomas Paine) BINDS a barrister in such a way that he cannot refuse to accept a brief in his professed area of practice. It binds him to appear in that area DESPITE the fact that he disapproves of the client, he loathes the client's cause, and in the face of the fear of criticism of those who do not understand this obligation. In my opinion ANY fear of criticism from ANY source is insufficient a reason to return a brief. It is this tradition which ensures that the public will obtain my best services regardless of my opinion of my client or my fear of the State, the rich, and the powerful. The independent bar is indeed the "Servant of ALL, yet of none."

66

It is this tradition which ensures other things too. The bar is remarkably competitive. I want the work, but the client has total liberty to select the advocacy specialist of his choice. There is a wide range of experience, and fee rates, from which the individual can choose depending upon the exigencies of the case at hand. As far as I am able to ascertain, this tradition has for generations ensured that the rights of the individual have been and will be maintained.

67 The Bar is beholden to none. And in its present independent state, it enables barristers to maintain a professional objectivity and detachment which a solicitor may not have by reason his closer involvement with the clients affairs.

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"....as I remarked earlier, advocates outside an independent Bar do not attain the skill attained by members of an independent Bar. Chief Justice Burger of the Supreme Court of the United States, stated (see Quality of Justice and the Bars Response, 1989) in most explicit terms, that trial lawyers in the United Kingdom were markedly superior in quality and performance to their United States counterparts. He attributed this difference to the existence of the independent Bar in this country."

71

The Independence of the Bar incidentally recently received a boost. One of the pressures which act on the bar is the titled bit letters "QC". Of course none of us pursue it. Not so you would notice but it does not hurt. So the government recognising that nobody really wants it -- abolished it.

AND paradoxically, struck a blow for the independence of the bar.

72

I am a long way from saying that you need political patronage to become silk. But when the AG has the gift in his keeping it can well be that a deserving counsel is sometimes recalled as a someone who interfered with the governments agenda in some way and the blanket goes over. So I am glad that the AG abolished QC's. We have got one monkey off our back.

73

When the Bar is scattered to in house counsel, what is the result?

74 I am not knocking the USA system but why do they have such a huge civil rights movement? Why do we have virtually none? There is almost no civil rights movement in England either, or Canada. Do we have a defacto civil rights movement in the very profession?

75 In the USA, there is no independent Bar, although there is a developing association of defence lawyers. There are lawyers who operate quite well within their system who take cases for the sole purpose of farming them up to specialist firms and they take a 10% finders fee. Immediately one might think there is no pressure on such a lawyer to do much more than be a "spotter", he has no need for independence as a tradition or a philosophy, nor has he pressure to behave in the manner of an independent lawyer.

76 A system such as that, here in Australia, chills my blood. Imagine, the "spotter" telling the client that he had a good case, farming it up to the mega-firm, but inadvertently forgetting to inform the next lawyer of a piece of damaging evidence.

77 Apart from the benefits that the independent Bar offers, one can readily understand that where the large firms dominate the role of the advocate this is more than likely to damage the smaller firms. In short, how

can they compete when the largest firms take the cream of the professionals available to run trials? The smaller firms immediately become beholden to the larger firms.

78 Do not think that I am a jealous and alarmist Counsel. On the 16th February 1992, the Newcastle Law Society passed a number of resolutions amongst which the said Society explicitly stated that they did not support the Council of the Law Society of NSW, they deplored the remarks of the then President of the Law Society and they resolved "that the Newcastle Law Society request the Law Society of NSW to - express its support for the retention of the independent Bar and access by solicitors to it..."

79 I do not pretend to know what motivated the Newcastle Law Society to make their stand against an extremely powerful Sydney centered organisation like the Law Society, But you can bet it was not because they liked the idea that they would be beholden to a situation where they (and their clients) did not have specialist advocates at their disposal or that they would eventually have to enter liaisons with firms where they did not know how their client would be treated.

80 With an independent Bar, Solicitors have a wide choice.  
The solicitor tries and buys on behalf of his client.  
Without an independent Bar he can only farm the case up  
to a mega firm.

81 The rights of the individual are useless unless he has  
someone to fight for them and maintain them. It is  
that independent bar which, in the end, does just that.

82 Consider the other side of the coin. Poll the defence  
lawyers - lawyers who defend in the criminal  
jurisdiction and who draw on long experience.

Do they see any change from the days when members of  
the independent Bar handled much of the trial work.  
And the change I am told is not for the better. I am  
too new at the game to have an overview.

83 This is not the place to be controversial, but some of  
the in-house counsel for the DPP seemed to be inclining  
towards persecution rather than prosecution. The air  
of a detached prosecution is giving way to a grind-his-  
face-into-the-ground and give nothing away attitude.

In fact, a counsel of the DPP once said to me, "I am  
inconsolable when I lose a case." As I know the man in  
question, I do not read anything at all in to the

statement which is derogatory of the bloke. But an outsider hearing such a statement may have a problem.

84 In fact, we now are reaching a dangerous place where we have two Bars, the Criminal Prosecution Bar and the Independent Bar. I believe the time will arrive when someone will say to a DPP Counsel, words to the effect, "Get a good result in this one and I will let you do all our rapes - or whatever."

85 Perish the thought that one day the Minister will ring the Director and say, "This case of XYZ is coming up, we want a good result here - a conviction. Now I want you to make sure that someone good is strapped up for it." Perish the thought indeed. It happens in the USA.

86 The handling of the Jack Ruby case, by Police and Court, has brought home to the US, the failure of the system to reject outside pressures. Let me quote something else;

"No aspect of American trial procedure was subject to more flagrant abuse than the practice of finessing or deceiving ones adversary. In Great Britain (read Australia) the Prosecutor must disclose all the evidence he proposes to offer."  
(Fair Trial by Richard B. Morris)

87 It took a Constitutional challenge based on the Due Process Amendment before it was ruled, that for a Prosecutor to suppress evidence favourable to a defendant, when he knew a State witness was lying, was a violation.

88 The Alger Hiss case has many critics who contend that the prosecution was more concerned with securing a conviction than uncovering truth or just merely prosecuting an offence. The Prosecutor's opening was replete with inflammatory and prejudicial arguments and references to damaging matter which was never to be seen in evidence.

IS THERE ANY CHALLENGE TO MAINTAIN AN INDEPENDENT BAR?

89 So far as I am concerned, and the opinions I express here are my own, there is no doubt that the independence of the Bar is continually being tested.

90 With the American examples I have quoted above, I hear those well intentioned Prosecutors and Honourable Prosecutors and dishonourable Prosecutors and dishonourable defenders say, "Well, it can't happen here." You probably heard the citizen ask, "Can it happen here?"

And I say, what is there to stop it?

91 Unless there is a strong and independent bar to fight for the rights and immunities, the rights of the individual will go by the board.

92 And can't it happen here? In the Corporate Affairs Commission V Yuill (172 CLR,) the decision of the majority of the Court was that in effect with the course of the Act before it, the confidentiality of the disclosures of the client to the Solicitor could be ordered to be revealed. It in effect makes the Solicitor a dobber.  
There were however, two strongly worded dissenting judgments.

93 McHugh J., said at 348

"The right to refuse to disclose communications and materials passing between a legal advisor and client for the purposes of advice or use in existing or anticipated litigation is a fundamental Common Law Right. (See Baker v. Campbell 153 CLR)"

94 Clearly the independence that the lawyer has is part of this right to stand up to the interfering and belligerently stupid State. That independence in Yuill's Case was taken away. But at least it was fought all the way to the High Court. That wasn't the

end of the matter though, that decision was reported in the Commonwealth Law Reports published in 1992 and in the Australian Law News of August 1992, the President of the Law Council of Australia, immediately went to print over it and called for an immediate review. In an article, in that same worthy magazine, the author of which I have been unable to ascertain, quotes as follows,

95

"To use communications made in the course of Solicitor/client, Fiduciary relationship against the client in circumstances not contemplated at the time of the communication is tantamount to using confessional evidence in breach of the rules against the use of involuntary or unfairly obtained confessions, as discussed in Cleland v R 151 CLR 1 and other relevant authorities.

"The doctrine threatens Lawyers with a role akin to that of an informer rather than the role of a professional, whom the client can trust and rely on for guidance. If Lawyers are seen in this light, clients will be discouraged from seeking services which may harm them and will resort within creasing frequency to act without obtaining prior legal advice."

96

And why would they? This scenario is not far fetched. Two business men are speaking, one says to the other, "Hey, Con, did you get some legal advice on these new Superannuation Laws?" The answer could justifiably be "Are you kidding?, Lawyers are dobbbers. Look what happened to poor old Yuill."



97 It is with some satisfaction that I note that the Law Council made a recommendation that the Government introduce legislation as a matter of urgency to amend section 68 of the Australian Securities Code to make provision for a new sub-section which would have the effect of overriding Yuill.

98 The thought therefore, may be engendered that the Yuill problem is confined to its own peculiar circumstances and facts.

99 There is the Right of the individual to silence. Is that the next target of the attack which is making the thin end of the wedge a bit thicker? Consider the judgment of Mr. J Hunt in Reeves (NSW CCA Unrep. 1.12.1992) His Honour bowed to the judgment of the High Court in Petty 173 CLR 95, but went on to say

"That case did not lay down any rule of universal application that evidence may not be given and of the answers given where that evidence discloses that the accused has exercised his right to silence.

The High Court did say in Petty v The Queen (also at 99) that the Crown should not lead evidence that, when charged, an accused person made no reply, but that is because, by reason of the legal processes involved, there could never be any relevance of that fact to any issue in the case. However, the fact that the investigating police officers put the prosecution's version of the facts to the accused and gave him this

opportunity to answer them and to give his own account of the events in question falls into a different category."

Firstly, it is to be observed that the High Court actually said, "Thus, to take an example, the Crown should not need evidence that when charged, the accused made no reply." One might think that if this is "an example", there may well be other areas where Silence is irrelevant.

100

The High Court and Mr. Justice Hunt are in an apparent agreement on the consequence of this in that it could have no relevance to any issue in the case. However, whilst it is easy to think of a situation where silence is a fact that can be taken into account, one wonders what the direction should be where the silence in answer to a situation where a proposed accused person has the opportunity to reply and explain his case, but remains silent. One wonders what the "different category" is.

Silence, as a general proposition must be irrelevant. If Wilson v. The Queen (123 CLR) is good law at all, then the accused silence can never be used. The prosaic expression in Wilson, by Barwick, C.J.

"The fundamental rule governing the admissibility of evidence is that it must be relevant. In every instance, the proffered evidence must ultimately

be brought to that touchstone."

101

All that is now required for a massive opportunity for miscarriage of justice is some well intentioned zealot to cause legislation which would enshrine Yuill, in a "different category", and the thin end of the wedge has started to look remarkably thick. The independence of the Bar starts to wither before the onslaught of a lack of fairness under which the Bar must buckle in view of its duty to the Court. The rights of the individual are slowly staggering.

No more of comfort shall you get,  
Save that the sky grows darker yet,  
And the sea rises higher.

G.K. Chesterton

102

It would be unlikely indeed, that such hideous legislation would be balanced by taking into account the remarks of Mason C.J. in Giannarelli v. Wraith, 165 CLR 543 at 555, where His Honour said,

"The peculiar feature of Counsel's responsibility is that he owes a duty to the court as well as to his client. His duty to his client is subject to his overriding duty to the court."

The Bar acts in aid of the courts. The courts administer and interprets the laws and are bound by

them. The quote from Gianarelli is followed by these words, "In the performance of that overriding duty, there is a strong element of public interest."

103 However, the overriding duty which Counsel has to the courts, is where the strongest support for independence of the Bar is to be found.

104 Here the independence of the judiciary and the Bar overlap. Each part must act in aid of the laws of the land. Unless they are free and independent of fear from the punishment of the State or the rich and powerful and unless they refrain from looking to the State and the rich and powerful for advancement, their independences can never be more than puppetry to the powers that be. They can never uphold the Rule of Law.

105 In Malaysia, the independence of the Bar was called into question and it experienced staggering difficulties arising from its stance upon the shameful dismissal of the Lord President (read High Court Chief Justice) and the later charging of the Vice President of the Bar Council with contempt. The government continued to harass the Bar and it declared that it would "curb" the power of the Bar by amending the Act of Parliament which by which the Bar was constituted. It would do this by deleting from the Act that which

was the primary objective of the Bar i.e.

"....to uphold the accuse of justice without regard to its own interests or that of its members, uninfluenced by fear or favour."

106 Earlier in this paper, when I referred to the belligerently stupid State, no doubt many of you thought that I was referring to the NSW Government. Well I could have been, but if I was, they are mere amateurs. The real prize for catastrophic stupidity obviously belongs with the professionals.

107 Erode the independence of the Bar and you take away those who would uphold the cause of justice. Take, for example, the Barrister who joins the not-so-mega-firm. She is working away diligently and the firm's Case Co-ordinator and Jolly Fine Fellow, wanders into the now Solicitors office and says, "Connie, I see your working on the Frigthorne v Arswort case. You wouldn't believe it, Arswort and I went to school together."

108 What does Connie do? She is suing Arswort. There is an immediate pressure on Connie to do something. What it is, she does not know. But, you would think that the jolly fine fellow had a reason for coming in out of the blue and saying what he did. The conflict is real. Connie has a mortgage to pay and she likes to keep her

job in the not-so-mega-firm. Does she not fight as hard for Frigthorne? Does she think that if she buckets the daylights out of Arswort, she would not get her partnership? The ramifications are endless. There is no need for me to spell them out. In this case, Connie has lost her independence.

109           However, I am pleased to report that Connie did, in fact, bucket the daylights out of Arswort, told the company coordinator to shove his job and she went back to the Bar.

110           However, you don't need this prosaic example. In NSW a senior magistrate was alleged to have said to a Clerk of the Court, "Who is the beak on so and so's matter?" Upon hearing the reply, the magistrate was alleged to have said, "Don't give it to him, he's an ex-copper, give it to x." In this one statement, the public were duped, the Old Pals Act was revived, a magistrate was suborned and independence was shattered.

111           I ask a different question. What is to stop the Attorney General asking the Director of Public Prosecutions for information on a politically sensitive prosecution? What do we have to rely upon other than the personal honesty and professional integrity of our Director?

118 In NSW we have a government which tells the people how wonderful it is to lengthen prison sentences, to punish unremittingly and to overflow the jails. What easier target could there be than to attack these anti-social scum and make sure that the system does not break under the few anomalies where a prisoner undeservingly (or even deservingly) is released early. You have relentless support for this attitude in the mindless current affairs programs where idiots run around in an "holier than thou" attitude, telling the big lie that "The people have the right to know", when what they really mean is "I want the right to kick someone when he's down with impunity, the right to dob and the right to be irresponsible, uninformed and unlearned."

119 The other side of the coin (which the same lunatic current affairs programs support,) is the attack on Lawyers.

120 Fundamentally, what the government has done is to make part of its business the attacking of the single profession, which by the very decrees of the High Court, must act in aid of the Courts which are the only place where the citizen may receive the full measure of justice in this land.

Our reponse must be to reaffirm the bars traditional professional ideals and aspire to excellence. The professional ideal is not the pursuit of wealth but public service. That is the vital difference between professionalism and commercialism<sup>1</sup>

121 The Courts cannot function without the Bar. The Bar cannot function without its independence.

122 The Independence of the Bar is not a concept of self praise, "What a splendid group of independent thinkers we are". The Independence of the Bar, is the best way that I can see to secure the independence of the people. And when the last surviving Barrister hangs up his wig and walks across the street in front of the Court to join the mega-firm, it will be realised with the force of a hammer crunching into your skull that the expression Independence of the Bar, is no adjectival phrase, but a guarantee to the people.

123 Our law did not arrive yesterday in the DX, it goes back for thousands of years.

124 In fact a Jewish friend of mine said to me, "Your much vaunted common law - your whole system of law was stolen. You stole the ten commandments to form the foundation of your common law, you took the ten



commandments ...." "Hang on", I said, "You might be right in saying that we took your ten commandments, but you can never say we kept them."

125 In Sir Thomas Malory's King Arthur, you will read how Queen Guinevire was charged with poisoning a Knight. The trial was a highly sophisticated affair which consisted of her champion beating the hell out of her accusers champion.

126 Sometimes I think nothing has changed. Sometimes I think that when I am in a certain Judges Court, I can safely and persuasively maintain that he has single handedly brought back trial by ordeal. I won't say who he is. My lips are sealed. If you want to find out, you'll have to work hard. And the hardest you can work is to commence with speaking to me after hours and bearing in mind the old Latin Maxim "In vino, veritas".

127 At any rate, so far as I can see, the Independent Bar does as the Minstrel Boy

"Though all the world betray thee,  
One sword at least thy right shall guard,  
One faithful harp shall praise thee."

128 You could do worse than that for a motto for the Independent Bar.

I will close by expressing a personal opinion on the Independence of the Bar. The words are not mine, they are the words of the Baptismal Right of the Catholic Church.

"This is my faith, I am proud to hold it."

Key Note address to the 1992 conference of the English, Scottish and Australian Bar Associations, London, 4th July 1992, Sir Anthony Mason C.J

1

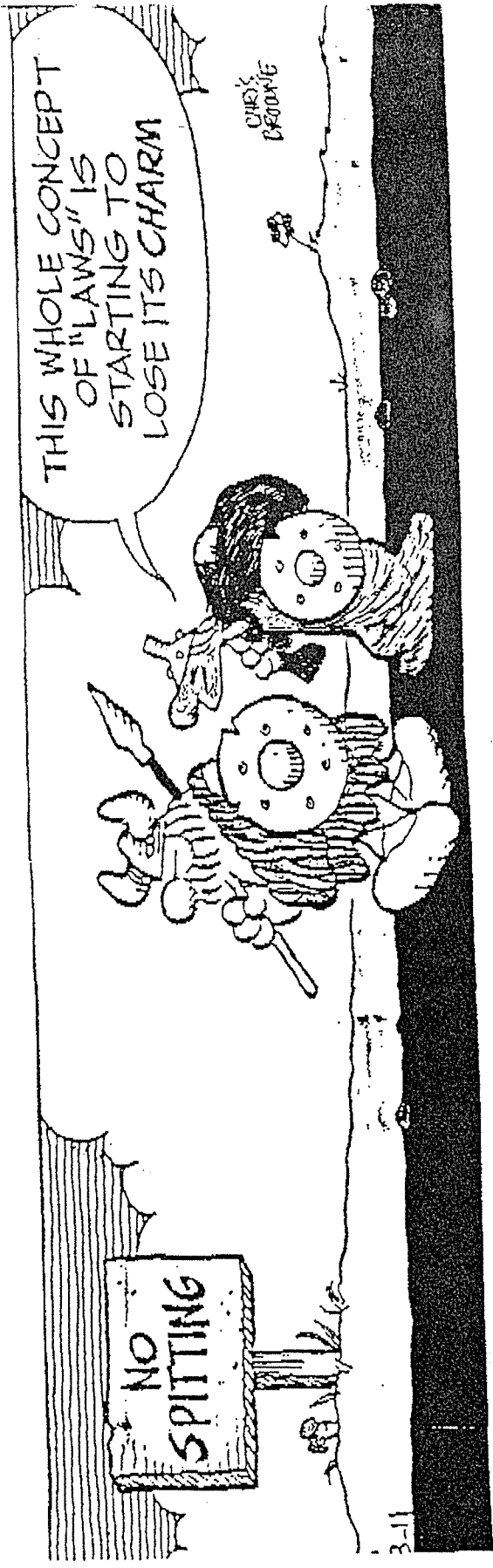
\* Simony. The offence of buying or selling ecclesiastical favours.

DRYDEN

In friendship false, implacable in hate,  
Resolved to rule, or to ruin the state.

politicians

APPEND A



THIS WHOLE CONCEPT OF "LAWS" IS STARTING TO LOSE ITS CHARM

CHICKS  
BROODING

NO  
SPITTING

3-11

England to get to the devil." Upon hearing this, More said, words to the effect, "And Sir Richard, after you have smashed every law in England, and chased the devil into a corner, with what laws would you protect yourself when the devil turned on you?"

For the word devil, substitute the word arch criminals. Plural. And when the most avid policeman has cornered his prey, and he only has the smoking ruins and shot out windows of the law behind him, where will he go when the arch-criminals turn on him and bear their fangs and claws?

41 AND if we follow the admonition to King Henry "First, lets kill all the Lawyers." Who will stand up for the King and plead his case when the usurper comes along. Not the Lawyers.....they are all dead.

42 BUT then if all the lawyers are allowed to live, Why must they be independent? Why is it that they are to be independent, what does independence really mean? Especially in relation to the Criminal Law?

43 Well I do not pretend to know the full answer but I know the result. The result is that I will defend a person whom I detest and loathe; If I am a Crown I will prosecute a person who has a reputation which I

consider to be beyond reproach. I will not fear the enmity nor have the affection of my fellows as my guide in my representation. I will represent the cause to the law. I will defend the law.

44 It is undoubtedly true that some members of the bar lose sight of, or do not possess the feeling that they constitute the line between the mindless oppression of the unthinking State and the citizen; Between the malicious expansionism of commercial interests and the citizen; Between the bloody mindlessness of law enforcers and the citizen.

45 They shrink from their duty or maybe they are never even aware of it. They counsel in corners and find settlements where the client thinks not; as one senior counsel remarked to his client,

"If you persist in that version, I will have to throw in my hand to which his disrespectful and aged junior rejoined "Throw in her hand, you mean." Part of our job is to facilitate the access of our client to the Court, not to hinder it.

46 The person who gives that advice is acting as the judge and he immediately assumes the mantle of knowing the price of everything and the value of nothing. He has

was the primary objective of the Bar i.e.

"....to uphold the accuse of justice without regard to its own interests or that of its members, uninfluenced by fear or favour."

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