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ARTICLES

Judging For The People
Honouring 175 Years of the Supreme Court in Victoria

Editor's Note
David Harris

Introductory Remarks
Simon Smith

The Augustus Wolskel Memorial Lecture: Reflections on the History of the Supreme Court after 175 years
Hon Marilyn Warren AC

William Meek: Melbourne's First Lawyer
Simon Smith

From Foundational Case to Footnote: Judge Willis' Opening Address in the Case of R. v Bonjon
Janine Rizetti

In the Case of Molesworth v Molesworth
Justice Victoria Bennett

Flos Greig: Solicitor, Woman, Pioneer
Kathryn Miller

Judge-Made Law: The 'Menhennit Ruling' And Abortion Law Reform In Victoria
Bronwyn Naylor

Sir Leo Cussen—A Brief Note About A Great Jurist
Justice Mark Weinberg AO

The McGarvie Letter: Reforming from the Inside
Michael McGarvie

Notes on Contributors

About the Royal Historical Society of Victoria

Guidelines for Contributors
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Editor’s Note

This special edition of the *Victorian Historical Journal* contains a selection of the papers presented at the ‘Judging for the People’ conference, an event held on 9 April 2016 in conjunction with an exhibition celebrating the 175th anniversary of the Supreme Court in Victoria. Organised by the Royal Historical Society of Victoria with support from the Sir Zelman Cowen Centre of Victoria University, the conference and exhibition were accompanied by a publication, *Judging for the People: A Social History of the Supreme Court in Victoria 1841–2016*, edited by Adjunct Professor Simon Smith from the Sir Zelman Cowen Centre.

Chief Justice Marilyn Warren accepted an invitation to deliver the Augustus Wolskel Memorial Lecture as an introduction to the conference. The Wolskel Lecture, the RHSV’s major biennial oration, has been delivered by a distinguished historian or public figure since the 1960s, and we were honoured that the chief justice agreed to be part of that tradition.

We hope that you enjoy the collection and we thank the authors for participating in this phase of the commemoration. We also thank Simon Smith for his introductory remarks to this edition of the *Journal*.

David Harris
Monday 12 April 1841 was a significant day in the history of Victoria. It was the day that the Supreme Court sat in Melbourne for the first time, the irascible Judge Willis presiding. Technically, the court was the Supreme Court of New South Wales sitting in Melbourne, as separation was still ten years way, but let us not allow too much detail to confuse the story. The establishment of a superior court in the colony at that time was a significant constitutional milestone. Two years earlier, Charles La Trobe had arrived to provide a gubernatorial presence; this was to be followed in 1842 by the arrival of early representative democracy with the establishment of the Melbourne Corporation. The three elements of the doctrine of separation of powers were thus in place.

In 2014, the Royal Historical Society of Victoria recognised that the 175th anniversary of the establishment of the Supreme Court was fast approaching and resolved to ensure it was fully recognised. The foundation piece for the celebrations was the publication in 2016 of *Judging for the People: A Social History of the Supreme Court in Victoria 1841–2016*. Fully and enthusiastically supported by Chief Justice Marilyn Warren AC QC, it brought together contributions from a distinguished group of legal scholars and historians. All participated *pro bono*. Publication of the handsome volume was made possible by the generous financial support of the legal profession.

In April 2016, the RHSV also convened a one-day history conference to further examine key moments in the history of the court and to allow wider community participation. This special volume represents a report on those proceedings. The chief justice provides context by contributing her reflections on the role and work of the court after 175 years. Simon Smith examines the fascinating life of William Meek, Melbourne’s pioneering lawyer, and Katie Miller traces the determined journey by Flos Grieg to become the first woman admitted to legal practice in Australia. Important court decisions that influenced state social policy and impacted the standing of the court in the community are also explored. Janine Rizzetti looks at 1841 case of *R v Bon Jon* and its impact on the applicability of imperial criminal law to the local Indigenous people; Victoria Bennett and Kevin Summers...
bring the sensational divorce case of a nineteenth-century Supreme Court judge to life; and Bronwyn Naylor traces the role of judge-made law through the *Menhennit Ruling* and its impact on abortion law reform in Australia. Finally, Mark Weinberg and Michael McGarvie provide special insight into the contributions of two reforming judges, Sir Leo Cussen and Richard McGarvie.

*Simon Smith*
Reflections on the History of the Supreme Court after 175 years

Remarks of the Hon Marilyn Warren AC,
Chief Justice of the Supreme Court of Victoria,
on the occasion of the Augustus Wolskel Memorial Lecture
Royal Historical Society of Victoria
Saturday 9 April 2016

Abstract
In 2016, the Supreme Court of Victoria marked 175 years since a resident judge of the Supreme Court of New South Wales arrived to administer justice in the Port Phillip District. This anniversary has provided an opportunity to reflect on the evolution of the Supreme Court, before those years are greyed from memory. The development of the Court since its colonial beginnings has at times happened at great speed with the Court responding to the vexed social and economic issues of the day, from murder to fraud and insolvency. At other times, it seems the pace has been quite glacial. Before the introduction of Court Services Victoria in 2014, the Supreme Court had spent decades tussling with the executive for control over the administration of the courts. The executive would assert the need for accountability, the judiciary would respond emphasising the need for the Court’s independence as the third arm of government. Inertia was the regular outcome. The Court’s efforts to acknowledge the Indigenous owners of the land on which the Supreme Court rests and over which it wields the rule of law also came after a period of disappointing inaction. Commemorating this anniversary ensures such shortcomings and the efforts to redress them are not left without comment to the confines of history.

Introduction
The Supreme Court has always been both influenced by and an influence on its time. To appreciate the evolution of the Supreme Court of Victoria, it is useful to have a glimpse of the context (social and geographic) in which it came to be. Author James Boyce has described how Melbourne looked prior to white settlement:
The Yarra River was tidal up to a rocky basalt ledge (where Queens Bridge now stands), at which point it was as much as 90 metres wide. What the British would call “the falls” acted as a barrier to the saline tidal flows, ensuring that upstream of the rocks could be found a permanent source of fresh water.

This natural bridge, where salt water met fresh, was also where geology and botany divided in an apex of ecological encounter. Within an easy walk could be found grasslands, various woodlands, as well as, in almost every direction, mud. On the northern side of the river, stretching three kilometres to the north west, “was a wide expanse of flat, boggy land, greater than a thousand acres … in extent”. In the middle of this was a permanent lagoon which one early settler recalled as “a beautiful blue lake … intensely blue, nearly oval and full of the clearest salt water; but this by no means deep”. On the southern side of the Yarra, between the river and the edge of the bay, swampy land stretched for about six and a half kilometres and included a number of permanent lagoons, including what was to become … Albert Park Lake. There were also extensive lagoons in the region of what is now Port Melbourne. By contrast, much of today’s central business district was well drained grasslands, framed by gentle and lightly wooded hills, such as Batman’s Hill, … and the pastoral plains stretched far to the north and west.

This was Kulin country, the home of the Wurundjeri people. In the 175 years since the Supreme Court first sat in this district, little has been done to acknowledge and respect the Indigenous peoples on whose land the Supreme Court buildings have been built. Some efforts were made by Judge Willis, and later Sir Redmond Barry, with respect to the recognition of the Indigenous people, but their relevance to the courts was essentially disregarded. Rather, history shows the interactions between the Court and Indigenous people were far more malign. The first capital punishments ordered in the Supreme Court were in 1841 when two Indigenous men were hanged for murder. Their execution was cruel, inhumane and uncivilised.

It took from 1841 to 2015 for the Supreme Court of Victoria to welcome the original owners of the land to the court site. At a smoking ceremony on 20 May 2015 I said:

Justice is not new to this place. The Supreme Court is over 160 years old and has been on this site for 130 years delivering justice. Traditional justice is thousands of years old. Justice is based on the law of the
people, so, for the traditional owners of the land, this place is very familiar.

This day has been a long time coming, I regret that. There have been 10 chief justices before me and over 140 Supreme Court justices. No real offer of welcome, acceptance, acknowledgment or friendship has been given.

To the traditional owners I say: I stand here today on behalf of all the judges, associate judges, judicial registrars and staff of the Supreme Court of Victoria. I welcome and acknowledge you and I offer you our friendship.

There is nowhere here I can pick up grains of sand and tip those grains into the hands of the elders. I ask instead that the elders press their hands against the sandstone when they come here and mark this place again as their place.

In the Supreme Court Library the main room displays the portraits of the eleven chief justices. The room now includes a portrait of Barak, the respected last chief of the Wurundjeri people, with all the other court chiefs. He was there when Batman arrived in 1835. He would have been in the vicinity in 1841 when the Court first sat. His due acknowledgement is appropriate and welcome.

The Supreme Court has now taken a leadership role through judicial education in Victoria as to Indigenous culture and awareness. Justice Stephen Kaye, supported by the judges of the Court, has led many programs to ensure the Victorian judiciary understands the relevance, significance and importance of the original owners of the land on which the Victorian judiciary works and applies the rule of law. In one sense, it is a reflection back to the beginning, an acknowledgement that when Melbourne was established it was Kulin country, the home of the Wurundjeri people.

The Social Relevance of the Supreme Court

Apart from this fundamental gap in the Supreme Court’s work, over its 175-year history, it has played a prominent role in the development of Victorian society. When significant moments in Port Phillip’s and Victoria’s history occurred, the Supreme Court was often at the forefront, resolving disputes and punishing misconduct.

Reflections on the Court’s history are usually pre-occupied with its criminal work: the trials of the notorious Ned Kelly, of Colin Ross over the murder of a twelve-year-old schoolgirl, of Squizzy Taylor and
his criminal world, and of Ronald Ryan over the shooting of a prison warder. But the Supreme Court has also always been at the forefront of what was occurring in the local economy.

During the 1830s, the economy of Port Phillip had been buoyed by a land rush, commercial enterprise and speculation. In the early 1840s, as depression set in, ‘lines of credit, stretching from banks or merchants to other businessmen and settlers and supported by wide use of bills of exchange, often with multiple endorsements, predictably crumbled.’

By the 1880s and 1890s there was considerable litigation and numerous prosecutions driven by the boom and bust economy that saw ‘the rise and fall of Marvellous Melbourne’. Historian Graeme Davison noted that, by the early 1880s, ‘Melbourne was leaving its trading and primitive industrial stages behind and gradually acquiring the broader functions of a fully fledged metropolis’. Between 1881 and 1891, the population increased from 268,000 to 473,000. By the late 1880s, the crashes and the depression had truly arrived. The impact of this period on the law was significant. As Davison recounts:

The bulk of legal work during the boom consisted of routine solicitors’ transactions such as conveyances, contracts, deeds and wills. But in the early 1890s, as contract-making gave way to contract-breaking and the courts thronged with litigants, the bar began to claim the lion’s share of work and public attention.

Then there were the building society scandals. One speculator, John Bellin, had accumulated more than £70,000 in personal debts by mid-1890, most of which had been incurred in buying land in Melbourne. Out of desperation to deal with a severe crisis with his creditors, Bellin, a director of building societies, misappropriated thousands of pounds from clients. He was subjected to criminal charges. His defence counsel was a barrister, Dr Madden (later a chief justice of Victoria). Hartley Williams, justice of the Supreme Court, took a stern view of the case. He said, ‘It is unfortunately now public knowledge that crimes of this description have of late been committed by men holding high positions of trust with alarming frequency.’ The judge went on: ‘Many blameless, honest and industrious persons have been ruined or have lost the result of years of toil by your criminal appropriations.’
As the crisis increased in the 1890s, the Supreme Court was, in one sense, in the thick of it. The liquidators of all the failed companies and building societies were extremely active and must have occupied much commercial litigation time in the Supreme Court, with applications to wind up companies and seek various types of corporate relief. With each fresh collapse, the Supreme Court was called to step into the fray. Michael Cannon describes how public disquiet multiplied with the suspension of the Commercial Bank in April 1893, following heavy withdrawals and a slump in the value of the bank’s shares. An urgent application was brought in to the Supreme Court involving a reconstruction scheme for the bank, which was approved by the then Chief Justice Madden. Three weeks later, on the weekend of 29–30 April, the National Bank informed the premier that it intended to suspend business on the Monday. On Sunday 30 April, a proclamation was quickly prepared and rushed for the signature of the then acting governor, Chief Justice Madden.

When dealing with criminal prosecutions relating to the collapses, the Supreme Court judges were not reticent in expressing their views. Court proceedings to remove the liquidator of a bank amidst allegations of misconduct saw an attempted defence of the transactions on the basis that no profits were made by the directors and that they had come out of the transactions badly. The trial judge, Mr Justice Holroyd, said: ‘The mischief of it is that the people whose money they took came out of it worse. They speculated with other people’s money, and caused an enormous amount of misery. That is the real truth of it’.

Another impugned speculator was Matthias Larkin. He built a lavish house in Canterbury Road, Albert Park, which he called ‘Lake View’ because Albert Park Lake could be seen from the upper level. He engaged in a series of frauds on clients who used his estate agency and made attempts to save the monies and avoid the consequences of the insolvency court by transferring assets. He was convicted of fraud charges and sentenced to six years’ gaol with hard labour. Later, further charges of embezzlement were laid against him and he was given an extra five-year sentence, that is, a total of eleven years’ imprisonment with hard labour. The chief justice said, ‘In the evil history of an evil time, your name and conduct stand as a monument of woe to multitudes of people’.
Another celebrated banking scandal case was the Anglo-Australian Bank collapse. All the bank's directors and chief officers were involved and charged with various counts, including issuing a false report and balance sheet with intent to defraud. Mr Justice Hood sentenced Charles Staples, the key player, to the maximum of five years' imprisonment, adding that he would have increased the sentence if parliament had made the offence a felony instead of a misdemeanour.

Insolvency and financial collapse continued to dominate Supreme Court business for decades after, through the 1930s, the 1960s and in the myriad of cases in the 1990s, such as *Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd*, the Christopher Skase and Qintex litigation, the case against Alan Bond for corporate fraud, and the extensive litigation around the collapse of the Estate Mortgage Trusts. The Supreme Court in each case stepped forward to preside over and answer the financial questions of the day.

Throughout this time, while the Court was performing its work and responding to the community's needs, it was also on a journey from colonial control and dependence to self-governance. This journey was a far less active one, slowed by tensions over administration that harked back to the earliest days of Melbourne's settlement. As this history is less well known and is fundamental to the Court as an institution, it is important to record it on this anniversary.

**Melbourne, the Port Phillip District and British Law**

In 1788, on January 26, a new colony was established: the Colony of New South Wales under the governorship of Governor Arthur Phillip. The colony was a prison ruled by the governor under fear of the New South Wales Naval Corps and the lash. Appointed in 1823, the Supreme Court of New South Wales exercised superior jurisdiction over New South Wales itself as well as other areas that soon fell within its shifting boundaries. These included the land to the south that came to be known as the Port Phillip District.

Significantly, Melbourne was not founded as a penal colony or prison, nor was it founded by 'government-sanctioned settlement parties' sent from afar. The Bass Strait region was first colonised by the British in 1798, a decade after the colony of New South Wales was established but some five years before the official settlement of Van Diemen's Land. During this time, sealers and whalers hunted in Bass Strait and along the coastline of what would later become the Port Phillip District. It
was necessary to bring the rule of law to counter the lawlessness in the area that included, tragically, attacks on the Indigenous people and the abduction of Indigenous women.\textsuperscript{22} Indeed, one of the reasons for the official colonisation of Van Diemen’s Land was to exercise authority over the activities of the sealers and whalers in Bass Strait.\textsuperscript{23} But it was not for over thirty years, until 1835, that the ‘village’ of Melbourne really began. As John Pascoe Fawkner put it, it was ‘a land flowing with milk and honey’.\textsuperscript{24} Melbourne provided a ‘benign and familiar environment’ that could be easily farmed and easily traversed.\textsuperscript{25}

The growth of the village and expansion of the new settlement as a whole generated an urgent need to establish law and order. Captain William Lonsdale was appointed to take charge of the settlement around Port Phillip in September 1836.\textsuperscript{26} Lonsdale was appointed as police magistrate. As former Judge Paul Mullaly explains, ‘Lonsdale was given instructions which made it clear that the laws of England applied to both the colonists and the local indigenous people’.\textsuperscript{27} At the start, justice in the colony of Port Phillip was administered in a tent and then in a wattle bark hut. It was all quite primitive, with minimal administration. The police magistrate and the later subordinate magistrates administered the rule of law. For the most part they were concerned with criminal matters. In 1839, Charles La Trobe was appointed superintendent and given the powers of a lieutenant-governor, subordinate to the governor of New South Wales.

As the town and its surrounds grew and flourished, civil, commercial and admiralty disputes inevitably broke out among the residents. It was necessary then for the rule of law to be brought to the colony to decide civil disputes between citizens. As Paul Mullaly has written, the ‘leading inhabitants of Port Phillip petitioned New South Wales Governor Gipps in May 1841 for the appointment of a Resident Judge and the establishment of a Supreme Court with civil, criminal and admiralty jurisdiction’.\textsuperscript{28} Without a resident judge, it was necessary for the residents of Port Phillip to take their civil disputes to Sydney. It was not until 1836 that John Walpole Willis, having been removed as a puisne judge of the province of Upper Canada, accepted an invitation from the Colonial Office to transfer to the Australian colony of New South Wales Governor Gipps in May 1841 for the appointment of a Resident Judge and the establishment of a Supreme Court with civil, criminal and admiralty jurisdiction.\textsuperscript{29} Without a resident judge, it was necessary for the residents of Port Phillip to take their civil disputes to Sydney.

It was not until 1836 that John Walpole Willis, having been removed as a puisne judge of the province of Upper Canada, accepted an invitation from the Colonial Office to transfer to the Australian colony of New South Wales as an associate justice of its Supreme Court. Willis was appointed by Governor Gipps to become the new resident judge in Port Phillip in 1841. Upon the decision being made, arrangements were to be
set in train for the construction of a new courthouse (previously a store). The building, on the south-western corner of Bourke and King streets, was upon its completion a matter of interest in the flourishing colony. A contemporary illustration suggests it was a modest structure, as was the case with most buildings constructed in Melbourne at that time.

Justice Willis’s arrival in developing colonial Melbourne was recounted by John Leonard Forde in his work, *The Story of the Bar in Victoria*: ‘From the moment of Mr Willis’ arrival in Melbourne till his departure from the shores of Port Phillip, he was continually before the small public of the settlement in some extraordinary way, now provoking amusement and surprise, and again exciting shame and resentment.’

Justice Willis’s eccentricities were evident in several aspects of his courtroom behaviour. In the tradition of British judges of assize, Justice Willis provided regular addresses to juries prior to the commencement of criminal trials. However, unlike the British judges, Justice Willis ‘never confined his observations to the state of the calendar [the law list]’; rather, in Mullaly’s words, his addresses touched on a vast range of matters including the (dismal) state of the economy:

> the Moral sin of gambling, the Evils of drinking, the Virtues of piety and good living, the Necessity and value of religion, Prudence in business affairs, the Wickedness of the authorities in allowing convicts and ticket-of-leave men to come to Port Phillip and the inadequacy of the Supreme Court building.

After delivering these addresses, Willis’s ‘practice [was] to give the manuscript … to the newspaper to be … published after the sitting; in order to ‘ensure that the colonial authorities would become aware of his concerns.’

And so it was that Justice Willis sat. He did not last very long. As Canadian historian John McLaren describes matters:

> In the new location, Willis’s increasingly choleric disposition, his antipathy to those in authority and the gentlemanly elite of the district, his perceived partiality in cases argued before him, and continued sniping at his colleagues in Sydney so severely tried [Governor Gipps’] patience that he gave the judge his marching orders in June 1843.
The arrival, then precipitate departure, of Willis illustrated the challenges for the Colonial Office in administering the colonies.

**The Colonial Office and the Rule of Law**

It is worth now turning to set out the colonial, administrative and environmental context that acted as a backdrop to these early years of the court in Victoria. As, McLaren has noted:

> To understand the histories of judicial tenure and accountability in the British Empire in the 19th Century, it is important to have a sense of not only the struggle for judicial independence in England itself before 1701, but also of the status and exercise of control over colonial judges in the pre-1800 empire.  

The development of the empire was not systematic. Colonies were established by commercial charters, by proprietary grants by the Royal Prerogative, and by religious covenant. The settlers of the colony took with them English law, but substantial discretion remained vested in local officials to construct justice systems appropriate to colonial conditions: ‘[b]ecause of distance, and political and constitutional turmoil in England itself, Imperial control was oft en weak, providing leeway to colonists to experiment’.  

In 1801, British responsibility for the colonies was transferred to the new secretary of state for war and the colonies. Henceforth, the Colonial Office exercised primary authority over the running of the empire. Things really took shape upon the appointment of James Stephen Jr as legal counsel to the Office for War and the Colonies in 1814, a position he held until 1836 when he became permanent under secretary. He was a dominant figure in the moulding of policies and administrative character for the colonies for the better part of 35 years. The Colonial Office became the effective body for making judicial appointments to the colony, vetting judicial performance, and administering judicial discipline, including exercising the power of removal.

It fell to the Colonial Office to arrange not only the appointments but also the physical environment in which the judges would sit and administer British justice to the colonies. Further, importantly, the Office was also responsible for judicial salaries and pensions. In 1825, the salaries and pensions were established in a scheme. The English judges were quite well paid; a puisne judge was paid £5,500. Court fees were paid to consolidated revenue to help cover the costs of running the
However, outside England there was great disparity in judicial salaries across the colonies. The first chief justice of New South Wales, Francis Forbes, received a salary of just £2,000 in 1822. Perhaps unsurprisingly, as McLaren observes, there were ‘frequent complaints from colonial judges about arrears in their salaries and the stinginess of the colonial authorities in approving expenses’. There were also physical problems:

These included inadequate court facilities (including the judge’s residence and the theatre) and domestic accommodation (draughty and leaky residences), diseases (a particular problem in colonies in the tropics), the rigors and privations of life on circuit (in territory ranging from desert, through jungle, to mountainous terrain and sub-zero temperatures in ice and snow), social ostracism if one fell out with the politically powerful or vocal and what must have seemed to some a cultural wasteland (a concern for those who pined for the glittering life of London, Dublin, or Edinburgh).

Creation of the Supreme Court of Victoria

On 5 August 1850 the Imperial Parliament at Westminster passed An Act for the better Government of Her Majesty’s Australian Colonies (‘the 1850 Act’). This Act provided for the creation of the Colony of Victoria and authorised Queen Victoria to establish, by letters patent, the Supreme Court of the Colony of Victoria. Section 28 read:

Be it enacted, That it shall be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, to erect and appoint a Court of Judicature in the said Colony of Victoria, which shall be styled “The Supreme Court of the Colony of Victoria;” and such Court shall be holden by One or more Judge or Judges, and shall have such ministerial and other Officers as shall be necessary for the Administration of Justice in the said Court, and for the Execution of the Judgments, Decrees, Orders and Process thereof.

Section 28 went on to devolve the authorities, powers and jurisdiction of the Supreme Court of New South Wales to the Supreme Court of Victoria once the latter was established. The Port Phillip District duly separated from New South Wales and became the Colony of Victoria on 1 July 1851.
Although the 1850 Act foreshadowed the creation of the Supreme Court of Victoria by letters patent, the Court was not established in that manner. Rather, it was established by a Victorian Act exercising power under section 29 of the 1850 Act. In 1852 the Legislative Council of Victoria passed *An Act to Make Provision for the better Administration of Justice in the Colony of Victoria* (the ‘1852 Act’). Section 1 of that Act noted that no letters patent had been received and that the exigencies of the Colony of Victoria ‘rendered it necessary to make provision for the better administration of Justice therein’. So, not waiting for the crown to act, the Victorian Legislative Council took the initiative, and section 2 of the 1852 Act then established the Supreme Court of the Colony of Victoria.

Section 3 provided that the Supreme Court would ‘consist of and be holden by and before a Judge or Judges not exceeding three in number’, and then set out qualification requirements for the judges. Judges were to be appointed by letters patent, or by the lieutenant-governor of Victoria until ‘the pleasure of Her Majesty be known’.

Under section 4, one of the judges was to be styled ‘The Chief Justice of the Supreme Court of the Colony of Victoria’, who would ‘have rank and precedence above and before all persons whomsoever in the said Colony of Victoria excepting the Governor and Lieutenant Governor thereof and except all such persons as by law or usage take place in England before the Lord Chief Justice of the Court of Queen’s Bench’.

Lieutenant-Governor Charles La Trobe appointed two judges to the Supreme Court: Justice William a’Beckett as chief justice and Mr Redmond Barry as puisne judge. Their salaries were included in the civil list. Justice Barry had previously been the solicitor-general of Victoria and a nominee member of the Legislative Council, while Chief Justice a’Beckett was previously the resident judge of the Supreme Court of New South Wales for the District of Port Phillip.

Before moving to Melbourne, a’Beckett was an acting judge on the New South Wales Supreme Court. He moved down to Port Phillip and was confirmed as permanent resident judge in 1846. And so began his battles with officialdom. The government demanded the return of £100 it had advanced towards a’Beckett’s removal expenses, making him the first resident judge who had to pay his own way to get to Melbourne. This just added to his frustration after he had to sell items of furniture
to reduce the voyage cost to Melbourne. The Colonial Office refused to
budge, and a’Beckett paid back the £100.

So it was that the Supreme Court of the Colony of Victoria, with
its two judges, was created.

**Administration in the Early Days: Creation to 1890**

The 1852 Act establishing the Supreme Court was the product of a
report commissioned by Lieutenant-Governor La Trobe and prepared
by Redmond Barry as solicitor-general and William Stawell as attorney-
general, regarding the administration of justice at ‘separation’.48 The 1852
Act established the Supreme Court according to Barry and Stawell’s
vision.49

Professor Ian Scott notes that:

> It is obvious that the intention was that the Supreme Court of Victoria
> should be a colonial version of the English central royal courts and
> that its position in the overall constitutional arrangements should be
> similar to that of the royal courts in Britain. The Supreme Court was
> not created in a vacuum. It was the product and beneficiary of several
> hundreds of years of English constitutional history. In the minds of
> colonial lawyers and judges constitutional convention filled what the
> legislation left out.50

The establishing act also gave the Supreme Court wide rule-making
powers under section 32. Essentially, the 1852 Act did not deal with the
financing, staffing or administration of the Supreme Court. Much of the
Court’s administration was left to the rules of Court, made pursuant
to section 32. Financing and staffing were principally left to the crown
and prerogative power.51 A dependence on the executive was born.
Before the coming of responsible government, several royal officers,
including the governor, chief justice, chief secretary, crown solicitor
and attorney-general, were to an extent involved in the administration
of justice and the courts.52

**1855 and the Coming of Responsible Government**

In 1855, Victoria was granted Westminster-style responsible government
by the passing in Britain of *An Act to Establish a Constitution in and for
the Colony of Victoria* (‘the Victorian Constitution of 1855’). Victoria’s
lieutenant-governor became the governor of Victoria, and a second
house of parliament was created.
Scott notes that the Victorian Constitution of 1855 did not suggest ‘that any member of the government was responsible to the legislature for the administration of the Supreme Court’. This mirrored the substantive position in England, where the administration of the courts was left to the courts, and the executive had very little responsibility for or control over administration. This meant there was an uncertain relationship between the executive and the Supreme Court in this period, in part enhanced by the different attitudes of Lieutenant-Governor La Trobe and his successor Lieutenant-Governor Hotham (later Governor Hotham) towards the Court.

La Trobe was not one to keep a firm hand on the arms of government. He was ‘suspect of being rather pliant and indecisive’, and ‘gave little sense of leadership’. His intervention in the Court administration was likely minimal. In June 1854, Charles Hotham took the reins and was alarmed at his inheritance: a colony facing ruin.

With a ‘domineering leadership’ style, Hotham proceeded to take a firmer grip on government. Historian Geoffrey Serle says Governor Hotham attempted to govern personally and without assistance from his own officers, which led to overwork, exhaustion and his ultimate demise. He was reportedly ‘obstinate and secretive with his councillors and … [was] unwilling to delegate matters to his officials’. However, it was under this style of leadership that responsible government came to Victoria. After reviewing the financial state of the colony as left by La Trobe, Hotham ‘introduced reform of government finance’ and exercised strict scrutiny over appeals for funding.

Redmond Barry’s experience, when he unsuccessfully sought funding for a librarian for the Supreme Court library, seems symptomatic of this. Redmond Barry was the acting chief justice in 1853 and 1854 and was friends with Hotham’s predecessor, Charles La Trobe, who had resigned to return to England. Like Hotham, Redmond Barry was said to demonstrate a ‘controlling nature’ and a ‘proclivity for autonomous actions’. Perhaps unsurprisingly, he was prepared to ask the executive to meet court needs. In 1854 he wrote to the colonial secretary, asking him to inform then Lieutenant-Governor La Trobe of the Court’s urgent and pressing need for increased office accommodation and staff. His repeated requests for the government to supply the Court with textbooks were consistently refused.
Redmond Barry was subject, too, to the intervention of Attorney-General Sir William Stawell. Stawell, with Barry, had been one of the architects of the Supreme Court system and played a leading part in preparing legislation and in appearing in court in proceedings involving crown interests. He took responsibility for even small matters of court administration.

Ironically, perhaps because Stawell played a leading role in the administration of the court system while attorney-general, he found it difficult to allow a new attorney-general to have the same involvement after he became chief justice in 1857. Matters of court administration, which Stawell had previously managed personally as attorney-general, he then left to Redmond Barry, a member of the Court. Barry took care of the routine running of the Court system so far as it affected the judges. He was also constantly seeking the government’s attention to deficient court buildings. Barry and Stawell frequently discussed the circuit system and the possibility of saving money by discontinuing some circuits. Barry also dealt with the attorney-general in relation to legal education, judicial pensions and the Supreme Court Rules.

A tension emerged between the desire to bring all government machinery within the clutches of responsible government, and the lack of any formal appointment of a minister responsible to parliament for the administration of the Supreme Court. As a result, the relationship between the attorney-general and the judges of the Supreme Court was an uneasy one almost from its beginning. This was not made easier by the constant turnover in government ministries; for example, between 1868 and 1874, there were eight attorneys-general.

The uneasiness is illustrated by a seemingly innocuous letter. On 4 January 1864 Justice Barry wrote directly to Governor Charles Darling to inform him that he was taking a holiday. This sparked a constitutional crisis.

Attorney-General George Higinbotham (who later became chief justice) wrote to the governor in disapproval of a judge communicating directly with the governor. The attorney-general referred to judges as ‘officers of his department’ and, in order for judges to remain within the system of responsible government, required that they communicate through the attorney-general. The governor in council then resolved that the correct procedure was for judges to address communications to the attorney-general when wishing to bring any matter to the attention of the
governor, government or executive council. This incident demonstrates that in their first clash, Westminster responsible government prevailed over judicial independence.69

In a transformation a little like Sir William Stawell’s, Higinbotham, after becoming chief justice, recanted on his view that Supreme Court judges were officers of the attorney-general’s department, but the legislature was more steadfast.70

**The Politics of the New Law Courts: 1860s and 1870s**

As the government’s coffers started to fill with goldrush money and Victoria was transformed ‘from a minor pastoral settlement to the most celebrated British colony’, demands for improvements to the Supreme Court or for a new court altogether were irresistible.71

In 1863 a parliamentary select committee was established to report on the state of the existing Supreme Court near the corner of La Trobe and Russell streets. At that time the existing Court was unable to accommodate various court officers, who instead worked from rented premises external to the Court. The judges were invited to comment on the adequacy and convenience of the existing court buildings. Only Stawell and Barry acted on the invitation. Neither supported moving the Court. It was Redmond Barry’s preference that new accommodation to be added to the existing court buildings.

Throughout the 1860s Barry campaigned accordingly, requesting improvements to the existing court rather than the construction of a new court. He did, however, express a preference for location in the event that the Court was moved. His view was to prove prescient.

In 1870, against the opinion of the judges, the select committee decided to move the Supreme Court to William Street, where it now sits. By this time, the western end of Melbourne had become the city’s business hub, owing in part to its proximity to the railway and the wharves. The 210 William Street locale was originally intended for the Victorian parliament, so it is fitting that the third arm of government was moved to such a site. The chosen site was the site Redmond Barry had preferred if the court had to relocate.

Following the decision to build a new court, a royal commission was established to suggest, consider and select the plans for the new law courts. The commission comprised the Supreme Court judges, the attorney-general, the solicitor-general, some parliamentarians, and others. As was the case with many other public buildings in Victoria a
public competition for the design of the new law courts was held, based on the brief from the royal commission. The new law courts, which also housed the County Court, were completed in 1884.

The Judicature Act 1883 (Vic)

Several Acts passed in the second half of the nineteenth century increased the judges’ power to regulate the operations of the Court, first among them the *Judicature Act 1883* (Vic.) (‘the 1883 Act’).

The 1883 Act contained a schedule of ‘Rules of Court’ that came into operation on the commencement of the Act. Section 34 of the Act conferred rule-making power on the judges in the following terms:

> From and after the passing of this Act, the Court may at any time, with the concurrence of a majority of the Judges thereof present at any meeting for that purpose held, alter and annul any Rules of Court for the time being in force, and make any further or additional Rules of Court for carrying this Act into effect.72

In terms of administration, the most significant contribution of the 1883 Act was the creation of the Council of Judges. Section 54 said:

> A Council of the Judges of the Court, of which due notice shall be given to all the said Judges, shall assemble once at least in every year, on such day or days as shall be fixed by the Chief Justice, for the purpose of considering the operation of this Act and of the Rules of Court for the time being in force … Any Extraordinary Council of the said Judges may also at any time be convened by the Chief Justice.73

The Council of Judges continues to meet in accordance with its statutory obligations. The Council of Judges remains the collegiate forum at which the policy-making administrative powers of the judges are exercised or delegated. The chief justice still chairs the meetings at which the business of the Court is attended to and policy decisions are made as they were over 130 years ago. These days the agendas are substantial. The Council of Judges meets quarterly or more frequently as necessary.

In the tradition of this institution, the chief justice of the Supreme Court is one among equals. The authority of the court and the power of controlling its affairs belong to all the judges collectively.74 When not performing judicial duties, single judges revert to being a member of a court that consists of all the judges, and, unless expressly delegated to
a particular judge or committee of judges, administrative powers and court governance remain with the judges as a whole.75

**The Supreme Court Act 1890 (Vic)**
The *Supreme Court Act 1890* (Vic) (‘the 1890 Act’) did not materially alter the administration of the Supreme Court. Rather, it was an Act to consolidate the law relating to the Supreme Court.

By section 10 of the 1890 Act, the number of judges of the Supreme Court was increased to six. The civil list (the grant for the expenses of government) did not include the additional salaries needed. The balance was guaranteed by section 15 of the 1890 Act, which appropriated any shortfall from the consolidated revenue of Victoria.

To this day, the special appropriations component of the state budget meets the cost of judges, that is, judicial salaries. The ongoing costs of the Court are met through recurrent appropriations.

**Public Service Legislation in 1883**
In 1883, the Victorian public service was overhauled, when the number of departments was reduced from the nearly 80 that had existed in 1886 to just twelve. There was a minister responsible for each. At this point, the attorney-general became responsible for the Law Department. The administration of the courts thereafter became a matter for the Courts Branch of the Law Department, which was to develop into a mega department.76

This was the real transition away from autonomy to the executive model of court administration, a model that persisted in Victoria until 30 June 2014, and a model that the executive inaccurately understood to be the ‘traditional model’.77

**Conclusions on the Early Days of the Court**
Reflecting on the Court’s administration in this period, and in particular the Supreme Court’s rule-making powers, as consolidated by the 1890 Act, Professor Scott suggests that:

> it is difficult to avoid drawing the conclusion that the judges were the persons upon whom responsibility fell for seeing that the Court was efficiently and effectively organised and that it was they who had the power to direct non-judicial staff and, through the use of the rule-making power, the authority to make such changes to the organisation and administration of the Court as they thought necessary from time
to time. Where legislative changes were required they had the power to draw this to the attention of the Governor.78

In effect, the judges were ‘collectively the permanent heads of the Supreme Court department of government’.79 The judges had power to make rules in relation to the functions of the few administrative officers attached to the Court and, in that way, could control them.80 The English legislation on court officers inspired the Victorian provisions.81

The Council of Judges in this period was empowered to consider the working of the several offices and the arrangements relative to the duties of the officers of the Supreme Court, but, critically, Professor Scott says the ‘judges rarely took seriously the invitation’ to do so, and this might have been because they thought such matters were properly the responsibility of the attorney-general and his department.82 As such, the Council of Judges did not play its intended role.

The vigorous pursuit of responsible government and the consolidation in government administration then resulted in responsibility for the administration of the courts being assumed by the Courts Branch of the Law Department, for which the attorney-general was responsible to parliament. The Supreme Court may have had strong rule-making powers and the ability to direct non-judicial staff, but it had to rely on the executive for crucial elements such as finance and staffing.83

100 Years’ Vacuum: 1883 to 1983
The legislation in respect of the Supreme Court was consolidated in 1890; however, the administration of the Supreme Court did not materially change during the century following the 1883 Act.

At the close of the nineteenth century, from 1897 to 1899, there was a ‘Royal Commission for Inquiring as to the Means of Avoiding Unnecessary Delay and Expense and of Making Improvements in the Administration of Justice in Victoria’. The royal commission’s report dealt mainly with procedural matters and only indirectly touched on court administration.84

The administration of the Supreme Court did not develop over the years according to any logical process. Sir John Young, chief justice of Victoria from 1974 to 1991, explained the haphazard development in the following terms:
Measures were taken from time to time to meet what were perceived to be some pressing needs but, on the whole, things just drifted along. One of the reasons for that was that hitherto judges have taken no interest in the administration of the courts and indeed they have, in the past, generally regarded it as being rather beneath them.85

In his article, ‘The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence’, Justice Richard McGarvie likened the judges of this period to a ‘certain king of France’, who roasted away in front of a fire because he did not deign to move his seat, a task that belonged to an absent functionary.86

Chief Justice Young said the judges in this period put themselves in the hands of the executive, and this created a vacuum in court administration. During this period, he said, the attitude was that ‘the public service, the executive branch, should provide what the courts needed to enable them to decide cases’.87 It was for the judges ‘to ask for what they wanted’, as they best knew what the courts needed, and it was considered that the judges were ‘entitled to be very cross’ if their requests were not met promptly.88 However, the judges were ‘very modest in their demands’.89

The position boiled down to this: the department thought it unnecessary to do anything unless asked, and the judges asked for little, so little was done. This produced a significant vacuum in Supreme Court administration.

There are several reasons why the judiciary did not step in and assume some responsibility for administration:

- The relationship between the attorney-general and the administration of the Supreme Court was unclear;
- There was general resistance to change;
- Many judges were not interested in court administration. They thought it beneath them and a waste of judicial time;
- Some judges believed that being involved in administrative matters threatened their judicial independence and impartiality;
- In common law jurisdictions, it has generally been assumed that a strict distinction can be drawn between judicial functions and non-judicial functions.90 This was a significant hurdle to new thinking on court administration;
Some judges thought that because they were not trained as administrators, they would be ineffective in administering the court;

Judges and lawyers tended to think that legislation, rules of court and rules of practice took care of the planning and organisation required in the Supreme Court, and no further attention was needed.\(^{91}\)

However, there were some developments during this period that are worth noting here.

In 1968 the Supreme Court joined the County Court and Magistrates’ Court in being administered by the Courts Administration Division of the Attorney-General’s Department.\(^{92}\) This then turned into the Courts Management Division of the Law Department. Before 1968, the Supreme Court was administered through the attorney-general’s head office.\(^{93}\) The Attorney-General’s Department had a permanent secretary at its head, and a deputy secretary who was responsible for the Courts Management Division. The Courts Management Division depended on other divisions of the department for support.

In this period the Supreme Court judges forgot and neglected the common law principle that the judges collectively are responsible for the administration and operation of the court.\(^{94}\) The judicial arm of government ‘failed to organise itself and failed to assert itself in the manner necessary for the preservation of judicial independence in the modern democratic world’.\(^{95}\) Owing to the political necessity of having operational courts, the executive stepped in and assumed the relevant responsibilities.\(^{96}\)

In 1985 Chief Justice Young said it was time to fill the vacuum that was created between 1883 and 1983. In the 1980s, that is precisely what the executive and the judiciary in partnership set out to achieve.

**A Decade Of Discussion, Partnership and Experimentation**

A starting point for the increase in momentum for judicial court administration was the Coombs Report of 1976. The Coombs Report was the product of the Royal Commission on Australian Government Administration. Commissioner Professor Enid Campbell said:

> It does not appear compatible with the constitutional status and responsibilities of the courts that they should be beholden in any way for their administrative support and servicing on a department
of the executive branch, and especially a department whose minister happens to represent the Crown as litigant, and which is the general legal services department for the executive branch as a whole.97

The major push for judicial court administration came in the 1980s. The Australian Institute of Judicial Administration (AIJA) became active in about 1982, and this gave occasion for several influential judges to speak on the topic of judicial independence and judicial court administration.98

Alongside this more complete understanding of judicial independence was a growing interest in the explosion of litigation in the 1980s. This explosion put pressure on the courts and court systems. As a result, politicians and the executive started to put even more pressure on the courts and judicial officers to be efficient, to increase ‘productivity’, and to justify requests for extra funds and staff. This is in contrast to the previous situation, where, if there were unacceptable delays in dealing with cases, the executive was expected to appoint more judges and support staff to fix the situation.99

In this era before case management hit Australian courts, courts had a laissez-faire approach to conducting their business.100 They would only start to act once the parties to litigation indicated they were ready. The court relied on the parties’ lawyers to ensure the case was disposed of as expeditiously as possible.

The introduction of case management meant the courts started to become more involved in management activity. To do this, judges needed the help of non-judicial court staff. The philosophy of case management involved the rejection of the traditional separation of the roles of judge and administrator. The judge was no longer seen as a passive referee. Case management brought the judiciary into administrative territory.101

1984: Civil Justice Committee Report

In December 1983, the Victorian government established a Courts Administration Division as a separate division of the Law Department with a new deputy secretary for courts. The top end of the Courts Administration Division was reorganised.

The most significant development since the 1883 Act was the Civil Justice Committee’s Report to the Attorney-General Concerning the Administration of Civil Justice in Victoria (‘the Report’), published in September 1984.102 The Civil Justice Committee was formed following
a preliminary study prepared by Professor Ian Scott for the Victoria Law Foundation. The preliminary report suggested that a number of matters needed further investigation. The Civil Justice Committee was established as a joint Law Department/Victoria Law Foundation project.

The Civil Justice Committee’s report recommended that the courts be administered by a partnership of the judiciary and the executive. The committee was chaired by Chief Justice Young. Also on the committee were Chief Judge Waldron of the County Court, the acting secretary to the Law Department, a barrister, a solicitor, and two non-lawyers experienced in management and administration theory.

The Report did not directly deal with the question of who should run the courts, as it considered that administration required a partnership between the judiciary and the executive. This makes sense in the context of the 1980s, when the debate was still polarised in terms of responsible government and judicial independence. The judiciary argued that there could be no judicial independence without administrative independence, and the executive argued there could be no accountability or responsible government with administrative independence. There appeared to be no middle ground.

Accordingly, the Report focused on how to improve the partnership between judiciary and executive. The partnership model was a mechanism of experimentation, with the finer details to be worked out progressively.

The committee recommended that the division of responsibility between the Council of Judges and the Courts Administration Division of the department be better defined to ensure judicial control of staff, case management and court records. Its major recommendations in respect of the Supreme Court concerned the Council of Judges, a new Executive Committee, the prothonotary, a new chief executive Officer, and a new Courts Advisory Council.

Following the recommendations in the Report, the role of the Council of Judges was strengthened. The Report recommended the Council have primary responsibility for the operation and conduct of the Court. The Council started to meet more frequently, and, from 1983, it held the view that the Council of Judges was the ultimate authority responsible for the Supreme Court’s administration and operation.

This strengthening of the role of the Council of Judges required the judges to accept responsibility for the operation of their courts.
It required the judges to accept that, aside from hearing cases, they must also spend time on the responsibilities for the administration and operation of the court. The Report said the judiciary should be responsible for case management, listing, rules, and other matters intimately connected with the litigation process.

The Report also recommended that there be an Executive Committee in addition to the Supreme Court’s Council of Judges. An Executive Committee was then established in 1985, comprising the chief justice and six other Supreme Court judges, each serving for three-year periods. The Executive Committee met weekly, and its decisions were usually affirmed at the monthly meetings of the Council of Judges. Minutes of meetings were circulated to all the judges of the Supreme Court. Each puisne judge on the Executive Committee was assigned a portfolio. Initially, the six portfolios were: Judicial Administration; Staff, Buildings and Facilities; Legislation and Rules; Planning and Development; Court Records; and Computers. The Executive Committee decided on the implementation of Council decisions and made decisions on day-to-day administration matters.

Under the partnership model, the executive was to have responsibility for budget, staffing and accommodation. However, this did not fall to the Courts Administration Division of the Law Department. Rather, the budgeting, financial management, IT systems, HR and personnel functions were handled by a separate section that provided management services to the entire department.

The budget was determined by the department on a department-wide basis. The basic operating funds for each government department were founded largely on a non-negotiable formula (last year’s budget less a productivity bonus—representing the saving of costs by virtue of an expected increase in efficiency—plus an adjustment for inflationary changes). Then there was an off-budget competition process where government units fought for items on their wish list. The Attorney-General’s Department would rank court-related budget proposals against each other, and then against other areas of department responsibility. Judicial participation in this process was limited. Many judges were not interested in budget matters, some because they thought budgetary issues were not related to judicial tasks, and others because they thought judicial input was ignored in any case.
The incumbent attorney-general at the time of the 1984 Report, Mr Jim Kennan, had suggested a Courts Commission, but the Civil Justice Committee ultimately postponed consideration of such a structure. Under Attorney-General Kennan’s proposal, the Courts Commission would have had representatives from the judiciary, the profession and the department, and would have been responsible for the administration of all courts in the judicial hierarchy. The Civil Justice Committee opted for the stepping stone solution of a partnership. It said that if its recommendations proved ineffective, a Courts Commission could still be considered.

I note that Justice McGarvie played an important role in the recasting of the administrative structure for the Supreme Court. In a now public letter to the chief justice, Justice McGarvie was trenchantly critical of the way Chief Justice Young administered the Supreme Court. He called for reform but in doing so attacked the chief justice personally. This has been discussed by Justice Ken Marks in his autobiography. Marks described a letter sent by Justice McGarvie to then Chief Justice Young as being very provocative. I am told by surviving judges from the time that the letter of Justice McGarvie shocked many of the judges, who were dismayed by the disrespect and discourtesy shown to the chief justice, albeit some actually agreed with the substance of the letter. At the end of the day it really does not matter save to note that at the time the letter was deeply divisive.

It certainly led to change; however, what is not entirely clear is whether that letter was the sole impetus. There were indications, as previously noted, that Chief Justice Young was already working with the Victoria Law Foundation, particularly with the assistance of Professor Scott, to achieve a restructure and to garner greater power and authority for the Court itself. Also relevant is the social context to the letter sent by Justice McGarvie to Chief Justice Young. In 1982, John Cain led the state Labor Party to government after many years in opposition. Over its decade in power, the Labor government appointed individual judges who came from backgrounds that were different from those of the judges already appointed. Although he was appointed by a Coalition government, Justice McGarvie was a known associate of the Australian Labor Party prior to his appointment. Justice Nathan was another example, having worked for both Prime Minister Whitlam and then Premier Cain prior to his appointment, latterly as counsel assisting the
attorney-general. The presence of greater diversity in the backgrounds of judges no doubt contributed to a desire by some for change.

Importantly, that change was achieved. By 1991, Justice McGarvie’s view of Chief Justice Young’s work was so altered that he stated ‘Sir John Young has made a greater contribution to his community than any other Chief Justice of Victoria has made in that capacity.’

New Directions—1991 and Beyond
Chief Justice Young, after experiencing serious problems with the partnership model under a government that put pressure on the court to change administration of the court, to reduce staff, and to reduce or redeploy the meagre personal staff of judges, announced a project to look at the feasibility of an independent statutory body tentatively named the Victorian Judicial Council.

In 1991 a Judicial Steering Committee was established. It comprised the chief justice, three Supreme Court judges, three County Court judges, three magistrates, the chairman of the Bar Council, the president of the Law Institute, and the secretary to the Attorney-General’s Department. It was hoped this would lead to a Victorian Judicial Council, which would have virtually the sole responsibility for managing the courts, and would be accountable to the public for the conduct of the judicial system.

The Steering Committee looked at the executive model, the autonomous model and the separate department model. It had its last meeting in May 1992 and was then disbanded. The different tiers of courts could not agree on the appropriate structure. The Supreme Court wanted each of the three tiers of courts to have its own one-line budget administered by its own judges’ council, but the County Court and Magistrates’ Court wanted a single Judicial Council to oversee one common budget and one administrative structure. The Supreme Court judges were worried they could be outnumbered in an overall Council, and that they would lose resources to the other tiers. This was consistent with the Supreme Court’s advice to the Civil Justice Committee in 1984 that the Supreme Court should be the ultimate authority responsible for its own administration. There was a lull in activities for over two years until 1994.

On 12 September 1994, when delivering a lecture at the University of Melbourne entitled ‘The Law, Lawyers and the Courts,’ incumbent attorney-general, Jan Wade, said the existing court management/
administration system was not greatly changed from earlier times, despite significant interest in court governance over the past ten years. She then outlined a new policy of self-governance for Victorian courts. At the end of 1995, the government proposed a new arrangement, under which formal responsibility for court governance would be handed over to the courts.

In a separate discussion paper in 1994 the attorney-general noted ‘[f]ew stakeholders have ever expressed much satisfaction with the Civil Justice Committee partnership proposal as it has worked in practice.’ It was thus acknowledged that it was time for the work done in the 1980s to be progressed to an autonomous model of judicial court administration.

The covering letter to the discussion paper stated directly that the divided management relationship between the executive government and the courts had never been very easy and remained problematic. Attorney-General Wade said that support for the judicial control of court administration had gradually grown due to the need for a responsive and accessible justice system, the view that competing priorities for expenditure of the courts’ budget were best assessed by the courts themselves, and the split accountability of the Supreme Court’s CEO being unsatisfactory to both the courts and the executive.

Ultimately, the efforts of the attorney-general in 1994 and 1995 did not produce the desired reforms. In all likelihood this was due to the retirement of Chief Justice Young, who for years had been the driving force pushing the courts into and the executive out of the administrative vacuum.

Consideration of the attempts made by Chief Justice Young for over a decade to lead not just the Supreme Court but all the Victorian courts to a more acceptable and satisfactory level of independence from the executive emphasises how demanding and difficult the task must have been. This is particularly so in the context of sitting regularly in Court, as the chief justice did, and in overseeing the operation of the Supreme Court. On reflection, it might be said that Chief Justice Young was the father of the reform of court governance in Victoria.

In 2004, the issue of court governance was the subject of renewed agitation when then Attorney-General Rob Hulls and the Department of Justice identified court governance as an issue for attention in the ministerial statement New Directions for the Victorian Justice System 2004–2014. The government’s objective was to map a ten-year plan of
potential developments in the judicial system from an executive point of view.\textsuperscript{118} The judiciary set up a companion project called the Courts Strategic Directions Project.

In 2004 the Victorian courts and the Victorian Civil and Administrative Tribunal (‘VCAT’) published the \textit{Courts Strategic Directions Statement}.\textsuperscript{119} The development of appropriate governance arrangements was the first critical issue identified:

Appropriate governance arrangements are essential to maintain the separation of powers, to protect the independence of judicial officers and their capacity to perform their duties. It is also vital in facilitating the effective co-ordination and administration of the Courts and VCAT and to enhance community confidence in the justice system.\textsuperscript{120}

Thus the first recommendation of the statement was:

Governance should be reviewed to design arrangements suitable for Victoria which strike a proper and practical balance between the need to maximise the independence and operational effectiveness of the Courts and VCAT and the constitutional responsibilities of the Parliament and the Executive, combines authority with responsibility and facilitates appropriate co-ordination and integration within the Judicial branch. To that end, the new Canadian model should be considered.\textsuperscript{121}

The state government failed, however, to enter into enduring discussions about court governance, and the judiciary’s 2004 statement was not actioned.

This may be attributed to a number of factors. First, there was disquiet and dissatisfaction on the part of the attorney-general and the Department of Justice with the views expressed by the Victorian courts as to the current status and operation of court administration under the executive model. Second, also evident was a predisposition to the view that the Victorian courts and tribunal were not capable of self-administering and that the arrangement would most likely lead to lack of reform, inefficiency and over-expenditure. So the statement fell into abeyance.

A further influential report looking at the governance of Australia’s courts from a ‘managerialist’ perspective was published by the AIJA in 2004.\textsuperscript{122} This report advocated a model that combined features of
the South Australian Courts Administration Authority model and the Canadian Courts Administration Service model, ‘vesting accountability for court administration in a chief administrator who is overseen by an entity, in which each of the courts is represented by its CJO [Chief Judicial Officer], which issues collectively determined directives to the CA (Chief Administrator).’

The conclusion of the AIJA report was subject to the qualification that in the larger states, including Victoria, it was recommended that joint control be by two of the three courts rather than all courts.

Administration of the Supreme Court on the Eve of Court Services Victoria

It was not until 2010 that genuine recognition was given to the need to implement some of the proposed changes. In the lead-up to the 2010 state election, the Victorian Coalition announced its policy that, if elected, it would take action on the reports. By this point, the need for change had reached critical heights.

Although, from 1984, the model of court administration in place in Victoria may have been promoted as a partnership model, it really fell within the definition of an executive model. The Supreme Court was described in the state budget as a ‘business unit’ within the department (along with corrections, emergency services, police, consumer affairs and other divisions). It was treated as a ‘unit or functionary within the Department of Justice’, rather than as the third arm of government.

There were very significant and invasive controls. The executive controlled court staff, buildings, IT systems and financial allocations. The judiciary had little or no control over those matters. Court administrative staff members were employees of the Department of Justice. Court officers and staff were employed under the Public Administration Act 2004 (Vic). The secretary of the Department of Justice, as the relevant public service body head, employed the Supreme Court’s CEO. The CEO was accountable to the secretary of the Department of Justice, though by convention the CEO was subject to the direction of the chief justice.

The judiciary had some involvement in court administration, but such involvement was based only in part on legislation, and mostly on convention, cooperative effort and negotiation. For example, the court through the chief justice was responsible for the assignment of judicial workload, the organisation of sittings and lists, the allocation of
courtrooms and the immediate direction of administrative staff carrying out those functions. Further, the courts controlled access to and internal use of the buildings they used. The crown, through the Department of Treasury and Finance, owned the buildings occupied by the Supreme Court. The sites were managed by the Department of Justice on behalf of the crown. The quality of the facilities was subject to the funding decisions and the priorities of the department.

In terms of spending, the executive determined priorities within the court, between the courts, and between the department and courts. When it came to funding, the Supreme Court was put in the position of having to compete with the executive's political priorities.129

The Department of Justice had as its stated vision 'One Justice'. This attitude prevented the department from seeing the courts as the third arm of government. Justice Tim Smith noted that in the proper constitutional framework the only entities with which the courts were in 'partnership' were the executive and Parliament.130

As Justice Smith described it, the executive model produced quite a conundrum. Executive models rely on a cooperative relationship between court personnel and the administering department. But the very model threatened the relationship it relies on. Under the model, the Supreme Court had to decide whether to be 'difficult', or whether to put up with unsatisfactory situations (for example, inadequate data security) in order to maintain the relationship. When the judiciary did decide to be 'difficult', it had to spend time and energy negotiating with the executive. From the department's perspective, judicial officers and court staff raised issues and expected the executive to respond, without knowing how difficult those demands might be to meet.131

**Separation of the Courts**

On 23 November 2010, just four days before the state election, the Victorian Coalition announced that it would establish a new Courts Executive Service, independent of departmental or political control, which would provide the executive support for all Victorian courts and for VCAT; and that it would also transfer the staffing and resources currently in the Courts Division of the Department of Justice to the new Courts Executive Service.

The then Leader of the Opposition Mr Ted Baillieu said: 'Department of Justice officers should not be able to access the email systems and computer files of judges, and court administrative
staff should be appointed by and accountable to the courts, not the Department of Justice and the Attorney-General.\footnote{132}

The reforms were implemented under Act No 1 of 2014, the Court Services Victoria Act (Vic). The reform separated the Victorian courts from the executive arm. An independent statutory authority called Court Services Victoria commenced on 1 July 2014. On the launch of Court Services Victoria, I said:

By 1851, separation [from NSW] was announced and the Colony of Victoria came to be. Bonfires were lit and celebrations were held under the Separation Tree. In 1852 by an Act of the Legislative Council the Supreme Court of Victoria was established. Victorian history was made.

In a sense, we should light bonfires and go to the Separation Tree in the Botanical Gardens and celebrate today.\footnote{133}

Court Services Victoria has been in place now for almost two years. Its transfer of power to the Victorian Courts and judiciary has had seismic effects. The Supreme Court played a leadership role in establishing Court Services Victoria. The Victorian chief justice chairs a council that is constituted by the heads of jurisdiction and lay members whom the council appoints. This system of self-governance by the Victorian courts is a long way from the colonial administration of the nineteenth century and the executive controls of the twentieth century. Through Courts Services Victoria the legacy of Chief Justice Young of court self-governance was fulfilled.

Conclusion
For 175 years, the Supreme Court has been an active and influential part of society. In Port Phillip, and later across all of Victoria, it has been an institutional and social leader. It has dealt with financial insolvencies and collapses as they arose, with serious criminal cases, and it has ensured the protection and safety of the community; it has also provided jurisprudence on human rights (Victoria being the only state of the federation that has introduced a human rights charter); it has imposed and then later opposed capital punishment, led structural reform, and it has overseen the admission of all lawyers in the district and then the state (each year around 1,500 lawyers are admitted to practice in the Supreme Court of Victoria).
The Supreme Court has also, slowly but surely, helped to reframe the governance of all Victorian courts. Internally, it has not always operated smoothly. The relationship between the courts and the executive has been strained as each respectively jostled for autonomy or accountability. The introduction in 2015 of the self-governing model with Courts Services Victoria at its helm has been an historic step toward implementing a clear and effective line of management and in ensuring judicial independence.

Self-evidently, the Supreme Court has been an institution of constitutional and structural influence on the history of the colony and the state, and this will continue into Victoria’s future.

There are three significant landmarks in Melbourne. The tower of Government House representing the executive arm, the dome of the Supreme Court of Victoria representing the judiciary, and Victoria’s Parliament House representing the legislature. These three landmarks are emblematic of the democratic structure of Victoria.

Acknowledgements
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Notes
7 Davison.
8 Davison.
10 Rocke.
11 Rocke.
13 Cannon, p. 140.
14 Cannon, pp. 140–1.
15 Cannon, pp. 76–9.
16 Cannon, p. 79.
17 Cannon, pp. 98–100.
18 (1999) 1 Victorian Reports 188
20 Boyce, p.16.
21 Boyce, p. 9.
22 Boyce, pp. 13–14.
23 Boyce, p. 10.
24 Boyce, p. 85.
25 Boyce.
28 Mullaly, p. 20.
30 Forde, p. 57.
31 Forde. This was not uncommon amongst judges sitting in Melbourne, who often addressed 'problem[s] then facing the local community' in their addresses: Mullaly, p. 108.
32 Mullaly, p. 9, p. 127.
33 Mullaly.
34 McLaren, p. 4.
35 McLaren, p. 10.
38 McLaren, p. 34. It is to be noted that the authority was exercised over the empire with the exception of India.
39 McLaren, pp. 34–35.
40 McLaren, p. 48.
41 McLaren, p. 54.
McLaren.

Australian Constitutions Act 1850 (UK), s 28.

Letters patent are ‘prerogative instruments granting Crown offices or franchises’. See Peter E. Nygh and Peter Butt (eds), Butterworths Australian Legal Dictionary, Sydney, LexisNexis Butterworths, 1997, p. 685.

In Victoria, the position of lieutenant-governor is presently held by the chief justice. Originally, however, the lieutenant-governor was Victoria’s most senior representative of the crown, and sat under the governor of New South Wales, who was at that time known as the governor-general of New South Wales. The lieutenant-governor of Victoria was made governor of Victoria in 1855, when responsible government came to Victoria. From that time the governor of Victoria ranked as equal as to the governor of New South Wales.

An Act to Make Provision for the better Administration of Justice in the Colony of Victoria 1852 (Vic.), s 4.


Reynolds, p. 13.


Scott, p. 17.

Scott, p. 15.

Scott, p. 9.

Scott, p. 15.


Serle, p. 158.

Reynolds, p. 25.

Serle, p. 203.


Knox.


Reynolds, pp. 15, 64. Chief Justice a’Beckett took two years’ sick leave from 1853 and returned to London.

Reynolds, p. 70.

Reynolds, pp. 105–06.

This is not to say that the judges of the Supreme Court of Victoria were not independent. Rather, the incident shows that judicial independence was not developed to its full extent owing to the needs of responsible government.


Besides the statutory rule-making powers, the Supreme Court could exercise inherent jurisdiction to control its own officers, from solicitors to the registrar and the humblest clerks. See McPherson, pp. 177–88.


98 AIJA is a research and educative institute, similar to a university, which concentrates on judicial administration and improvement of practical judicial skills. The initial support for and momentum behind AIJA came from the 1973 Supreme Court and Federal Court Judges’ Conference, and the judges there in attendance. AIJA’s continued contribution to judicial administration was guaranteed in 1985 when all governments in Australia accepted the responsibility of making annual contributions to the AIJA to enable it to have a full-time secretariat run by an executive director and staff. See McGarvie, ‘The Ways Available’ pp. 236, 259, 264.


101 Church and Sallmann, p. 4.


103 Scott, p. 74.

104 Scott, pp. 116–77.

105 Victorian Civil Justice Committee, Report, vol 1, pp. 296–362

106 Church and Sallmann, p. 19.


109 Church and Sallmann, p. 18.

110 Church and Sallmann, p. 23.

111 The McGarvie letter was not publicly revealed until the Hon. Ken Marks AM published his biography. The author of this paper has been informed by a retired judge on the court at the time that Chief Justice Young answered Justice McGarvie’s letter. However, a copy of the reply has not been located.


115 The Hon Jan Wade MP, attorney-general of Victoria, The Law, the Lawyers and the Courts, Dean’s Lecture on Law Reform, University of Melbourne, 12 September 1994. The lecture is reproduced in Hill, Appendix B.

116 Hill, Appendix B.

118 Australian Institute of Judicial Administration, 'Australian Courts', p. 273.

119 Courts Strategic Directions Working Group, *Courts Strategic Directions Project*, 1 September 2004, p. 11.

120 Court Strategic Directions

121 Court Strategic Directions

122 John Alford, Royston Gustavson and Philip Williams, *The Governance of Australia’s Courts: A Managerialist Perspective*, unpublished (the text says it is published by AIJA—which is true?) conference paper, Australian Institute of Judicial Administration, 2004. If it is unpublished the title should not be in italics

123 Alford, Gustavson and Williams, p. 93.

124 Alford, Gustavson and Williams, p. 87.


130 Smith, 'Court Governance', p. 9.


William Meek: Melbourne’s First Lawyer

Simon Smith

Abstract
William Meek arrived at Port Jackson on 31 January 1838, after 118 days at sea. Nine months later he made his way to Port Phillip (Melbourne) where he made minor legal and local history by being the first practising lawyer to arrive in the fledgling colony (established 1835). Three years later he was joined by his wife and two sons but before they arrived he built a thriving conveyancing practice and, as a pioneer burgher, helped establish such social structures as the Melbourne Cricket Club and the Melbourne Club. However, it all collapsed in the 1840s depression and in 1844 he was bankrupted. In 1847, after an ill-fated return to England where his beloved wife Mary died, he returned with one son to Melbourne. Although he quickly re-established his legal practice, it was short-lived; he died suddenly, aged 40, in January 1850. But what event or events prompted him to leave England in 1837, how did he fare and what sort of impression did he leave in Port Phillip?

At the Beginning
‘For the first time I regretted my determination of leaving Old England, and felt the utter loneliness of my situation,’ so confided a despondent William Meek to his diary on 2 October 1837.1 On that day the 27-year-old attorney boarded The Spartan at Gravesend for a voyage to Australia. It would change his life. Little is known of Meeks’ early life. The first records we have of him indicate that his parents were John and Sarah Meek and that he was christened on 8 August 1810 at St Mary Magdalen, Bermondsey, in London.2 He was one of at least four children; there was an older brother John and two sisters, Sarah and Mary. His father is listed as a currier, someone who specialised in leather processing. It appears to have been a successful family business that provided his brother John, in later years, with a comfortable lifestyle.3 His sister Mary was also involved but through her German-born husband, Bernard Spindler, who was a ‘kid leather dresser’ and had interests in tanning and property.4 Certainly, leather was a major industry in Bermondsey at the time and the family business appears to have been sound enough
to enable William, in 1827, to commence a five-year articles of clerkship indenture, most likely with a London attorney (solicitor). At that time, the law was increasingly seen as an acceptable career path for sons of the gentry and upwardly mobile men. However, those wishing to become attorneys had to find a principal willing to train them and also be in a position to pay an upfront one-off fee, possibly as high as £80. In return, the principal would provide board and lodging and supervision in the ways of the law. The training itself was unstructured. There were no examinations. Rather it was learning by observation and doing. In that pre-typewriter age, this usually involved much engrossing of deeds and other clerical duties. It was all unpaid. William Meek successfully negotiated all this and, on 12 January 1832, aged 22, he was duly admitted as an Attorney of the Queen’s Bench at Westminster.

The Meek family had roots in northern England in the counties of North Yorkshire and Durham, now popularly known as ‘James Heriot country’. There they were involved in leather tanning, milling, the early Methodist church and local government. Indeed, William Meek is said to have been a first cousin of Sir James Meek (1815–1891), thrice mayor of York. Accordingly, it is not surprising that by 1833 Meek had established a legal practice in the Horsemarket, the commercial centre of Darlington, County Durham. At the time Darlington was a small market town with a population of 8,574. Its major industries included textiles, breweries, foundries and brick, tile and tan yards. It was also becoming an important centre for the development of the steam train, the pioneering Stockton and Darlington Railway having opened in 1825.

1833 continued as a big year for William Meek. In June he married Mary Elizabeth Clark of Killerby Hall, Darlington. The Clarks were gentry and successful local farmers. Significantly, they were already related to the Meeks, as William’s brother John had married Mary’s elder sister Isabella Anna (1809–1892) in 1830 and that was probably the source of William and Mary’s introduction. Within a further three years the William Meek family was complete with the arrival of William John (1834) and Edward (1836). Both were baptised at the local St Cuthbert’s Church in Darlington. For the moment, life was sweet.

A Storm Cloud Descends
Something happened in William Meek’s life in 1836 that made him decide that he had no future in England, let alone Darlington. What
it was is unclear. He was not struck off the Attorneys Roll, nor does he appear in the criminal records of the Old Bailey. Nor does family legend shed any real light on any social indiscretion, although Meek’s diary alludes to some tension with a cousin, Sarah Meek.\textsuperscript{11} Searches of newspapers and court records of that time do show up other William Meeks in trouble but none is a match. For example, a 27-year-old workman Meek was imprisoned for six weeks in November 1836. He stole 2¾ pounds of copper from his employer, a carriage lamp maker. He pleaded poverty.\textsuperscript{12} Nor is there evidence of marital indiscretion. Quite the contrary, the relationship between William and Mary was a strong one. The records show that his financial circumstances enabled him to make careful provision for her whilst they were separated and his diary entries show nothing but affection, albeit couched in a language of melancholy. ‘God bless you Mary and my poor bairns’, he wrote three weeks after leaving England, and again, this time on New Year’s day 1838, the even more heartrending ‘[pray for] my dearest Mary for I know that no-one can feel what she has felt for her wretched and to her [at all events for some time] lost husband’.\textsuperscript{13}

In any event in January 1837 Meek was preparing the ground for departure to Australia. That month he established two trusts in favour of his wife and sons. Both named his brother John and brother-in-law Bernard Spindler as trustees. One trust was to pay Mary Meek an annuity of £70 for life to maintain herself and the children during the separation. Some of its capital was to come from £300 worth of book debts due to Meek. The other trust anticipated an inheritance that would fall to Mary Meek upon the death of her mother Isabella Clark of Killerby Hall. That entitlement was also to be held for the benefit of Mary and the children. The necessity for this latter trust reflected the limited property rights of women in a period that saw assets of women controlled by their husbands, something that he would be unable to do from Australia.\textsuperscript{14}

By May 1837 Meek had wound up his practice in Darlington and had requested Robert Nesham, a local attorney who had been managing his practice, to box his papers and send them to him in London. Significantly, in his words, ‘family circumstances’ made it impossible for him to return to Darlington, suggestive of some familial social indiscretion. Unfortunately, in the move, Meek’s admission papers, necessary for admission in the colonies, went missing, requiring him
to seek, in September of that year, a certified copy from the Master of the Queen's Bench in London. However, it was not all business. Most likely in this period, William and Mary commissioned portraits of themselves, perhaps to ensure an ongoing presence for the two young boys. The portraits eventually made their way to Australia, although family legend suggests that of William spent time facing the wall in recognition of the dishonour he had brought upon the family.

*William Meek 1810–1850 and Mary Meek c. 1810–1847. Artist unknown (c. 1836)*

*Courtesy Julia Margaret Curran*

**Australia Ho!**

Whatever the reason for William Meek voyaging to Australia, it is clear that his future prospects in England were uncertain. The country was experiencing the dislocation caused by the start of the industrial revolution and, for the professional classes such as lawyers, oversupply brought its own problems. Increasingly, young men looked to make new starts elsewhere in the British Empire. Even then, the options had narrowed. The United States was long gone and opportunities in the West Indies had receded since the passage of the *Slavery Abolition Act 1834* (UK). That legislation had affected the lucrative sugar trade and the jobs that it supported. By contrast, New South Wales, as convict transportation drew to an end, was receiving an increasingly positive
press, particularly with reports of the money to be made through land grants and purchases. Further incentive was offered by an immigrant bounty scheme focused on trades people and single women. This then was the further context of William Meek’s decision to move to the Great South Land.

He boarded The Spartan at Gravesend on Monday 2 October 1837 farewelled by his brother John, his sister Mary and brother-in-law Bernard Spindler. This at least was evidence of family solidarity, whatever the catalyst for the journey.

Mary Meek Spindler and Bernard Spindler (c. 1860)
Courtesy Julia Margaret Curran

Meek had clearly resolved to keep himself occupied on the voyage and this included writing a journal with almost daily recording of navigational co-ordinates. On the first day he also recorded the names of the 21 passengers with whom he would be sharing the ‘Captain’s Cabin’ and the ‘between decks’ berths. He made no mention of the 25 passengers, sheep, three horses and one cow in steerage. Even at sea the class divide was clear.

The nearly four-month voyage itself was relatively uneventful. The Spartan hugged the west coast of South Africa before taking advantage of the prevailing westerlies and striking eastwards across the Indian Ocean and along the southern coast of Australia. It then sailed up the east coast to Sydney. The ship landed only once for water and other supplies during
the voyage. It was at the Portuguese Cape Verde Islands off the west coast of Africa. A pleasant two-day ‘excursion’ enabled some sightseeing and a meal at a two room hotel in Praia: ‘our dinner consisted of fish of course served up with garlick and some chops broiled to a cinder. This would have been anything but pleasant if it had not been accompanied by some most excellent wine between a Port and a Claret, 1/- a bottle.’

The weather was generally kind and even the notorious Bay of Biscay ‘rather agreeably surprised not so much motion as I had expected although the wind blows freshly’. They would, however, experience extremes. At different times Meek confided to his diary that it was ‘excessively hot’, dead calm and that one night the sea was so rough ‘that we shipped a great deal of water (and I) awoke to find myself as wet almost as if I had been in the sea’. He did, however, keep busy. He became the editor of the Spartan Gazette, the shipboard newsletter issued on Saturdays, and he embarked upon legal self-improvement in preparation for his new life. The two newly published texts he studied offer a window on emerging legal practice arenas in the colonies. He assiduously read ‘Clark on Colonial law’, from the heady heights of the main top, presumably in an effort to escape the claustrophobic environs of the ship. Then, on what must have been a slow new year’s eve south of Albany, Western Australia, he examined ‘Hayes on Conveyancing’.

Relations between Meek and the other passengers appeared to have remained cordial despite the cramped conditions and the lack of privacy. They played card games, sang and conversed. From descriptions in Meek’s diary they were mostly on similar missions to start afresh. Edward Broadhurst was ‘a young Barrister going out to practise at the Bar in Sydney’. In fact he would go on to be a successful QC. Then there were:

Mr (Abraham) Lincolne who is going out to settle as a land surveyor, seems desirous of accommodating and obliging his fellow passengers. He has a gun which he occasionally fires at gulls etc and often hits the same. He is about my height but not so stout. Next to him follows the Dr (Martin), a regular out and out Scot, indeed a Highlander in all but the kilts, is about 6 ft high and has half of the Mate’s cabin. He is decidedly religious and has already given us one or two lectures upon that subject.
Meek also spent time recording his early impressions of the women passengers. He did so through the prism of allocated seating at the Captain’s table:

The Capt’n. invariably takes the head of the table unless his duties demand his presence on deck and usually amuses his party by some anecdote or other. On his right sits Miss Flower, rather interesting than pretty, appears to have had bad health but is a very pleasant companion rather little and thin but a good figure and good feet and legs, the rest I have not yet had an opportunity of seeing. Next to her is Mrs Grey an old Scotchwoman as usual very proud of her country and kin and anything but agreeable. She is betw 60 and 70 and accompanied by her daughter and grand-daughter, the first of whom sits next her Mama she is about middle stature for a woman and very like my sweet cousin Sarah Meek and I should say rather like her in temper and disposition, consequently not very delightful. The grand-daughter a little girl of about 11 yrs. old a little funny lass she and I are great friends. She has been very sick.27

During the voyage Meek was given to bouts of melancholy, even depression. After his brother and other family took their leave at embarkation he ‘for the first time regretted my determination of leaving Old England, and felt the utter loneliness on my situation’.28 A further six weeks on, publication in the Spartan Gazette of pieces ‘diary’ and ‘Home Sweet Home’ caused him to record ‘that the latter caused one some most painful feeling—for where is my home?’29 However, it was New Year’s Day 1838, celebrated in the middle of the Indian Ocean, that saw the most emotional outpouring and introspection:

The first place in the small short catalogue must be & is my very dearest Mary for I know that no-one feels what she has felt for her wretched & to her (at all events for some time) lost husband—my poor little Willie & Edward claim the next place in my memory tho’ I cannot expect they will feel aught for me …

My next friend I need not for one moment hesitate to name as [brother] John for thro’ good report and evil report I have ever found him the same kind considerate & good friend may happiness and prosperity attend both him & his and surely if rectitude of conduct and religious principle can make a man happy he will be so—The next is [sister] Mary Spindler and I do not believe that anyone with the exception of my poor wife feels more deeply in my welfare and her husband—Then now remains but Sarah and Mr Clark among my
near relatives & I am sure they wish me well also my Uncle—I feel I have omitted one whom I ought not to have forgotten it [is sister-in-law] Isabella whose uniform kindness to me has ever exceeded what I ought or could have expected from her. I am confident that she wishes me well—I believe I have but another name to add to this list and that one is [attorney friend] Jonathon Ward—So that—upon lookg. at this list and the one which I had been asked for one I shd. have made out in Dpn [Darlington] is sadly reduced in number I shall add nothing further than that I trust I may be enabled to pursue a different course to that which has led to such lamentable results & that the end may be that I shall again see myself surrounded by those who are very very dear to me & friends made by my own good conduct ...

By the middle of January 1838, the end of the voyage was in reach and shipboard spirits lifted. An indicator was the certificate made for the ship’s cow in recognition of her having supplied three gallons of milk every day. All the passengers signed the award. Then it was over. On the morning of 29 January 1838 The Spartan entered Port Jackson Heads, a vision that Meek described as ‘one of the most romantic and wildest scenes I ever saw’. The voyage had taken 118 days. It was also 50 years and three days since Captain Arthur Phillip and the First Fleet had arrived but it is unlikely that the significance of the historical coincidence was on Meek’s mind. He had other things to do.

**Arrival in the Great South Land**

Sydney in 1838 had an estimated population of 23,000, half of whom were either convicts or their descendants. Still a large military garrison, it was in the middle of a ‘calamitous’ drought that made food supplies scarce and costs high. Meek found this out straight away. After some searching he took rooms with a Mrs Greenhills in Elizabeth Street that, although ‘comfortable’, were very dear at 30 shillings per week. He told himself that he could not have got them for less. However, he was shocked when he had to pay Mr Cohen, the watchmaker, four guineas to repair his watch. It had been damaged when he had fallen into the sea when going ashore at the Cape Verde Islands in November 1837. Worse still, Cohen did a poor repair and Meek ‘blew him up’.

An early priority was to get admitted to practice so that he could start to earn a living from his profession. He was delighted when his enquiries at the Supreme Court indicated that his English certificate
would be a sufficient basis to apply for early admission. He had feared he would have to wait until the June sittings. Even so, it was April before Attorney-General Plunkett successfully moved his admission, and it was conditional for twelve months. Chief Justice Dowling noted that the rules required this when the applicant was not personally known to the bench.

In all, Meek would spend eight months in Sydney acclimatising to his new environment. Having arrived in the heat of summer he would learn that the sultry climate brought with it mosquitoes; he was ‘horribly bitten’. To keep homesickness at bay he wrote regularly to Mary, being careful to ensure his letters caught the ship’s sailing for ‘home’ although he knew he could not expect an answer on a return ship for at least eight months. He also dined regularly with friends from The Spartan such as Lincolne and Broadhurst and, after four months at sea, delighted in regularly taking a ‘pleasant bath’. In the early days he explored Sydney landmarks such as St James Church and even ventured up the river to Parramatta. He opined that ‘the river is very beautiful but disappointed in the place itself’. He also attended a levee welcoming the arrival of the new governor, Sir George Gipps. The acknowledgment of his attendance in the list published in the newspapers confirmed his place as a gentleman of Sydney. Other legal worthies named included W.C. Wentworth, Roger Therry and Sidney Stephen. The need to work was, however, not forgotten. He had business cards engraved ‘very nicely done but like everything else very dear—10/-’. He placed advertisements in the papers announcing his imminent admission and accepted his first legal work, a debt summons on instructions from Horace Flower, one of his co-passengers from The Spartan. Flower was already on his way building his career as a successful wool merchant.

Nonetheless, trying to establish a legal practice in Sydney in 1838 was tough. The drought took its toll on business, and regular arrivals of lawyers simply added to the competition. At the same time, Meek would have been aware of the rapid expansion of a new colony to the south at Port Phillip, established in 1835. Indeed, during 1838 a basic legal infrastructure was being assembled there with the arrival of the mounted police, the establishment of a Court of Petty Sessions and the designation, from 1839, of Melbourne as a place for holding Courts of General Sessions (for more serious crime cases) and jury trials. In particular, as a conveyancer, Meek would have watched the Sydney
Simon Smith – William Meek: Melbourne’s First Lawyer

The crown land sales of Melbourne town allotments in September 1838. A land boom was underway! This combination of events was a tempting lure for a lawyer keen to improve his professional and financial standing. Thus, in October 1838 Meek sailed for Melbourne to become the town’s first practising attorney. It was a move that did not go unnoticed. The colonial press described it this way:

Mr Meek of the Supreme Court is about proceeding to Port Phillip, for the purpose of practising his profession. Mr M’s services, as agent to the Sydney and Van Diemen’s Land solicitors, will be of infinite advantage to them—as a vast number of persons who have “taken the line” from Sydney, or have paid their debts with a flying topsail from Hobart town and Launceston, are residing, we are informed, at this modern Alsatia.

Flight to Alsatia (Melbourne), a Busy Burgher and a Series of ‘Firsts’

Historian Ruth Campbell mused on what went through the mind of the 28-year-old attorney as he gazed on Melbourne for the first time. She wrote: ‘Perhaps his impressions were the same as those of another newcomer, in May 1838, the Rev. William Waterfield, for whom the “Yarra village” was reminiscent “of extensive preparations being made to hold a rural fair, many of the buildings being of wood and more like booths than houses”’.

In any event upon arrival Meek immediately set to work. He established offices in what was for a time called Meek Street but now better known as Bank Place, a walkway between Collins and Little Collins Streets.

As the first locally based conveyancer, Meek had plenty of work, a bonanza even! No doubt his shipboard study of ‘Hayes on Conveyancing’ stood him in good stead. Even though the Melbourne population at the time was a modest 3,511 (3,080 males and 431 females), sales of land were brisk. Property in central Melbourne sold and resold especially quickly. For example, blocks in Collins and Queen Streets bought for £136 in 1837, sold in September 1839 for £10,244. Meek participated in this frenzy, assisting purchasers to raise capital by placing advertisements in the Sydney press. He also dabbled himself. In 1840 he purchased 25 acres in what is now the suburb of Richmond from William Yaldwyn, a squatter. Although he did not hold it for long, his early subdivision is commemorated by the continuing existence of a Darlington Parade.
Although Meek was the first practising attorney to arrive in the small colony, he was joined within months by others. John William Thurlow was next, followed by Horatio Nelson Carrington. These two would carve out their own special places in local legal history. However, in November 1839, there was a surge in lawyers with a further seven, including Redmond Barry, a barrister, arriving on the Parkfield. The Port Phillip Gazette was not impressed. Their opinion of lawyers was low, too many were 'pettifoggers'. They could not welcome them as the town already:

boils over like a bush cauldron with the scum of fierce disputes: and it is because a set of meddling pettifoggers have been permitted unmolested to stir up ingredients with their vile "chop sticks", that the working thereof have become unbearable. The fresh hands are, it is to be believed, somewhat more capable of skimming skilfully the seethings of the pot, or at least, of benefitting any wrangling parties desirous of adding fuel to the fire with a ladle of "het hoose in the lungs that'll gar them hand their clack for good six months".

Anticipating competition, Meek had from earliest days sought to raise his business profile by actively engaging in the establishment of local business and social infrastructure. It no doubt also fitted with his view that he was gentry and, if he was to live comfortably in colonial Melbourne, he needed to ensure he was able to mix easily with people like himself. Like other colonial leaders, he had clear views on what constituted a 'Gentleman'. It certainly was not someone involved in 'trade'. As a result, as historian Paul de Serville has noted, Meek found himself in the public eye in the early days as a defender of 'standards'. In the period 1838–1840, he was the honorary secretary or solicitor for the establishment of the (short-lived) Port Phillip Association, the Melbourne Club, the Melbourne Fire and Marine Insurance Company, and the Port Phillip Turf Club. In the same period he also became a founding member of the Melbourne Cricket Club and supporter of an auction company for Melbourne and a senior warden of the inaugural Masonic Club. All sought to create in Melbourne institutions that mirrored similar ones at 'home'. The Port Phillip Association, in particular, was intended to act as an employment cartel where the members upon their 'honour and respectability [undertook] not to hire or take into our service any man who shall not be able to produce a written discharge or testimonial from his former master, dated not more
than one calendar month previous. Clearly they had no intention that Melbourne would become a penal colony, even if by default.

As if he was not busy enough with a booming conveyancing practice, in May 1839 Meek found himself involved in a duel between two fellow members of the Melbourne Club, Dr Barry Cotter and George Arden. It was Melbourne’s first duel. It was Cotter’s challenge but the catalyst is unknown. Possibly it was something that Arden had written in the newspaper he edited, the *Port Phillip Gazette*. Arden, although only nineteen, had developed a reputation for impetuosity with his regular attacks on leading colonists. Paul de Serville has described him as ‘an unstable and quarrelsome man’. Nonetheless, Meek acted as Arden’s second. Fortunately Cotter’s shot missed Arden, although it hit Meek’s hat. Arden then fired wide intentionally. Honour had been satisfied.

On his own admission Meek was ‘stout’ for a thirty-year-old, a fact amply demonstrated by his portrait. However, he was also nimble of foot or, as *Garryowen* wrote, he was lively on his ‘pins’. Certainly at the time there was a particular skill in navigating the tree-root obstacles and unmacadamised (and occasionally muddy) streets of Melbourne. In 1840 Meek’s luck ran out and he is reported, within the space of six months, to have broken his leg three times. One instance was an accident on a horse, as the *Launceston Advertiser* reported, ‘Mr Meek had been riding with some friends in the bush, and his horse having become unmanageable crushed him with such violence against a tree, that his leg was fractured above the knee’. During his recovery he is reported to have retained his friend, barrister Redmond Barry, ‘to advise generally on titles of property and peruse drafts connected with conveyancing’. It was not the only time that Barry and Meek supported each other. Importantly, Meek had supported Barry at a public meeting held in June 1840 that petitioned Governor Gipps to appoint a Supreme Court judge for Port Phillip. The burgeoning growth of the colony and the increase in litigation had made the need to travel to Sydney for access to superior court justice unworkable. The agitation was successful but it soon became a case of be careful of what you wish for!

In the meantime there came some uplifting news; Mary and the two boys were coming to Melbourne. It arrived in a charming handwritten letter Meek received in 1840 from his six-year-old son, William junior. The letter clearly indicates that the family was receiving Meek’s letters. It also showed the quality of the private education that William was receiving in a time when there was no state-regulated education system:
My dear papa
I have been to London and I like my cousins very much. I am going
again soon with mama and Edward and then we are all coming to see
you we are so glad. I hope we shall not be shipwrecked on our voyage.
I went to Camberwell fair. I bought a gun but I left it at Leeds. I wish
you to get me a bow and arrows against I come. I have promised to
shoot a white eagle for my cousins. I am going to Stockton soon. I hope
you are quite better and are able to shoot with me. I am my dear papa

Your affect son,
W J Meek 64

As he awaited the arrival of his family, Meek must have felt that
his life was at last settled. It would not turn out that way.

Family Reunion and a Partner
1841 was a year of arrivals. In April, John Walpole Willis arrived to take
up the position of first resident judge of the Supreme Court of New
South Wales at Port Phillip. He had been sent down from Sydney after
he fell out with Chief Justice Dowling. 65 His court convened on 12 April
and he admitted the first practitioners. Meek was eighth of fourteen
attorneys (solicitors) and five barristers to sign the Supreme Court Rolls
that day. 66 As he and other practitioners would soon find, Willis was a
difficult fellow. Almost from the start he was ‘quarrelling with most
members of the bar, court officials, the press, the clergy and most of the
leading citizens of the settlement’. 67 He would last just over two years
before being removed from office by Governor Gipps in June 1843. 68

For Meek, the more important arrival three
months later was his family. He had not seen
them for three and half years. Wife Mary and
sons William (7) and Edward (5) arrived on the
Stratheden after a three-month voyage. They were
part of a small group of twelve cabin passengers
that included Thomas Clark (c. 1815–1887), Mary’s
brother. 69 He had acted as their escort on the voyage
but his real intention was to practise as an attorney
in Australia. He too would leave a pioneering mark
on the legal profession.

Thomas Clark (aka Clarke)
Courtesy State Library Victoria (Chuck c. 1860)
The family appears to have been introduced immediately to what passed for local society. Within days they had met Georgiana McCrae, illegitimate daughter of the Duke of Gordon and wife of another pioneering lawyer, Andrew McCrae. She noted in her diary that she had met ‘Mrs Meek and her two little boys, just arrived from England on the Stratheden’.

Later the Meeks appear to have reciprocated the courtesy over dinner and another diary entry provides insight into the physical challenges of colonial life and William Meek's bravado:

After dinner, Mr Meek drove some of us home in his trap: a fearful experience—the horse sent at top-speed through the worst country in the world. At one minute we were completely off the ground, at the next, suddenly down again—gutters, three or four feet deep, and everywhere, jagged tree stumps interspersed with boulders!

Soon after, the Meeks travelled to Van Diemen’s land, possibly to assess opportunities in that more established colony. Reflecting the closeness of the legal community at the time, they travelled in the company of another pioneering conveyancer, Horatio Nelson Carrington and his wife.

But business also pressed. In November of that year Thomas Clark, aged 26, was admitted to practice on the motion of James Croke, the crown prosecutor; he was the seventeenth to sign the Attorney Roll. He had previously spent time working as a clerk for his brother-in-law, who also acted as his character referee. Clark's admission documents indicate that he had recently been admitted to the English Queen's Bench (1840). Soon after, Meek made Thomas a partner and the firm of Meek and Clark was born. They operated from a two-storey building on the west side of Meek Street, now Bank Place.

Clark's entry to the local legal world appears to have been well received, although Garryowen noted a physical disability. He referred to him as ‘a full-faced comfortable-looking man, and was known as “lame Tom”, through deformity of one of his feet, which reduced his locomotion to a ponderous sort of half-hop, effected by aid of a huge stick’. However, a partnership that started so promisingly would not last.

The Boom Falters and Things Sour

The speculative land boom that had been set in train by the first sales in 1837 had by 1842 begun to fail dramatically. In 1840 land revenue had been £220,000. By 1841 it was down to £53,700. The market was glutted and a recession had set in. As historian Alan Shaw has explained,
'there never was a “real” demand for much of the land that was bought, only a desire to resell at a profit—and this could no longer be done.' As a result, the recession claimed more and more casualties as a trickle of insolvencies turned into an avalanche. In the period 1842–1843 an estimated 228 insolvencies occurred in the Port Phillip District. The early cases came before Judge Willis and he was not impressed, particularly if lawyers were involved. Here names like Carrington, Conolly, Deane, Smith and Thurlow resonated. Inevitably, the recession impacted conveyancing practices such as Meek’s. He was personally exposed as an investor. Money was short. Illustrative of the economic deterioration was the litigation in which Meek became immersed during 1842. He was pursued by Mr J.M. Chisholm, until then a successful Collins Street merchant, for return of bills of exchange worth £142 2s 1d. At the time, real currency was in short supply and bills, backed by the reputation of the initiator, circulated as money. The actual bill was needed if the amount pledged was to be redeemed. Meek’s problem was that he could not return Chisholm’s bill. He explained to Judge Willis that he had sent the bills with a Mr Clark, almost certainly his brother-in-law, to his agents in Sydney and they had not been returned. Willis was not impressed. He made it clear that he thought the professional reputation of lawyers was involved and they should not allow their personal interests to intrude on those of their clients. He admonished Meek when he said ‘as a stigma rests upon your character, I think it would be in your interests to have it immediately cleared up.’ Until that was done he was suspended from practice. Eventually the money was paid and Meek was able to return to legal practice. The role of his brother-in-law in this episode may well have been the start of a souring of a relationship. It was not the first time Meek had incurred the displeasure of Judge Willis. At the start of the year he and Richard O’Cock, another practitioner, had both been disciplined. Meek had been fined £5 for filing a false plea as a ruse to gain further time and thus delay the hearing of a case. That he was not gaol or struck off was the result of a plea by his good friend Redmond Barry. O’Cock was reprimanded for neglecting the interests of his client. Again Barry made an effective plea stressing extenuating circumstances. In all of this Thomas Clark kept his head down. It worked to his advantage that he had arrived late in the land-boom cycle and, without
significant capital, was not at financial risk. He did experience some excitement though at the start of 1842 when a burglar broke into the Meek office only to be scared off by Clark who happened to be sleeping there. Clark was reported in the *Port Phillip Gazette* as saying how unfortunate it was that he had no firearms with him at the time. However, things were not travelling well with the partnership. In May 1843, it was dissolved by mutual agreement after little more than a year. The catalyst may have been the financial troubles of Meek. No doubt ‘the Chisholm matter’ had not helped, although later events suggest personality differences stemming from the temperament of Clark. Partnership breakups are never easy let alone with a family member. It would not be the last time that a Meek–Clark partnership would be dissolved.

**Going ‘Home’ and Tragedy**

Separation from family back in Britain was a major challenge of colonial life at this time. Another was the length of time it took for news to reach the colonies. Thus, when Isabella Clark, mother of Mary Meek, died at Killerby, County Durham, on 30 November 1843, that news would not have reached the Melbourne Meeks and Thomas Clark until the middle of 1844. Then it would have simply added to their troubles, William Meek having been declared bankrupt by new Resident Judge Jeffcott on 22 February 1844. However, there was a silver lining. Mary Meek was to receive a substantial individual inheritance of £1055, as did her two sisters. No provision was made for their brother Thomas Clark, which suggests that he may have benefited from a distribution before he had left England.

Matters moved promptly in England when Isabella Clark died. Within a month her executors, son-in-law John Meek and son William Bentley Clark, had been granted probate. They had sold substantial amounts of furniture from Killerby Hall. They had also drafted articles of agreement to enable arbitrators to value premises and tithes at Killerby. This enabled the sale of land and distribution of proceeds in accordance with the Meek trusts established in 1837. However, the agreement provided for the signature of ‘William Meek of Melbourne Port Phillip New South Wales’, who at that stage was a long way from the English jurisdiction. A further complication was the need to re-assign land interests under the will of Mary’s late grandfather, Edward Huntington, and of licences held through the Right Reverend Edward,
Lord Bishop of Durham. Re-arrangement of land holdings at this time was a complicated business.

In these circumstances it was no real surprise that the Meeks decided to return to England. It would enable inheritance matters to be sorted out but almost certainly there was some homesickness in the mix. The Australian adventure had not been an unqualified success. By February 1846 all was in readiness for the voyage back to England, this time via South America, again taking advantage of the westerlies. We have a good sense of the preparations for the journey from part of the William Meek diary that survives:

Having arranged all preliminaries the previous day by payment of passage money and che [sic] and Mary having done most of the packing awoke at half past six and arose from our stretchers and after great exertions managed to reach the Geelong Steamer in time she having waited half an hour for us—got all our traps on board and bid[e] farewell to our friends Mr & Mrs Clay, Hodgson & O’Cock and several others. Started at half past ten and arrived on board [the Duke of Richmond] at 5 o’clock pm and found all confusion. Wool not stowed. Captain not on board but everything showing preparation for getting underway—made our bed on the floor and after tea and brandy and water turned in.87

The ship chosen for the voyage was the barque Duke of Richmond listed to depart from the Port of Geelong. Geelong was an emerging centre of the growing colonial wool export trade, and this was reflected in the large cargo of wool taken on board. It would take a number of days for the wool to be stowed and, in the meantime, Meek and his family became familiar with what would be their surrounds for the next three months. Food was of special interest. Also, Meek was impressed with the prowess of the ship’s surgeon in carving beef at mealtime: ‘he giving me a hunch of beef as thick as a two inch deal board.’ Tea without milk was more of a problem, although twelve-year-old son Willie was ‘rather more reconciled to it.’88 In what would prove to a sadly prescient observation, they were less impressed with the surgeon’s medical skill:

by the bye talking of the Dr, I may well record my present opinion of him which is that he has not been accustomed to good society as he says himself in his Elegant phraseology that he has not had a good blow out since he came and he’d be blewed about sevl. things. Mary says she hopes none of us may be ill to require his service …89
By 19 February 1846 all was in readiness and the Meeks made ready to sail to London. By 19 February 1846 all was in readiness and the Meeks made ready to sail to London. Thomas Clark saw them off. He came down especially to Geelong on the steamer Vesta for the occasion. It would not be a happy voyage because a week after their arrival in London in May 1846, after ‘an exceptionally rough passage’, Mary Meek died; she was 36 years old. The cause is unknown but the event is a reminder of the ever-present perils of long-haul sea travel in that period. It would take a further six months for the news to reach Port Phillip where it would be announced with ‘deep regret’.

William Meek, widowed aged 36, must have been devastated. He had two sons aged twelve and ten, no established home or career in England, so what of the future? If there had been an intention to resettle in England it is clear from subsequent events that it was soon dismissed. In the meantime, he most likely resolved any outstanding inheritance matters and decided that his youngest son Edward should remain in England under the care of his brother John's family. In fact Edward would never return to Australia.

For William Meek, the more promising future was in Port Philip and within a year he was on his way. On 6 September 1847 William and ‘Master Meek’ (William junior) arrived back in Melbourne aboard the Slains Castle. It was another beginning.

A New Start and More Tragedy
When Meek returned in 1847, Melbourne's population had grown to 12,351. It had trebled in the decade that had elapsed since he had first arrived in 1838. The recession of the early 1840s had passed and it was no longer a pioneering community. Indeed, in 1847, Melbourne was officially declared a city. Meek appears to have slipped back into legal practice fairly easily, again in rooms in Meek Street. It seems his brother-in-law Thomas Clark was also based there although they were no longer in partnership. Meek's practice appears to have been less dependent on conveyancing and to have widened into a general practice, whilst Clark had developed a commercial practice built around banks and pastoralists. Clark's practice would expand in a few years when the gold rush exploded on Melbourne.

As he had done when he first arrived in Port Phillip, Meek once more sought to develop a profile in community affairs. He had mixed success. In 1848 he stood for election for the Lonsdale Ward of the new City Council. He lost 89 votes to 104. He certainly lacked the support of the press particularly the radical anti-establishment Argus. It thundered:
In Lonsdale Ward there will be no contest, Mr. Meek having resolved upon trying the chances against Mr. Annand, the out-going Councillor, though with every certainty of a disgraceful defeat. It would be a waste of words to institute a comparison between two candidates so completely the reverse of each other in ability, habits, and almost every other requisite qualification for a Town Councillor. Mr. Annand is so immeasurably the superior of his competitor, that we should hold it high treason to the good sense of the burgesses of Lonsdale Ward to entertain a doubt that the issue of the contest can be other than the return of Mr. Annand by a very triumphant majority.37

He had more success with the Melbourne Cricket Club where he was elected as the fourth president in 1849–50 only to resign in January 1850 in protest at not having been consulted on team selection.98 Meanwhile, in his private life, it appears he was building a Gothic-style home named “The Priory” at the new seaside special survey estate of Henry Dendy at Brighton.99 It was on the corner of what is now Meek and St Kilda Streets, Brighton. It would later be generously described as ‘a two storey residence with ten rooms, bathroom, man’s room, cow shed, fowl house etc’ on a large block.100 The evidence suggests that this was Meek senior’s property and not, in the first instance, that of his son, William junior. There are documents that indicate Meek senior borrowed money from Thomas Clark for a land purchase and that he was buying up furnishings such as opossum rugs, crockery and was moving furniture to Brighton.101 Historian Weston Bate, in his pioneer local history of Brighton, noted Meek as an early settler.102
In the meantime he resided in William Street, Melbourne, with his eldest son. Most probably, William junior, now aged sixteen, was a clerk in his father’s business. Nothing else is known about him at this period, but there were to be no further William Meek initiatives. On Monday 28 January 1850 he died suddenly at Brighton, aged 40. He was buried the next day at the old Melbourne cemetery. The community mourned his sudden passing. The *Argus* noted:

The funeral of this gentleman took place yesterday; his friends met the hearse at the bridge and accompanied the remains of the deceased gentleman to his last resting place. Most of the leading professional gentlemen of Melbourne joined in the funeral procession. The death of Mr Meek has occasioned a blank in many circles where his society was courted and esteemed.

**The Aftermath**

Things moved rapidly after Meek’s death. By the end of February, Thomas Clark had auctioned the contents of the William Street residence and had obtained from the Supreme Court a grant of letters of administration. The latter enabled him to dispose of the estate under the laws of intestacy, William Junior being the only beneficiary within the jurisdiction. Ironically for a lawyer, Meek did not have a will. The estate inventory in the court documents show a total estate valued £517 17s 4d; the sale of furniture raised £95 4s 4d. Debts due from clients totalled nearly £200 and reflected a strong conveyancing practice. A substantial Meek debt of £50 was due to Thomas Clark, who had advanced that amount as part of a £100 land purchase, most likely at Brighton.

Soon after, sixteen-year-old William junior returned to England to live with his Uncle John’s family. There he was reunited with his fourteen-year-old brother, Edward. The 1851 English census records William as a clerk living in the Bermondsey house of John Meek, leather merchant. Recollections of family members also confirm that the brothers were reunited but it appears they soon went their separate ways. Edward went into the merchant navy. He then did a stint at farming in New Zealand before he returned to England in 1876 to marry his first cousin, Isabelle Huntington Clark. It seems unlikely that the brothers ever met again.
By 1855, aged 21, William Junior was back in Melbourne to commence five years articles of clerkship to his Uncle Thomas. At the time he gave as his residence Brighton, likely with his uncle, and probably at ‘The Priory’. He was admitted to practice as an attorney in April 1860, having duly paid the required fifty guineas to the court library fund; admission was an expensive business. At that time Thomas Clark was in partnership with Frederick George Moule under the firm name Clarke and Moule. Adding the ‘e’ to the surname at the time suggests an attempt at further gentrification. That partnership would last only until 1860 but 150 years later its successor would be one of Australia’s leading law firms, now known as Herbert Smith Freehills.

After Clark dissolved his partnership with Moule, he immediately entered into another with Frederick Coster and William Junior. The new firm name was Clark, Coster and Meek. In its way, it was another Meek and Clark partnership. It too did not last and was officially dissolved by mutual consent after four years in 1864. There was clearly some acrimony as Clarke, this time with an ‘e’, sued his partners for a greater share of the partnership proceeds. He was successful and Justice Molesworth ordered Coster to pay £453 17s 11½d; and Meek £247 15s 5½d. Clearly, there was some measure of ongoing incompatibility between the men as, shortly afterwards, they all dispersed into the bush. Coster moved to Alexandra in the Victorian high country, while William Junior moved to the Western District to practise. In 1867, he took a minor legal appointment as a commissioner for affidavits for Coleraine and district. He settled there with his family, having married Susannah Mary Cotton in 1860. They would have five children. He died in 1899.

For his part, Thomas Clark was on the cusp of a decline. He had stayed in Melbourne after his brother-in-law and sister returned to England. He lived in Brighton where he shared his home, for eight or nine years, with a friend and client, Joseph Vautiere. Together they had farming interests. In 1856 Clark advertised for ‘an Overseer for a Sheep and Cattle Station: must have a thorough knowledge of sheep. Apply to Mr Thomas Clark, solicitor, Meek street, at the back of the bank of Australasia.’

His legal practice had also flourished, particularly after the gold rush of the early 1850s, which saw a surge in banking and other commercial work. Indeed it was this commercial nature of the practice
that had encouraged F.G. Moule to join forces with him. Moule would go on to be a senior commercial lawyer. Business was so strong that, in 1856, Clark commissioned the pioneering colonial architect Charles Laing to design and build for him a 31-room office building on the west side of what was now known as Bank Place, as well as three cottages in Brighton. The association had other benefits. In 1857 Clark, aged 42 married Laing’s daughter, seventeen-year-old Margaret, at a service in Brighton. They would have four children.

However, Clark was clearly a difficult if not troubled man, as hinted at by his three partnership failures. Garryowen writes that he was ‘a full faced comfortable-looking man’ who was also a light-hearted jovial sort of person, but one who fell into ‘a religious mania’. In 1864, after the partnership failure with William junior, he had left Melbourne and set up practice in Rockhampton in Queensland, then a pioneer town of 8,000 people. Why he made such a radical move with his young family is not clear. Possibly he saw a business opportunity, just as Meek had seen in Melbourne in 1838. Perhaps, as Garryowen suggests, there were religious demons driving him. In any event it was not a success and in 1870 he was committed to the insane asylum at Woogaroo in Brisbane. A report in the local paper described the situation:

Mr. Thomas Clark a solicitor, formerly practising in Rockhampton, and who has for some time been of unsound mind, was brought before the Court on Wednesday, upon remand from the Reception House. Dr. Salmond deposed that, since Clark had been under his care he had improved much physically, but mentally, very little; he still considered him a dangerous lunatic; he labored under melancholia, brought on by intemperance, and was not fit to be at large, or to take care of himself, he, therefore, prayed he might be sent to Woogaroo. Dr. Robertson gave similar evidence, and stated his belief that the patient might be benefitted by treatment in a lunatic asylum. The Bench accordingly ordered that he be forwarded to Brisbane in gaol, en route for Woogaroo.

He died in Rockhampton in 1887. The notice in The Capricornian noted proudly that he was ‘late of Killerby Hall, Durham, England’. He was 82 years old. It was a sad end for a pioneering Melbourne lawyer.
Conclusion

What then are we to make of the short life of William Meek? Until now he has had only scant attention in books on the period by local historians. Probably he died too soon to leave a full ‘footprint’ in Melbourne life and thus capture the interest of historians. Certainly, Paul de Serville, in his pioneering work *Port Phillip Gentlemen*, gives only passing references. Ruth Campbell includes a few pages about him but the histories of the Melbourne Cricket Club all but ignore him. For his part, *Garryowen* acknowledged him as the first practising lawyer to arrive in Melbourne but provided little insight into the man, his work or his life. He simply referred to him as a ‘jovial light hearted individual’.

Probably the fullest attention given to Meek was in Thomas Bell’s short article in the 1985 *Law Institute Journal* entitled ‘William Meek—the gentleman pioneer’.

Meek certainly did not meet de Serville’s definition of being a ‘Gentleman by Birth’, namely a colonist from titled, landed or armigerous families. He was after all the son of a currier, albeit a successful one. He does, however, easily satisfy de Serville’s other definition of being a ‘Gentleman in Society’—someone who by profession, commission and upbringing, is prominent in society and noted by contemporaries. For this, one need only point to his attorney status and his role as a pre-eminent settler in the establishment of social infrastructure such as the Melbourne Club, the Melbourne Cricket Club and the first Turf Club. Indeed, those initiatives, and his involvement in a duel, support the view that Meek clearly identified himself as a gentleman and as a standard bearer of gentlemen’s standards. This is reinforced through his own words and observations in his diary—for example, when he referred disparagingly to the surgeon on the *Duke of Richmond* as ‘not been accustomed to good society’.

He was without doubt a loving family man. He made detailed arrangements for his wife’s and children’s support when he first left for Australia, and his diary shows how much he missed them during the separation. That this love was reciprocated is charmingly demonstrated in the letter written to him 1840 by his then six-year-old son, William. He was also well regarded by his peers. Here the tributes at his death speak clearly to a man respected by his local community.

It is unlikely that we will ever really know what event or events acted as the catalyst for him to make the perilous journey to Australia;
in the end he would do it twice. Nonetheless, he was adventurous and his actions belie the mildness of his name. His was a life made difficult through separation from family, insolvency and the ultimate sadness, the tragic loss of a spouse. Nonetheless, he made the best of his circumstances. He was not simply the first lawyer to practise in Melbourne but a true pioneer of the colony. Had his own life not ended suddenly at the young age of 40 in 1850, he may well, with the stimulus of the gold rush, have emerged as a significant figure in the building of the nation. It is a case of what might have been.

Notes
1 Wm. Meek’s Log Book of his voyage from London to New South Wales 1837–1838 in possession of great-great-grandson Dr David Church. Further references to this source will be in the short form of the date the entry was recorded.
2 St Mary Magdalen in Bermondsey, Register of Baptisms, January 1803–December 1812, P71/MMG/011, London Metropolitan Archives.
3 Recollections of Mrs Ellen Isabel Bernard, grand-daughter of John Meek (William’s brother), dated October 1952. In possession of Julia Margaret Curran of Bairnsdale, Victoria, great-great-grand-daughter of William Meek. The recollections refer to John going on a Grand Tour to Italy after he retired in 1856.
4 A kid leather dresser was a person who worked with soft leather.
5 Petitions to be admitted as Attorneys, Solicitors and Proctors, Item 127: Affidavit of William Meek sworn 31 March 1838, Series 13672, State Record Office of New South Wales.
6 Recollections of Mrs Bernard.
7 Email to author from Ms Mandy Fay, Senior Librarian, Darlington Library, dated 27 January 2016.
9 York Herald and General Advertiser, 11 June 1833. Killerby Hall, Killerby, an early nineteenth-century large house and cottage, is now a Grade II listed building.
10 Fay email.
11 Log Book, 8 October 1837.
13 Log Book, 21 October 1837 and 1 January 1838.
14 Declaration of Trusts dated 20 January 1837, D/HH 2/8/68, Durham County Record Office.
15 William Meek, 1838 Admission Affidavit.
16 Interview Julia Margaret Curran with author, 10 August 2015.
Transportation to the east coast of Australia ceased in 1840; see example of positive

Log Book, 2 October 1838, and ‘Ship News’, Sydney Gazette and New South Wales
Advertiser, 1 February 1838.

Log Book, 1 November 1837.

Log Book, 13 October 1837.

Log Book, 7 November 1837; 23 November 1837; 4 January 1838.

Log Book, 16 October 1837.

The full title is Charles Clark, A Summary of Colonial Law: The Practice of the Court of
Appeals from the Plantation, and of the Laws and their Administration in all the Colonies,
London, Sweet, 1834; Log Book, 17 October 1837.

Log Book, 31 December 1837; the full title is William Hayes, An Introduction to
Conveyancing and the New Statutes Concerning Real Property with Precedents and Practical
Notes, London, Sweet, 1835.

Log Book 8 October 1837 and John Bennett, ‘Broadhurst, Edward (1810–1883)’,
Australian Dictionary of Biography, National Centre of Biography, Australian National

Log Book, 6 October 1837. Lincolne (1815–1884) was a sketcher, writer farmer and
stock agent. He is best remembered for his 26 pencil Australia Sketches done in the period
1840–1844. He died in Melbourne in 1884.

Log Book, 6 October 1837. One week later Meek would have a long conversation with
the grand-daughter of Mrs Gray and revised his opinion of Miss Gray: ‘I had mistaken
her completely. I find her an agreeable woman tolerably well informed and very lively’.
See Log Book, 12 October 1837.

Log Book, 2 October 1837.

Log Book, 13 November 1837.

Log Book, 1 January 1838.

Log Book, 15 January 1838.

Log Book, 29 January 1838.

Colonist, 29 December 1838.

Log Book, 1 February 1838.

Log Book, 8 February 1838.

Log Book, 2 February 1838.

Australian, 3 April 1838.

Log Book, 4 February 1838.

Log Book, 28 April 1838.

Log Book, 8 February 1838.

Log Book, 18 February 1838.

Australian, 27 February 1838.

Log Book, 9 February 1838.

Australian, 27 February 1838; Log Book, 30 April 1838 and J. Ann Hone, ‘Flower,
Horace (1818–1899)’, Australian Dictionary of Biography, National Centre of Biography,
text5465.


Launceston Advertiser, 18 October 1838. Alsatia is a disparaging reference to an area that is beyond the law and a refuge of the perpetrators of every grade of crime, debauchery, and offence against the law.


Boys, p. 98.

Sydney Herald, 31 October 1838.


Defined as an inferior legal practitioner, especially one who deals with petty cases or employs dubious practices.

‘Domestic Intelligence’, 16 November 1839. Until the arrival of the Parkfield there were just four attorneys in Melbourne. They were, in order of arrival, Meek, Thurlow, Carrington and McCrae. The new seven were Redmond Barry, C.B. Brewer, James Croke, Robert Dean, James Montgomery, Richard O’Cock and Edward Sewell.

For example, Meek found himself in very public correspondence with George Sullivan, a retired naval officer, over Sullivan being ruled ineligible to attend the 1841 Turf Ball. He was not a gentleman. Meek was secretary of the Turf Club. See Paul de Serville, *Port Phillip Gentlemen*, Melbourne, Oxford University Press, 1980, pp. 132–3.

Established on 17 November 1838. See Thomas Bell, ‘William Meek—The Gentleman Pioneer’, *Law Institute Journal*, vol. 59, 1985, p. 322; *Colonist*, 4 May 1839; The Turf Club was formed in November 1840 in the office of William Meek. The intention was to formalise the local rules of racing and to plan the 1841 racing season. The foundation members were all prominent in Melbourne Society. The Society would die a natural death during the depression of 1843. See further, de Serville, pp. 71–2.

Bell, p. 323; *Australasian Chronicle*, 21 April 1840. His effort to be appointed solicitor for the Auction Company was unsuccessful. Instead Montgomery and McCrae were appointed. See *Australasian Chronicle*, 15 May 1840. Although it started with a list of ‘ostentatious names’, the company had insufficient capital. It soon came to grief. See Edmund Finn, *The Chronicles of Early Melbourne 1835 to 1852 Historical, Anecdotal and Personal by Garryowen*, Melbourne, Heritage Publications, 1976, p. 596; *Port Phillip Gazette*, 21 November 1839.

*Sydney Herald*, 31 October 1838.


de Serville, p. 65.

Finn, p. 872.

Launceston Advertiser, 21 January 1840.

63 *Hobart Town Courier and Van Diemen’s Land Gazette*, 19 June 1840.
64 Original letter in the possession of a great-great-grandson of William Meek senior, Dr David Church.
65 The judicial career of Willis had already been a difficult one. He had been removed from office in Upper Canada (1829) and had difficulties in British Guiana (1835). See further John V. Barry, ‘Willis, John Walpole (1793–1877)’, *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/willis-john-walpole-2797/text3989.
66 His admission was moved by Henry Tyssen. See VPRS 82/P0000 Admission Files of Attorneys to Supreme Court and VPRS 16237/P00001/1, Roll of Attorneys, Solicitors and Proctors, Public Record Office Victoria (PROV).
68 Barry, *ADB*. Willis is believed to be the only judge in the British Empire to be removed twice from office.
69 *Australasian Chronicle*, 5 August 1841.
71 Hugh McCrae, Supplement, p. 30.
72 *Sydney Monitor and Commercial Advertiser*, 20 September 1841; see also Smith, Chapter 2.
73 VPRS 82/P000/1C, Admission Files of Attorneys to Supreme Court, and VPRS 16237/P00001/1, Roll of Attorneys Solicitors and Proctors, PROV. He had served his articles with Jonathon Ward of Stokesley, a good friend of Willian Meek. See *Jurist*, vol. 4, 1840, p. 1019.
74 Finn, p. 873.
75 Shaw, especially Chapter 8.
76 *Sydney Morning Herald*, 15 January 1844.
78 *Geelong Advertiser*, 18 July 1842. See also *Port Phillip Gazette*, 3 September 1842.
80 *Port Phillip Gazette*, 15 January 1842.
82 *New South Wales Government Gazette*, 27 February 1844, p. 33. Meek would apply for his certificate of discharge just six months later. See *New South Wales Government Gazette*, 24 September 1844, p. 150. It would be granted on 23 October 1844. See *Port Phillip Gazette*, 30 October 1844.
83 Copy of probate of Will of Isabella Clark of Killerby, D/HH 2/8/71, Durham County Record Office. Proved 19 December 1843.
84 D/HH 2/8/71, Durham County Record Office.

D/HH 2/8/84 (1844), D/HH 2/8/86 (1846), D/HH 2/8/85, Durham County Record Office.

Log Book, 14 February 1846. Frederick Clay and Richard O’Cock were also pioneering lawyers. John Hodgson was a successful businessman and a mayor of Melbourne.

Log Book, 15 February 1846.

Sydney Morning Herald, 21 February 1846.

Sydney Morning Herald, 16 February 1846.

Finn, p. 898.

Australian, 26 November 1846, and Port Phillip Gazette, 17 November 1846.

Recollections of Mrs Bernard.

Geelong Advertiser, 6 September 1847.


VPRS 28/P0000/Unit 4, Probate and Administration files, Inventory attached to Affidavit of Thomas Clark dated 1 August 1850, PROV.


Argus, 29 January 1850.

Argus, 30 January 1850.

VPRS 28/P0000/Unit 4, PROV.

VPRS 28/P0000/Unit 4, PROV.

Recollections of Mrs Bernard.

Argus, 5 April 1860.

Argus, 29 May 1891.

Wellborn, p. 22.

Argus, 24 July 1860.


Argus, 16 June 1864.

Argus, 15 February 1866.

Victoria Government Gazette, 23 August 1867, p. 1567.

Argus, 4 September 1860.

Age, 15 November 1899.
118 ‘Law Courts’, Age, 5 March 1859. Vautier Street in Elwood is named after him.
119 Argus, 26 March 1856.
120 Wellborn, p. 22.
122 Argus, 27 July 1857. Margaret Clark passed away in Queensland in 1901 aged 61. See Queenslander, 5 March 1901.
123 Isabel Vautier (1858–1924); Margaret Jean (1859–1865); Thomas Harry (1861–??) and Maud (1862–1942).
124 Finn, p. 873.
125 He was conditionally admitted to practice in the Queensland Supreme Court in 1864. See: Brisbane Courier, 5 September 1864. See also: J.T.S. Bird, The Early History Of Rockhampton, Rockhampton, The Morning Bulletin, 1904.
126 Maryborough Chronicle, Wide Bay and Burnett Advertiser, 14 May 1870.
127 17 September 1887.
128 Finn, p. 873.
129 Bell, pp. 322–3,
130 de Servile, Appendix I.
131 de Servile, Appendix II.
132 de Servile, Appendix II.
From Foundational Case to Footnote: Judge Willis’ Opening Address in the Case of R. v Bonjon

Janine Rizetti

Abstract:
R. v Bonjon was an 1841 case heard by Judge Willis, the first Resident Judge. Delivered 151 years before the High Court decision in Mabo, this case, and Willis’ address to the court that preceded it could have been a foundational case in indigenous legal autonomy. However, for a variety of reasons it has been relegated to a footnote in Australian legal history.

Introduction
Come back with me to September 1841, to the small temporary courthouse on the corner of Bourke and King Streets. Justice John Walpole Willis is speaking, reading an 8000-word address to the court before the hearing of The Crown versus Bonjon. This case involved inter se, or inter-tribal murder and it was probably the most important address that Willis made during his career. It took him three hours to deliver it—a luxury I don't have—so I’ve pulled out the most significant extracts. Listen to him:

…respecting the aborigines, it appears that they are by no means devoid of capacity, that they have laws and usages of their own, that treaties should be made with them, and that they have been driven away, from Sydney at least, by the settlement of the colonists, but still linger about their native haunts…

…it is to be regretted that, previously to the settlement of Port Phillip by the Government, no treaty was made with the Aborigines, no terms defined for their internal government, civilization and protection.

…According to the commission whereby this colony is governed, the Sovereignty of the Crown is asserted over the whole of the territory comprised within the limits it defines… There does not appear to be any specific recognition in this Commission of the claims of the aborigines, either as the sovereigns or proprietors of the soil, although it is in the recollection of many living men that every part of this territory was the undisputed property of the aborigines
..., But the frequent conflicts that have occurred between the colonists and the Aborigines within the limits of the colony of New South Wales make it, I think, sufficiently manifest that the Aboriginal tribes are neither a conquered people, nor have tacitly acquiesced in the supremacy of the settlers....

...the colonists and not the aborigines are the foreigners; the former are exotics, the latter indigenous, the latter the native sovereigns of the soil, the former uninvited intruders.1

Willis’ address to the court in Bonjon expressed arguments that would have resonances in Keating’s Redfern Address, Rudd’s Apology and the Mabo decision some 150 years later. The case of R v Bonjon could have been one of the foundational cases in Indigenous legal autonomy. It touched on all the big early nineteenth-century legal questions regarding Indigenous Australians: the legal status of British settlement, whether Aborigines could be said to have their own law, and whether British law applied in crimes committed between Aboriginal people themselves. It could, too, have been the most significant case in the career of Mr Justice John Walpole Willis.

But it was to be neither a foundational case, nor a career highlight. Instead, if R v Bonjon is known at all, it exists as an aberration, quickly over-ruled at the time, and for decades consigned to a footnote in later discussions of the amenability of Indigenous Australians to British law. So what was this case, and why was it overlooked for 150 years until the Mabo case brought Willis’ arguments back into the spotlight?

A Foundational Case?

R v Bonjon was the trial of Bonjon, accused of the shooting murder of another Aboriginal man as part of a long-running clan dispute over marriage arrangements. Tribally, Bonjon was of the Wada wurrung clan from the Barrabool Hills around what is now Geelong; the murdered man Yammowing was a Gulidjan man. The disputed woman, Cun.yam.ber.nin was a native of the Cal.ler.ner.nit clan on the Lee River. Chief Protector Robinson reported that the Gulidjan and Wada warrung were involved in constant disputes concerning marriages.2

Although this was a tribal dispute, it was carried out in that liminal space between inter-tribal politics and white oversight. The court did not accept Aboriginal testimony, it was only in this shared space that there were the white witnesses and the knowledge of British law to
sustain the charge. In this case, the intersections between blacks and whites occurred at several levels.

First, Bonjon himself had been with Crown Land Commissioner Foster Fyans as his 'boy' for perhaps as long as three years. At the time of the murder, Bonjon had been working informally for about six months with Fyans' contingent of Border Police, receiving rations and furnished with a horse and carbine as part of his service, but free to come and go without punishment for desertion as enlisted men would have been. Fyans described him as 'particularly sharp and intelligent in his own way' but with poor English skills.3

Second, Bonjon, Yammowing and Cunyerbernin were sleeping together in a white settler's hut alongside the owner of the hut and a white bullock-driver on the evening that the murder occurred.4 Conflict broke out between the two Aboriginal men inside the hut, and when the white hut-owner ordered them outside, the dispute was carried out into the surrounding bush.5

Third, Mrs Sievwright, the wife of the local protector had actively intervened in the dispute, and reported it to the white authorities.6 Chief Protector Robinson's diary reports that Yammowing had gone to Mrs Sievwright to complain that Bonjon had stolen his wife and that Mrs Sievwright had persuaded her to return to her husband, even though the young woman left with Bonjon after the alleged murder.

But little information about the actual murder itself was aired in the small Port Phillip courtroom. Once Bonjon's fitness to stand trial was affirmed, the jury was discharged. Now the question turned instead to the jurisdiction of the court in a case—not between settler and aboriginal—but between Indigenous people themselves. As Crown Prosecutor Croke and Defence Counsel Redmond Barry showed in their introductory arguments, this was a debate that had spanned decades in Australia, and centuries across the Empire as a whole through the writings of Locke, Blackstone, Coke and Vattel.

The Supreme Court of New South Wales had explored the issue previously. In 1829 in the Ballard case, the bench had decided that it did not have jurisdiction in inter se cases, but it had reversed this stance in the Murrell judgment of 1836. Willis, who was not in the colony at this time, clearly did not consider the matter closed. He knew that he was
wading into contentious territory, and setting himself up in opposition to the Sydney judges with whom he had such a strained relationship. His opening words made this clear: ‘I do not consider myself bound by the opinion of either Mr Chief Justice Forbes, Mr Justice Burton or Mr Chief Justice Dowling in the present case.’ The Bonjon case was the first Supreme Court murder trial involving *inter se* violence that had come before Justice Willis in his nearly five years in New South Wales. This was his chance to make his own mark in the debate, as single judge in his own courtroom, in the Port Phillip District.

Willis’ address, which he provided to each of the three Port Phillip papers of the day, traversed similar territory to that aired in earlier cases. But it was when he announced his intention to ‘trace the history of this colony and of the settlement of this district’ that things became more pointed. Willis—speaking not as missionary, not as journalist, not as advocate, but as Supreme Court judge—provided his audience with an unfamiliar, and probably confronting reflection of themselves as foreigners and uninvited intruders. The Aborigines he depicted were not the degenerated souls despaired of by evangelical missionaries; nor were they the brutish, cannibalistic savages of the white settler talk. Instead, he said, they were a law-based people with ‘laws and usages of their own’: a controversial viewpoint coming from the man who embodied British law in Port Phillip. Ongoing frontier violence demonstrated that the Aborigines are—he used the present tense—not a conquered people, and should be considered as distinct, though dependent tribes, governed among themselves by their own rude laws and customs. And for that reason, he doubted the propriety of assuming jurisdiction in this case of inter-tribal violence.

He was careful, though, not to box himself in. He closed his address by reserving the right to alter or abandon his present impression, should he later be convinced that it was erroneous. It was agreed that the trial would proceed, subject however to the express reservation of the right of jurisdiction, which Willis would take further time to consider.

There was no need. The next day another example of an *inter se* revenge killing was presented to the court. It reinforced Willis’ argument that Aboriginal law continued to exist and be practised, and raised the potential issue of double jeopardy, whereby an Aborigine could be punished under British law but still nonetheless be subjected to Aboriginal law. This, along with the Crown Prosecutor’s concern that
he had insufficient legal evidence to allow him to proceed with the case, led to Bonjon being remanded to the next session, and then released.

Willis wasted no time in forwarding a newspaper report of his speech to Gipps, urging him to 'submit it not only to the Legal Authorities in the Colony, but also to Her Majesty's Secretary of State, and the Law Officers of the Crown in England.' Just to make sure it reached London, he forwarded copies privately to his contacts there.

Meanwhile Bonjon returned to his work alongside Foster Fyans but within a few years he was dead: killed in revenge, it is reported, at a corroboree. British law did not deal with Bonjon, but Indigenous law did.

**A Footnote in History**

So why did the *Bonjon* case lapse into obscurity and Willis' contribution to views of Aboriginal sovereignty remain largely unremarked? First, despite Willis’ efforts in ensuring its publication, the case was only reported in the Port Phillip papers, not the Sydney press. At the end of the nineteenth century when Gordon Legge made a retrospective compilation of early Supreme Court cases from 1830 onwards from the Sydney papers, the *Murrell* case was picked up, and *Bonjon* was overlooked altogether. As a result, only the Murrell case was formally reported and cited right up to the end of the twentieth century as the authority for the proposition that Australian courts have jurisdiction over Aborigines.

Second, the response by the Sydney judges provided a stronger authority than this finding by a single judge in Port Phillip. It was, after all, an opening address, rather than a final finding. Had the case proceeded, it would have been referred to the full bench in Sydney and Willis’ stance would most probably have been overturned. As it turned out, this is all largely hypothetical because the case did not proceed beyond this point. Nonetheless, Willis’ address had elicited 'uncertainty as to the state of the Law'. Gipps considered introducing clarifying legislation but Chief Justice Dowling advised Gipps that the question of *inter se* violence had been decided by *R v Murrell* and that it would be unnecessary to introduce an Act of Council to remove any uncertainty. Lord Stanley endorsed this approach in July 1842. He stated that until *Murrell* was over-ruled 'it must be held to be the Law of the Colony'. Without referring it to the London-based Attorney and
Solicitor-General, he deferred to the Sydney judges as ‘the best and most competent Judges’ on the issue.14

Third, during the late 1830s and early 1840s the Colonial Office began placing more emphasis on a strict application of British law, replacing an earlier openness to legal pluralism. Willis’ stance in *Bonjon* represented old thinking.

Finally, Willis’ own commitment to Aboriginal sovereignty did not seem to run deep and he did not appear to have the religious or humanitarian contacts that would suggest a longer-term philosophical conviction. Until the *Bonjon* decision—and indeed, afterwards—Willis had given no indication in his other judgments that he would take the stance that he did. In fact, he was later accused of being too sympathetic to settler interests. It was an argument of the head, not the heart and not—as far as I can detect—part of Willis’ broader legal or political philosophy. Gipps was later to identify it as one of several grounds for Willis’ dismissal in 1843, characterizing it as either an error in law, or an attempt to produce mischief as part of Willis’ ongoing conflict with his brother judges in Sydney.15

Irrespective of Willis’ motives, *Bonjon*, along with the *Ballard* case, is the highest to which the Supreme Court reached on Indigenous legal autonomy until Mabo in 1992. His address voiced a critique of British justice that had shifted uneasily beneath the earliest Indigenous-European encounters, right from the beginnings of white settlement. But even in a post-Mabo world it is difficult to embrace Willis as an unrecognized and prescient advocate for Aboriginal sovereignty. The surprise in the case is not what he said—after all missionaries and evangelicals had been promoting such views for years—but that it was articulated in the Supreme Court, by a Supreme Court Judge, and by Judge Willis in particular. Perhaps the real significance of *Bonjon* is not that the argument for Indigenous legal autonomy was expressed, but that it was suppressed, so firmly and for so long.

[An extended version of this paper was published as “Judge Willis, Bonjon and the Recognition of Aboriginal Law” *ANZLHS e-journal*, 2010]
Notes
1 R.v.Bonjon, Port Phillip Patriot 20 September 1841 p.2-3
2 The spelling of individual and clan names varies among sources. For Bonjon and Yammowing, I have followed Ian D. Clark, Aboriginal Languages and Clans: an Historical Atlas of Western and Central Victoria 1800–1900, Melbourne, Monash Publications in Geography, 1990, p.222. For information on Cun.yer.ber.nin, I have adopted the transcription found in George Augustus Robinson’s journal entry dated 14 August 1841 in Ian D. Clark (ed.) The Journals of George Augustus Robinson, Chief Protector, Port Phillip Aboriginal Protectorate, vol 2: 1 October 1840-31 August 1841, Melbourne, Heritage Matters, 1998, p. 375.
3 Port Phillip Patriot 20 September 1841.
4 Geelong Advertiser, 21 August 1841.
5 Supreme Court Criminal Side 15 Sept 1841 The Queen v Bonjon Information for murder VPRS 30/P/000 Unit 185 NCR 9. Public Record Office Victoria, Melbourne (PROV)
6 George Augustus Robinson diary entry 14 August 1841.
7 Of the eight trials with Indigenous Australian defendants held in Sydney while Willis was there, five were heard by Chief Justice Dowling sitting alone. Burton heard a case in May 1838, and the full bench (Dowling, Burton and Willis) sat on an inter se case in December 1838 that did not proceed for lack of witnesses. Alfred Stephen, lower in precedence than Willis, heard a case concerning the murder of a white settler by an Aboriginal defendant in August 1840, having arrived in Sydney in May 1839 to replace Burton. http://www.law.mq.edu.au/scnsw/html/subject_index_a-c.htm (accessed 9 Feb 2010). When Willis arrived in Port Phillip in March 1841, there had been earlier trials conducted with Indigenous Australians, but the defendants were awaiting removal or had already been sent to Sydney for trial.
10 Willis to La Trobe 30 May 1842 42/1000 VPRS 19 Box 31 in 42/1191, PROV.
12 Crown Prosecutor Croke decided not to proceed immediately, and after being remanded to the next session, Bonjon was discharged.
In the Case of Molesworth v Molesworth

Script Delivered by
The Honourable Justice Bennett and Mr Kevin Summers

Abstract
In 1864 a jury of the Supreme Court of Victoria heard the petition and counter petition of Justice Robert Molesworth and his wife Henrietta for a judicial separation to bring an end to their 24-year-old marriage. That Robert Molesworth was one of four sitting justices of the Supreme Court added extra spice to the ongoing speculation in the colony as to the domestic affairs of the Molesworths. The reportage of the matrimonial proceedings throws interesting sidelights on a number of aspects of colonial life, most particularly social attitudes towards women and domestic violence.

Note on Presentation
This paper was authored as a dramatic script and, as such, certain liberties were taken with the sources for the sake of brevity and dramatic impact. Nevertheless, the facts are true and correct drawn from newspaper articles of the day and other historic documents. The authors wish to express their gratitude to Ms Joanne Boyd, Archives & Records Manager, of the Supreme Court of Victoria for her excellent collation of articles from which the contents of this script were drawn; and to Ms Monique MacRitchie, Legal Associate to the Honourable Justice Bennett for her assistance in the preparation and composition of the paper for presentation and publication.

Her Honour would like to thank Mr Kevin Summers whose co-performance on the day of the conference was superlative. At intervals throughout the presentation Mr Summers rose, put on a wig or appropriate hat and quoted from the relevant party. Mr Summers played the role of the court reporter; H.E. Watts, editor of the Argus; Mr J Mathews, barrister for Mrs Molesworth; Chief Justice Stawell; George Higinbotham, Attorney General; and a member of the public.
Script

HER HONOUR: Over the 175 years of its existence, the Supreme Court of Victoria has been the setting for innumerable instances of high drama, tragedy and triumph. The singular case of Molesworth v Molesworth, which occupied the Court in its matrimonial jurisdiction for four days in November 1864, had all of those elements together with a seasoning of celebrity scandal, outraged colonial sensibilities, and, in today’s terms, sex appeal.

Newspaper reports of the day betray the excitement generated in the colony as Supreme Court Justice Robert Molesworth, then aged 58 years, and his wife Henrietta, 17 years his junior, petitioned and counter-petitioned the Court for a judicial separation to end their 24-year-old marriage.

The Ballarat Star editorialised:

KEVIN SUMMERS: For the honour of the bench it is much to be regretted that such a case was ever allowed to become public. Before it came on his brother judges, leading members of the bar, and personal friends, endeavoured to compromise matters, but in vain. Never before in the history of the Colony has a case excited more public interest. (The Editor, Ballarat Star, 23 November 1864).

HER HONOUR: Melbourne didn’t have reality television, but they did have the Molesworths. And so to the case:

KEVIN SUMMERS: The scandal which for the last nine years has been festering, like a loathsome sore under the surface of Melbourne society, has at length...
ripened and burst. The credit of the colony was never so deeply touched as by this filthy tale of an ill marriage. A heavy responsibility attaches to the man who, on any provocation whatsoever, could so insult our public sense of decorum. There was no excuse for this occupying of all the ears and eyes of this community for four days with this brutal and disgusting story.

The fact that the principal characters who figure on the stage are a judge of the Supreme Court and his wife, and an ex-attorney general, will furnish no small occasion for triumph to those whose habit it is to speak sneeringly of colonial manners and morals. (H.E. Watts, Editor, Argus, 24 November 1864).

HER HONOUR: Robert Molesworth was called to the Irish Bar in 1828 and married Henrietta, then aged 17 years, in 1840. In 1853 the couple and their children moved from Ireland to Melbourne and in October of that year he was appointed as temporary Chief Justice of the Supreme Court. The following year, 1854, he was appointed Solicitor-General while sitting in the Legislative Council.

The Molesworths married life unravelled dramatically during 1855. In July of 1855 Robert formed the view that Henrietta had committed adultery with a fellow barrister and later Attorney General. He packed his wife off to England to live with her married sister where she stayed until her return to Melbourne in June of 1856.

On 17 June 1856 Robert Molesworth was appointed as one of four Supreme Court justices, an office he retained for nearly 30 years.
Nine days after his appointment to the bench, Henrietta, lately returned from England, attended the matrimonial home. In court Mrs Molesworth asserted that she had come, on the advice of London counsel, to take her place as Justice Molesworth’s wife. Hard words were exchanged between the couple during which Mrs Molesworth alleged the Judge belaboured her shoulders with a hearth brush, called her a ‘bloody bitch’ and delivered a solid punch to her face, knocking her down. Mrs Molesworth cried out to her husband: ‘For God’s sake don’t knock the teeth down me throat’.

Spurned by her husband, Mrs Molesworth seems to have sought solace elsewhere. Justice Molesworth alleged further acts of adultery by his wife in Melbourne during 1861 and 1862, and that she was delivered of a male child in England in November 1862 under the assumed name of Mrs Smythe.

Mrs Molesworth denied all these allegations and affirmed that, ‘for a period of nine months prior to September 1855, by a course of unkind conduct, including a physical public beating, the respondent rendered my life miserable’.

The trial of the petitions for judicial separation commenced before Chief Justice Stawell and a jury of twelve men on 17 November 1864. Mrs Molesworth also claimed alimony ‘suitable to her condition’.

KEVIN SUMMERS: The Court was crowded at an early hour by persons seemingly anxious to listen to the details of one of the most painful disclosures ever heard in a court of justice. No sooner were the doors opened than every available inch of room was occupied. Mr Justice Molesworth is
tolerably well known; he is a somewhat elderly
gentleman, seemingly of a mild and kindly
disposition. Mrs Molesworth is a tall, big
woman of a determined cast of countenance,
and what is ordinarily termed a strong-minded
woman. Mrs Molesworth seemed to be but
little moved whilst giving details which seemed
to harrow and disgust all those present as
spectators. (Court Reporter, *Ballarat Star*, 18
November 1864).

**HER HONOUR:** The editor of the *Argus* promised his readers
that all the pertinent details would be reported
in his newspaper over the next few days:

**KEVIN SUMMERS:** The hearing of what promises to be another cause
célèbre in the annals of the Supreme Court of
Victoria commenced yesterday, before the Chief
Justice, sitting in matrimonial jurisdiction. The
case was that of Molesworth v Molesworth,
being in the form of a petition filed by the wife
of Mr Justice Molesworth, one of the Supreme
Court judges, for a judicial separation. The
matters involved—the alleged adultery of Mrs
Molesworth with Mr R.D. Ireland, late Attorney
General—which have formed the staple of
much scandal for nearly nine years past, were
yesterday all raked up, and it would seem that at
last the whole facts will come before the public.
(H.E. Watts, Editor, *Argus*, 18 November 1864).

**HER HONOUR:** The *Argus* Law Report of 19 November
1864 contains an eye-witness account of the
confrontation outside the Molesworth’s St Kilda
home. It is said, Mrs Molesworth said to her
husband:

**KEVIN SUMMERS:** ‘A pretty judge you are; you are an old cuckold’.
At which he then struck her a blow. She threw
herself down at the gate when she was struck,
and after lying there a bit, got up, and threw herself down in the road, screaming at the top of her voice. She was doing this for twenty minutes or half an hour and drawing a crowd of people about her. (Court Reporter, *Argus*, 19 November 1864).

**HER HONOUR:** The witness continued his evidence to say that the next morning Mrs Molesworth sported a black eye. Counsel for Mrs Molesworth put to the witness, with heavy irony, that:

**KEVIN SUMMERS:** The learned judge was, of course, acting in a strictly judicial way. He does not cause any disturbance at all. She made it all with her black eye, I suppose? (Mr Dawson, Barrister at Law, ‘Report of Proceedings’, 18 November, 1864).

**HER HONOUR:** Counsel for Justice Molesworth submitted in an address to the jury that:

**KEVIN SUMMERS:** If there must be a case of divorce for every little show of temper, there would be more cases than married couples living together. (Mr Michie, Barrister at Law, ‘Address to Jury’, 18 November 1864).

**HER HONOUR:** Justice Molesworth was no passive litigant, he evidently did not repose his entire trust in his counsel. The *Star* reported:

**KEVIN SUMMERS:** Mr Molesworth, the respondent, was present all the time, and occupied a seat at the barristers’ bench in proximity to his counsel. He not only suggested questions, but to a certain extent took the management of the case into his own hands. (Court Reporter, *Ballarat Star*, 21 November 1864).

**HER HONOUR:** On 21 November 1864, the fourth day of the hearing, Justice Molesworth gave his evidence at some length. The *Ballarat Star* was there to paint a lurid picture:
KEVIN SUMMERS: Every inch of standing room in the court was occupied long before the commencement of the trial by persons eager to listen to the details of the case. To the credit of womanhood be it said that not one female was present. Mr Justice Molesworth was then called. As he entered the witness box, he was pale, and evidently suffering from nervous excitement of no ordinary character. He seemed deeply moved by the position in which he found himself placed. (Court Reporter, Ballarat Star, 22 November 1864).

HER HONOUR: In the witness box Justice Molesworth recalled the events of the evening of 26 June 1856 at his home:

KEVIN SUMMERS: Our conversation was very angry. I think she was abusive to me but I cannot recollect her exact expressions. I know I was abusive to her. I told her that I would not permit a whore of a wife in my house any more than any other whore. I told her to quit the house. She refused. She had a half-eaten apple in her hand, and that she threw at me. I then forced her out of the house, rushing her through the hall and down the garden to the gate. I did not kick her, but put my knee up to push her forward. At the gate I struck her a blow in the face. The instant afterwards she called me a cuckold, and said she might have made a cuckold of me twenty times. Mr Rose induced me to go in, but I heard her screaming out and exclaiming ‘a hundred a year’. (Argus Law Reports, 21 November 1864).

HER HONOUR: On 23 November the jury absolved Molesworth of cruelty, although they found that he had indeed ‘beaten the petitioner violently, blackened her eye and cut her lip’. The jury
In the Case of *Molesworth v Molesworth*

Script delivered by The Honourable Justice Bennett and Mr Kevin Summers

also found that Justice Molesworth had been provoked by his wife’s use of ‘irritating language’.

**HER HONOUR:** They found Mrs Molesworth had been unduly familiar for a married woman with Mr R.D. Ireland in April of 1855, but that she had not committed adultery with him, (no doubt that was a relief for the former Attorney General). Finally they found against her on the charges of adultery with persons unknown and, after hearing extensive evidence taken on commission in England, that Mrs Molesworth ‘[w]as in the latter part of 1862 delivered of a male bastard child’.

In a moral commentary, the editor of the *Argus* took an opportunity to remind his readers of the real seat of the vice exhibited in the sordid tale of the Molesworth’s marital discord. He reminded the readers of the country of origin of the couple:

**KEVIN SUMMERS:** There is something in the case, also, that is quite un-English, and with an odour about it such as only one nationality could furnish ... where can we read anything to match this very Irish story. (H.E. Watts, Editor, *Argus*, 24 November 1864).

**HER HONOUR:** And the wider colonial community did not entirely escape the editor’s baleful eye. There is something vaguely contemporary in his concluding remark: ‘The revelation of high life in St Kilda about the year 1855 is indeed more extraordinary than anything that an enemy of Victoria could have invented for her detriment’.

The Attorney-General of the day, George Higinbotham, was moved to write to Justice Molesworth on 28 November 1864 suggesting that he recuse himself from further sitting in the matrimonial jurisdiction:
KEVIN SUMMERS: Sir, The effects produced upon your mind by the long train of acts and events disclosed in the evidence as given by your Honour, must, in the opinion of the government, be such as to unfit you for the satisfactory discharge of your duties as a judge in relation to all questions and suits of a similar nature, and to make it expedient in the interests of public justice that the divorce and matrimonial causes jurisdiction of the Supreme Court should be administered by one of your brother judges. In submitting this conclusion for the calm consideration of your Honour, I am desired by my colleagues at the same time to state that the government expresses no opinion upon the merits of the case.

Yours,
George Higinbotham,
Attorney General,
28 November 1954.

HER HONOUR: In the court of public appeal, letters to the editor of the Argus published in late November and early December 1864 express, variously, outrage and compassion for the position of Justice Molesworth. One correspondent writes: ‘After the awful disclosures which have been made within the last few days, I believe that Mr Molesworth ought at once to resign his position as one of the judges of the Supreme Court of Victoria. It is utterly impossible that his judicial decisions can be received with proper respect any longer. I conceive that no arguments are required in this case to convince respectable people that they must insist upon the removal of a wife-beater from the seat of justice.’ (‘An Old Colonist’, Letter to the Editor, Argus, 26 November 1864).

And in reply to the ‘Old Colonist’:
KEVIN SUMMERS: I think 'An Old Colonist' should look at home, or rather at his own private character, and learn to sympathise more with his fellow creatures. ('A Sympathizer', Letter to the Editor, Argus, 1 December 1864).

HER HONOUR: Certainly Justice Molesworth had his supporters, even admirers: 'Are judges superhuman? Are not the actions of Mr Molesworth quite consistent with those of a gentleman and a man of honour, so placed as he was?'. ('BLANK', Letter to the Editor, Argus, 28 November 1864).

And finally, it had to be said by someone, that a woman was to blame:

KEVIN SUMMERS: It is not very creditable to this community that the revelation of the misfortunes of Judge Molesworth, in his domestic relations with a woman inherently bad, should have brought down upon him such a torrent of invective as the press and a section of society have indulged in within the last few days. I am sure that Judge Molesworth will then be more pitied than blamed for what transpired towards a woman whose wickedness and baseness are almost without parallel in the annals of female worthlessness. ('Observer', Letter to the Editor, Argus, 3 December 1864).

HER HONOUR: The editor of the Argus acknowledged that Justice Molesworth had 'rudely disturbed that pleasant fiction according to which, in the public mind, a judge who arbitrates between the wrongs of other mortals can himself do no wrong'. However the Argus finally came down firmly on the side of Justice Molesworth retaining his office and continuing to sit in divorce cases.

KEVIN SUMMERS: His passions have been provoked, and for some reason or other his vision will be distorted.
This is just one of those conclusions which are based upon nothing in logic or human nature, which children and women indulge in. Are judges perfect men? Does vice never soil the judge's ermine? Is it likely that he will run the risk of adjudicating unfairly in order to satisfy a passing spleen—that he will forfeit his place in order to gratify his temper? Selfishness is a stronger passion than even malice; and the best security against the exhibition of prejudice in a judge is his instinct of self-preservation. (H.E. Watts, Editor, Argus, 1 December 1864).

HER HONOUR: Justice Molesworth replied to the Attorney-General:

KEVIN SUMMERS: While the government has no right to interfere in judicial matters, I find that the duties of the divorce court have become personally distasteful to me. (Justice Robert Molesworth, 2 December 1864).

HER HONOUR: Being a woman of strong opinion, Mrs Molesworth appealed the verdict of the jury. Her counsel laid the blame for her moral collapse squarely at Justice Molesworth's feet:

KEVIN SUMMERS: He left her in this position of peril to her virtue, knowing full well what he was doing; for he uses the remarkable expression in one of his own letters, 'Your cravings are not of a class that scenery will gratify'. (Mr J. Mathews, Barrister at Law, 17 December 1864).

HER HONOUR: Mrs Molesworth's appeal against the verdict of the jury failed. In delivering the judgment of the Appeal Court on 24 December 1864, Chief Justice Stawell held that because the Molesworths had separated in late 1855, and, in the Court's preferred view, Henrietta had not sought to resume co-habitation with her
husband on the occasion of her visit to the matrimonial home on 26 June 1856, but rather had merely sought an increased allowance from him, she was thereby precluded from obtaining a judicial separation on the ground of cruelty.

KEVIN SUMMERS: Here the wife, having allowed herself to be separated, and after being put in a position to demand reinstatement, merely claims an increased allowance; she cannot, therefore, say that she ought to be separated on the ground of cruelty. I do not think it necessary to go into the question as to whether the violence used by the husband on the occasion amounted to such severity as would justify the Court in saying that it rendered it unsafe for the wife to live with him. On the wife’s own showing she has failed to establish her case, and her subsequent adultery would be quite sufficient to bar her right to relief even if she had established it. (Chief Justice Stawell, 26 December 1864).

HER HONOUR: Sighs of relief all round, I imagine, except, of course in the wife’s camp. I feel that Justice Molesworth, and perhaps the Court, dodged a bullet there.

Justice Molesworth continued to sit as a justice of the Supreme Court of Victoria for another 22 years until his retirement in 1886. He acted as Chief Justice during the year prior to his retirement. Reportedly, he was noted for his industry, courtesy, learning and expedition. Apart from a short visit to New Zealand, he never left the colony, and took no leave except for court vacations. The profession spoke highly of his Honour’s devotion to duty, although there were complaints from that direction about his habit of sitting through the luncheon hour. He never sat again in the matrimonial jurisdiction.
Sir Robert Molesworth lived in retirement for four years before his death in 1890. He died a man of high repute in the colony, having been knighted upon his retirement.

The Molesworth marriage did make a further contribution to the public life of the colony. Their son, Hickman Molesworth (1842–1907), was appointed as a judge of the County Court of Victoria in 1883.

What of Henrietta?

The diarist Annie Baxter Dawbin described Henrietta a few months before the trial: 'She is a tall, stout, rather brazen-faced woman, with fair hair and prominent blue eyes. She considers herself handsome, tells me of innumerable conquests, and talks Oh! so incessantly! Poor thing she is to be pitied if only on account of her children not even speaking to her.'

Of her life subsequent to the proceedings, nothing seems to have been recorded. Apparently finding life unsupportable in the colonies, Henrietta returned to England where she died in 1879 aged 56.
Flos Greig: Solicitor, Woman, Pioneer

Kathryn Miller

Abstract

This article traverses the journey of the first woman admitted to the legal profession in Victoria—through university, parliament, admission and practice. It challenges the legal profession to reflect on how it should remember the first woman solicitor, especially given her own frank ambivalence to her career.

The Eligibility of Women to Enter the Legal Profession

The first woman admitted to practice in Victoria and, indeed, Australia, started her law degree in 1897 at the University of Melbourne. Only five years earlier, the Victorian parliament had fused what continues to be described as ‘the two branches of the legal profession’¹ From 1892 onwards, lawyers were admitted as ‘barristers and solicitors’ and anyone so admitted had a right of appearance in all Victorian courts.²

This was a progressive step by the colonial parliament. The distinction between barristers and solicitors had been the English tradition for centuries and remains the law today.³ The fusing of the two branches may be seen as an opening up of the profession and a relaxing of barriers, which were deeply infused with class and social distinctions.

Yet the law that fused the profession did nothing to remove another discriminatory barrier to practice—that being the barrier to women being admitted to legal practice. That barrier was not expressed, but was built into the fabric of the common law and society.

At that time, the Supreme Court of New South Wales had held that, under the common law, unless legislation specifically conferred rights or privileges on women, it did not apply to them, for women were not included in the definition of ‘persons.’⁴ That case involved the question of whether a married woman was entitled to vote in a municipal election. Yet it was treated as authority for the arguably separate question of whether any woman was entitled to be admitted as a barrister and solicitor of the Supreme Court of then colonies of Australia.

Flos Greig—a Brave and Privileged Woman

It is in this context that Grata Flos Matilda Greig decided to embark on a law degree. She was the first woman in Australia to do so.
Miss Grieg’s action to commence a law degree was very brave for two reasons. First, she was enrolling in a law degree with no guarantee that she would be able to practise as a lawyer. Given the changes that were happening in the legal profession and society more generally, there was certainly cause for hope and optimism that Miss Greig would not be locked out forever. But there was also no guarantee. Indeed, the second woman to enrol in a law degree and the first one to graduate, Ada Evans, had to wait seventeen years for the state of New South Wales to reach enlightenment and change the law to permit women to be admitted as lawyers. Of course, by that time, Miss Evans’ life had moved on and she never actually did practise.

Second, Miss Greig enrolled in a degree with the intention of practising in law at a time when that law refused to recognise her as a person. In doing so, Miss Greig demonstrated that she had the ability not just to see what the law was, but what the law could be. This is characteristic of a legal professional—one who understands that law is constantly evolving and can and should be changed. It is a characteristic that remains very strong in today’s legal profession, perhaps best exemplified by the nearly 2,000 lawyers who give their time and knowledge to the legal advocacy efforts of the Law Institute of Victoria. The ability to see what the law could be is what sets us apart from the artificial intelligence computers that will shape much of legal practice in the coming years. And keep in mind that, when she enrolled, Miss Greig was only sixteen years old.

But Flos Greig was also incredibly fortunate. Unlike what American films tell us, pioneers rarely do it alone. Miss Greig’s personal circumstances gave her the means and support to commence a law degree, even though there was no guarantee that it would lead to practice. Although her status was restricted by her gender, she was otherwise socially privileged—she was a white immigrant from Scotland from a middle-class family that not only had the means to educate its children, but also actively encouraged education of all of its children, male and female, to complete their schooling.

As her journey towards admission continued, Miss Greig continued to receive support, including from her lecturer, John Mackey, who was also a member of the Victorian Legislative Assembly. Mr Mackey introduced into parliament a private member’s bill to remove the impediment to women being admitted to the legal profession. In the parliamentary debate about the bill, Mr Mackey referred to Miss Greig’s
personal circumstances and anomalous position in being unable to enter into articles until the bill was passed even though she had qualified as a Bachelor of Laws and made arrangements for articles.6

This broader support and social privilege does not diminish in any way what Miss Greig achieved. But it is important to remember the effects of intersecting privilege and discrimination. For example, would Miss Greig have been as successful in breaking down the barriers of gender discrimination if she had also been an Aboriginal person or of Asian descent or of working-class background? How many women of her era missed out on the opportunity to become a lawyer, merely because it did not even enter their imagination that such a course was possible?

These are questions that are not just relevant when examining our past, but remain relevant today, especially given that we now understand much more the role unconscious bias plays in shaping the career paths of people who do not fit the stereotype.

**Miss Greig at University—a Story of Men and Collegiality**

After enrolling in 1897, Miss Greig spent six years studying a combined arts/law degree and graduated in 1903, the second woman in Australia to do so in law. The story of her reception at Melbourne University is, of course, more a story of men’s attitudes to women than her own story. Unsurprisingly, her arrival was greeted with the usual huffing and puffing from the incumbents about the appropriateness of women entering a section of society traditionally preserved for men and the capability of women to do what traditionally had been done only by men. The debate about these issues was infused with the latent stereotypes and suspicions about women, epitomised perhaps in one suggestion that, although women would make ‘excellent cross-examiners’, they would make ‘execrable confidential advisors’.7

This debate was taken up by the Law Students’ Society towards the end of Miss Greig’s first year of study and culminated in a vote.8 I have not been able to discover why this vote was necessary. Perhaps it was no more than a student debate or moot and an example of bright intellectuals debating the issues of the day. Or perhaps it was a flexing of the patriarchal muscle and a reminder to women that men claim a right to have an opinion and to have the final say on what women do. In any event, there was a vote and that vote was overwhelmingly in support of women being admitted to practice.
Ultimately, this is one of my favourite parts of Miss Greig's story for what it tells us about law students and lawyers. In voting in support of women being admitted to practice, the male law students stated that they were ‘desirous of demonstrating that the alleged conservatism of the legal profession is corporate and not individual.’ I think that is a sentiment that continues to resonate within today’s legal profession and students—that not all lawyers are like the stereotypes and that, although the profession as a whole may be resistant to change, this is a reflection of a culture, as opposed to an individual preference. Again, I think this is something to keep in mind as the legal profession faces the changes currently taking place, which are driven by technology and client demand.

Aside from the initial debate, Miss Greig reported that, while she was at university, she received ‘nothing but the most absolute courtesy and kindly consideration from members of the profession to which she now belonged.’ I really like that Miss Greig considered law students to be part of the legal profession and it is certainly a view the profession as a whole shares today. One of the great things about the legal profession is the care and consideration we give to the next generation of lawyers.

As stated above, Miss Greig graduated in 1903 with third class honours and second in her class. This suggests that law school was much tougher in her day than it was in mine, when the list of first class honours ran for pages.

The Flos Greig Act and a Graceful Revolution
The crux of Miss Greig’s story is what happens next. Having graduated, Miss Greig now needed a special Act of parliament to override the common law discrimination that prevented her from being admitted to legal practice.

I do not propose to say much about that debate, as it follows the debate that was happening in other parts of society at that time—debates about women’s suffrage, women being admitted to the medical profession, women being able to own property. The arguments are well known to any student of history and, although it is entertaining to repeat them so we can express shock and amazement that anyone could ever think such things, I do not think it particularly advances our understanding.

There are, however, a few things to note about the Act itself. First, it was incredibly short—only one page. It is a salient reminder
that legal reform to remove discrimination is not a legally complex problem. Discrimination in our laws is not a legal problem—it is a political problem. Once the politics change, the legal reform is generally quite straightforward. I think this should be kept in mind during debates over same-sex marriage and, to a lesser extent, constitutional recognition of Indigenous Australians. I say to ‘a lesser extent’ in respect of constitutional recognition because, when it comes to constitutional change, nothing is straightforward! Second, the measure was formally titled the *Women’s Disabilities Removal Act 1903*. This infuriating title implies that the problem was the woman and not the common law that refused to recognise that a woman was also a person. It is a sentiment that remains in discussions about gender equality and equity issues, which are still too often framed as ‘women’s issues’ or a ‘woman’s problem’, suggesting that it is women who have the problem rather than the broader structures being the problem. Thankfully, in that very Australian tradition, the Act was given the more colloquial and, I think, more accurate name of ‘the Flos Greig Enabling Act’.

The Flos Greig Enabling Act passed and Miss Greig began her articles with Frank Cornwall of Sugden and Cornwall—whom she praised as giving her ‘a thoroughness of training many articled clerks miss’.\(^1\)

In August 1905, Miss Greig made history when she was the first woman admitted to practice in Victoria and, indeed, Australia. Then, as now, the speech from the chief justice to the newly admitted lawyers was inspiring and reminded them of their obligations. Chief Justice Madden also recognised that history was being made and the efforts of Miss Greig in making it. His Honour spoke directly to her, saying:

> Miss Greig—allow me to express my gratification at the graceful incoming of a revolution, and to express a hope that the success which has attended you as a student may also attend you in your career as a barrister and solicitor. I also trust the profession—the noble profession—of which you are the first female member in this country, will be well preserved and sustained in your hands, as it has heretofore been in the hands of the other sex.\(^2\)

But of course, even then, the watchful gaze of the patriarchy was not far away. A journalist from the *Age* reporting on the ceremony chose to focus on Miss Greig’s appearance, reporting that she ‘was fashionably attired in grey with a greenish tinted hat, trimmed with flowers—a
most unlegal costume'. Again, the focus on a woman’s appearance, rather than her achievements, is still sadly with us, both in society generally and in the law. The hysteria about the appearance, dress and physical features of our first female prime minister is still fresh within our memories.

In law, we still have living memory of judges refusing to ‘see’ (i.e. acknowledge an appearance from) a woman wearing green (that woman of course went on to become one of our most celebrated justices, the Honourable Betty King of the Supreme Court); or wearing pants (that woman went on to sit on the County Court bench, the Honourable Justice Marilyn Harbison); or just being criticised for wearing coloured stockings (that woman went on to be a County Court judge and state coroner, the Honourable Jennifer Coate).

**A Successful Career—but was it the one she Wanted?**

After admission, Miss Greig continued her string of firsts—including becoming the first female member of the Law Institute of Victoria in 1905.

After admission, Miss Greig opened her own practice as a sole practitioner in Melbourne. Her clients included the Woman’s Christian Temperance Union, which lobbied successfully to amend the *Children’s Court Act 1906*, resulting in the establishment of the Children’s Court of Victoria. Miss Greig continued to influence the role of women in society by assisting the efforts of women who were then moving increasingly into business, politics and public life, and helping women to enforce their rights when, through lack of experience and knowledge, they were the victims of unscrupulous men.

By all accounts, Miss Greig was a successful solicitor. However, I find it difficult to know how to celebrate or recognise this part of her career, the difficulty being that, although she was a successful solicitor, this was not necessarily the path that she chose.

Having been admitted, Miss Greig’s preference was to be a barrister. In an article published in the *Commonwealth Law Review* in 1909 and titled ‘Law as a Profession for Women’, Miss Greig expressed the opinion that ‘the most interesting part of the legal profession, it seems to me, falls to the barristers’ lot’. Miss Greig did not follow this career path because she would have had to rely on solicitors to brief her—and, of course, since she was the only female lawyer, that meant having to rely
on male solicitors. In her article, she suggested that there would need to be more female solicitors before there could be a female barrister.

I find this part of Miss Greig’s story difficult because it casts a shadow over what is otherwise a positive story of women breaking down the barriers. It reminds me that discrimination can continue through culture, long after the law has changed. It is also a shadow that continues to plague women in the law today—the systems and structures of the legal profession mean that women are still not completely free to choose the career path they want and their success is still too often limited by factors outside their control, which have nothing to do with their skill or competence. We only need to look at the stubbornly low numbers of women in law firm partnerships and at the ranks of senior counsel to see this (in Australia, 48.5 per cent of lawyers are women, but only 25 per cent of law firm partners and 10 per cent of senior counsel are women).\(^5\)

I also cannot help but wonder whether Miss Greig’s preference for the work of a barrister reflected something deeper than a mere preference for advocacy or advice work. Although the profession was fused in 1892, the cultural distinction between barristers and solicitors and their respective social standings remained certainly in Miss Greig’s time and, one could argue, still remains in some form today. I am not saying that the work of barristers is not important—but it is merely one way of being a lawyer in our profession and I think that, as solicitors, we need to do more to claim and promote the merits of our way of being a lawyer.

I also wonder whether Miss Greig’s stated preference for being a barrister reflected something deeper than a mere preference for advocacy or advice work. Although the profession was fused in 1892, the cultural distinction between barristers and solicitors and their respective social standings remained certainly in Miss Greig’s time and, one could argue, still remains in some form today. I am not saying that the work of barristers is not important—but it is merely one way of being a lawyer in our profession and I think that, as solicitors, we need to do more to claim and promote the merits of our way of being a lawyer.

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I think we solicitors have generally been less vocal and celebratory of both our own achievements and those of our pioneers. On this, the barristers definitely do it better. I am proud that, while I was president of the Law Institute of Victoria (LIV), we started to reverse that trend by commissioning a portrait of the Honourable Bernie Teague, the first
solicitor appointed to the Supreme Court and a former LIV president. I hope that, one day, we also find a way of appropriately recognising Miss Grata Flos Matilda Greig.

**Those Who Followed**

As a post script, I will note, for completeness, the numbers that followed Miss Greig. The next woman admitted to the legal profession was Anna Brennan in 1911; over the next twenty years, a further 34 were admitted, compared to 1,065 men; in 1939, twelve women were admitted; it was not until 1997 that more women than men were admitted to law.

In 2014, women make up 63 per cent of law graduates and, ironically, law is now seen by high school students as ‘something that girls do’—which just goes to show when we claim that someone can or can not do something based on gender alone, we set ourselves up for being laughed at by future generations.

**Notes**

1 President, Law Institute of Victoria, ‘Ceremonial Farewell to Crennan J’, Melbourne, 2014 HCATrans 287.

2 Legal Profession Act 1891 (Vic), s 10.

3 Legal Services Act 2007 (UK), Schedule 4, Part 1.

4 Ex parte Ogden (1893) 16 NSWLR 86.

5 The bill passed and became the Women’s Disabilities Removal Act 1903 (Vic).


7 Alma Mater, May 1897, p.10.


9 Alma Mater, May, 1897, p. 10.


Judge-Made Law: The ‘Menhennit Ruling’ And Abortion Law Reform In Victoria

Bronwyn Naylor

Abstract
Women’s right to access abortion has historically been seen as controversial by lawmakers, secular and religious. This article examines the sources of change in Victoria’s abortion laws, and in particular the role of judicial law making. The late 1960s was a time of challenges to class, gender and political inequalities, locally and internationally. In Victoria during this period, with politicians unwilling to introduce abortion law reforms despite substantial community support, a conventional—even conservative—judicial ruling in 1969 changed the law in Victoria at one stroke and provided a model of legal access to abortion for other jurisdictions for the next 40 years. The article examines the context for, and consequences of, the decision of Mr Justice Menhennit in R v Davidson, the ‘Menhennit ruling’.

Introduction
In May 1969 Mr Justice Clifford Menhennit presided over the Supreme Court trial of Dr Kenneth Davidson, charged with providing unlawful abortions. He gave the ruling that has since been known by his name—the Menhennit ruling—defining an abortion as ‘unlawful’ only if the doctor did not believe it was a necessary and proportionate response to protect the woman’s life, or her physical or mental health.

On June 3 1969, the jury acquitted Dr Davidson. The case changed the law and practice on abortion in Victoria and was cited around Australia. It became settled law—it was never challenged on appeal—that a doctor could lawfully provide an abortion provided he or she was satisfied that termination was both necessary for the woman’s life or health, and proportionate to that risk. At one stroke the decision tackled the ‘backyard’ abortion industry, the police corruption associated with the provision of abortions, and the notorious ‘gas gangrene’ wards full of women suffering from septic post-abortion infections.
This article examines the background to this famous case, a case that illustrates the role of judge-made law in a controversial area of social policy, where politics made parliamentarians less than courageous.

**Background To The Case**
Abortion had been a criminal offence since at least 1861 in the United Kingdom, when the *Offences Against the Person Act* was passed. The offence—of unlawfully using an instrument or poison to procure a miscarriage—was adopted into Australian criminal law, where the provision equivalent to the UK s.58 appeared in s 65 of the *Crimes Act 1958* (Vic):
Whosoever being a woman with child with intent to procure her own miscarriage unlawfully administers to herself any poison or other noxious thing or unlawfully uses any instrument or other means, and whosoever with intent to procure the miscarriage of any woman whether she is or is not with child unlawfully administers to her or causes to be taken by her any poison or other noxious thing, or unlawfully uses any instrument or other means with the like intent, shall be guilty of an indictable offence, and shall be liable to level 5 imprisonment (10 years maximum).

Abortions were of course still being obtained; criminalisation can be seen as a symbolic statement of society’s rejection of the practice. It certainly worked to prevent doctors providing the service as a normal health/medical service, and to drive the practice ‘underground’, to unqualified and unscrupulous providers and/or to doctors willing to collude in the necessary secrecy.

The demand for abortion has always been substantial: where women’s reproductive status is constrained and censured there will always be circumstances where women will feel they need to avoid pregnancy and childbirth no matter what the cost. In addition, constraints that limit access to contraception and to information about reproduction ensure that there will be women who become pregnant when they do not wish to.¹

The one certainty was, and is, that women will in some situations—whether single, or with numerous children—feel they have no alternative but to seek a termination of an unwanted pregnancy. Historically the rich paid large amounts for private medical treatment; the poor went to unskilled ‘backyard’ operators and many died or were seriously injured as a result.

By at least 1890, Melbourne was seen as the centre of underground abortion provision with the Melbourne Age describing Collins Street as ‘the very head centre of illegal operations … left largely undisturbed by both police and parliament.’² The incidence of abortion, and abortion-related deaths, increased to the point where, by the mid-1930s, ‘abortion accounted for 31 per cent of maternal mortality at the RWC [Royal Women’s Hospital].’³

Gideon Haigh, in his detailed examination of the abortion ‘racket’ in Melbourne, reports that abortion-related admissions to the Women’s Hospital soared during the Depression, with over 3000 women admitted
in 1933 and 1934. Thereafter the death rate declined, and subsequently it appears that medical practitioners more commonly provided abortion.

Researcher Barbara Baird interviewed a number of people about their memories of abortion in South Australia before 1970. For most of the women interviewed, ‘the trauma associated with illegal abortion stemmed from its illegality and the social climate of the time which made information about abortion very difficult to come by, and which imposed a heavy veil of shame, secrecy and silence.’

Class was also crucial: it was ‘the main determinant’ of the type of abortion they received. ‘The five middle class women who were interviewed all went interstate where doctors performed their abortions … The four working class women either aborted themselves or went to backyard abortionists. The abortionist [interviewed for the research], a trained nurse … served mainly but not exclusively a community of working class women.’

Baird found that some doctors collaborated in maintaining the shame and secrecy around the procedure: ‘Some doctors expressed shock, horror and anger when asked to perform an abortion. Others refused to do the job but made suggestions about how it could be done … Many Adelaide doctors would have known that a woman could get an abortion in Melbourne, performed by a competent doctor. Some did their best to pass on this information … [others] did not pass on the information.’

Not surprisingly, police corruption flourished. The combination of strong demand, and people willing to provide the service whilst trying to keep their actions undetected, led some police to accept bribes not to report the activity. Haigh describes a fully-fledged corrupt system—‘the racket’—in Melbourne from at least the early 1960s.

There was therefore not a lot of interest in reforming the law in the area; the cosy relationships between police and providers (including otherwise highly respectable doctors) provided financial incentives for all, or at least for police not to prosecute.

The UK Decision In Bourne
Given its colonial past, Australia draws its criminal law largely from that of the UK, and has until recently looked to the UK for legal developments. It was some time, though, before it followed the UK on this issue. In the UK it had been decided in the 1938 case of R v Bourne that a doctor could lawfully terminate a pregnancy to preserve the life
of the mother. The case involved a 14-year-old victim of a vicious gang rape. The doctor, Dr Aleck Bourne, took the view that it was his duty to provide the abortion and was prepared to be prosecuted in order to see the law clarified; he was in fact ultimately prosecuted under s.58 of the Offences Against the Person Act 1861 UK. The trial judge told the jury that they should understand the offence to include a proviso that there was no offence if the termination was provided only to preserve the woman’s life, and explained:

…if the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck and … in that honest belief, operates, [he] is operating for the purpose of preserving the life of the woman.

The jury acquitted Dr Bourne.

The court was specifically focussed on the liability of the doctor, basing the decision on the doctrine of necessity as applied by the doctor. Macnaghten J was careful to confirm that this was not about ‘abortion on demand’: ‘the desire of a woman to be relieved of her pregnancy is no justification at all for performing the operation’. Indeed the judge quoted approvingly the doctor’s evidence that he would not have performed the operation had he considered the young woman to be ‘feebleminded’ or ‘of “the prostitute class”’ since in such cases ‘the pregnancy would not have affected her mind’.

It was nearly thirty years before legislation was passed in the UK to reflect the decision in the Abortion Act 1967 (UK). Considerable high level political advocacy and campaigning took place before the legislation was introduced, and the bill only passed by 167 to 83 votes, in an all-night sitting, in the House of Commons. Section 1 of the Act stated that a person shall not be guilty of an offence relating to abortion when a pregnancy is terminated by a registered medical practitioner who genuinely believes that continuation of the pregnancy would involve ‘risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman greater than if the pregnancy were terminated’. It added a requirement that two doctors support the need for the termination, entrenching the medical focus of the provision.
A few years before the English courts determined the *Bourne* case a young Victorian barrister, Jack Barry (later Justice Barry of the Supreme Court of Victoria), had given a paper to the Victorian Medico-Legal Society in 1933, arguing that a termination of pregnancy should be lawful not only when it was necessary for the mother’s health, but also if necessitated by her economic circumstances.\(^{15}\) Subsequently disappointed with the narrowness of the decision in *Bourne*, he reiterated the argument that the legal principle of necessity supported the provision of abortion in another address to that Society in November 1938.\(^{16}\)

Significantly, he argued that this was a matter where the courts should lead the way: it was ‘not a fit subject for debate in popular
assemblies or in the Parliaments that we have’ as the ‘reaction of the average person’ to the subject ‘is not intellectual but emotional.’\textsuperscript{17} As we will see, the courts have indeed been more willing to address the issue than have legislatures.

In Victoria the mutually beneficial arrangements between police and doctors performing abortions were coming to an end by the late 1960s, when police began enforcing the law, conducting a blitz on doctors performing abortions in Melbourne.\textsuperscript{18}

At the same time there were calls for legislative change, no doubt reflecting the growing force of progressive thought more generally at this time (both in Australia and internationally). A \textit{Herald} newspaper poll reported over two-thirds of the population supported liberalisation of Victoria’s abortion laws, and a pressure group advocating legislation along the lines of the UK Act, the Abortion Law Reform Association, was established in April 1968.\textsuperscript{19} The AMA conducted a survey of members and, given their support for change, issued a press release in October 1968 calling for statutory reforms that would have effectively adopted the UK legislative provisions.\textsuperscript{20} The \textit{Age} newspaper editorialised in October 1968 about the need to reform a law that was ‘ambiguous’, ‘tenuous’ and ‘dangerously out of touch with community standards’.\textsuperscript{21} The Victorian ALP was apparently ‘pro-abortion’, and the Liberal Party State Council was also reported as supporting law reform in 1968.\textsuperscript{22} However the then Liberal Party Premier, Sir Henry Bolte, was also under pressure from the Democratic Labor Party (DLP), on which he depended for electoral survival, to resist any change.\textsuperscript{23}

The DLP was of course strongly aligned with the Catholic Church. Its public arguments against abortion reforms shifted from moral opposition to the perhaps more politically palatable argument based on the need for Australia to build up its birth rate.\textsuperscript{24} As DLP Senator and Deputy Leader Frank McManus argued in a letter to the \textit{Age}, ‘The DLP believes it is suicidal for a country like Australia, needing numbers for defence and development, and having plenty of room, to cut its birth rate.’\textsuperscript{25} These concerns reflected broader political opposition to abortion in the 1960s based on the small size of the population and the threat that abortion posed to ‘white Australia’.\textsuperscript{26}
The Path to Legal Abortion: Judge-made Law

Gideon Haigh draws a picture of a coterie of doctors carrying out abortions in Melbourne—some highly professional and others less so—and most, by the 1960s, making payments to homicide squad detectives to ensure tip-offs before raids took place. ‘By the mid-60s … abortion’s stronghold was discreetly wealthy East Melbourne.’

Until the 1960s, he notes ‘the Homocide Squad had mainly overlooked abortion … but its detectives became greedier.’ At one doctor’s surgery ‘corruption was a way of life,’ with money being given to a wide circle of police contacts, and relationships extending to employing the wife of one of the homicide detectives.

Doctors were occasionally prosecuted but always acquitted, although when prosecutions took place they inevitably—and outrageously—involved the public humiliation of the women who had sought abortions. Medical files would be taken by police, women identified and threatened with prosecution if they did not agree to be witnesses, and the women were then likely to be aggressively cross-examined about their sexual lives.

A change at the head of the Homocide Squad saw a new focus on prosecuting abortion providers—129 abortion charges were laid against doctors in 1969 alone. The flurry of prosecutions show, as Haigh argues ‘…a law falling apart at the seams, unpopular with juries, enforced with embarrassed inexpertise.’

The case we are interested in began when, at 10.30am on August 1, 1967, homicide detective Fred Russell raided the East Melbourne surgery of society gynaecologist, Dr Ken Davidson, acting on a tip-off that he was to perform an abortion that day. The patient in fact stayed away. But to make their raid worthwhile, detectives confiscated Davidson’s records, and began investigating the women whose files they now held, threatening conspiracy charges if they did not cooperate.

The prosecution for abortion came to trial two years later. Davidson was, as Haigh puts it, the least likely person to appear as a criminal defendant: ‘an old Geelong Collegian trained at Melbourne University and then the Royal Women’s and Royal Children’s hospitals. A handsome, cultured, courteous man entering his fifties, Davidson’s natural diffidence was deepened by a stammer. Women nonetheless seemed to flock to him.’
Judge Menhennit and R v Davidson

When R v Davidson came to court, Judge Clifford Menhennit was allocated to try the case. He was an equity lawyer, known for his expertise on s 92 of the Commonwealth Constitution.

Gideon Haigh observes that Menhennit was ‘the unlikeliest of judicial activists’—a ‘gentle, conservative jurist whose expertise was trade practices rather than crime and whose marriage was loving but childless’.34 His ‘reputation was for thoroughness tending to voluminousness’.

Whilst Justice Bill Gillard is quoted by Haigh as saying that ‘what Cliff knew of abortion would have been exactly nothing’, it is also noted that ‘he brought to an inflammatory issue a studious neutrality’, to a case that for some of the senior judges, who were practising Catholics, might have been more challenging.36

His decision in R v Davidson was clear and technical, firmly based in legal principle. He focussed on the word ‘unlawfully’ in s 65, which created an offence only where the act was ‘unlawful’. The fact that the crime was only committed if the act was ‘unlawful’ led to the inference that there was a possibility of ‘lawful’ abortion. Menhennit J drew on the defence of necessity to argue that an abortion could be ‘lawful’ if it was ‘necessary’—a quite conventional analysis. Necessity was generally accepted as a defence to almost any offence, with the exception at that time of homicide.

Mr Justice Menhennit said:

For the use of an instrument with intent to procure a miscarriage to be lawful the accused must have honestly believed on reasonable grounds that the act done by him was (a) necessary to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail; and (b) in the circumstances not out of proportion to the danger to be averted.37

The Chief Justice at the time, Sir John Young, reportedly said, ‘We were all rather amazed there was no appeal… Cases on such issues can usually be relied on to be appealed. In the end, Cliff’s decision satisfied everyone. Had it been against community standards, an appeal would have been certain. But he got it exactly right.’38
The decision was a ‘black letter law’ ruling that focussed on the liability of the accused doctor. It provided a defence based on the medical practitioner’s professional assessment of the woman’s health: it was not about the rights or needs of women seeking abortions. Indeed as Rankin observes, it is likely that ‘had a patient of Davidson’s been charged, that woman would have had no defence available to her.’

Gideon Haigh highlights the strikingly limited role of women from the cases:

…in the tens of thousands of pages of transcript of the Davidson and other abortion prosecutions in the second half of the 1960s, women feature mainly as the hapless prey of male lust, compelled to divulge the most intimate details of their lives before courts of older male judges, lawyers, police and jurors.

The decision effectively legalised abortion as long as the provider satisfied the above requirements. While it did not expressly require medical involvement, the common law tended to assume a medically-informed decision maker.

The result was therefore to confirm the medical profession’s control over abortion provision, and to in practice substantially reduce the power of unqualified abortionists. At the same time, access depended on doctors being satisfied that the Menhennit tests had been met—and being willing to provide abortions—and on women being able to afford doctors’ fees.

The medical profession was not uniformly delighted by the ruling. The editor of the Medical Journal of Australia was afraid that this would lead to ‘abortion on demand’, lamenting ‘the “shrill and insistent” women, who viewed abortion as akin to the hiring of a taxi or mending of a gas pipe, reducing doctors to mere service providers’. Others were concerned about resourcing, alleging that the government ‘had, “in effect, handed over to the medical profession a social problem with which it cannot or will not cope”’.

Robyn Gregory argues that, although the Menhennit ruling ensured that abortion could be provided legally, ‘while medical practitioners remained hesitant to perform abortions, their control ensured that abortion was no more accessible for women than it had been prior to the ruling.’
What Happened Next?

The effect of the decision was that virtually no further prosecutions were launched where abortion was carried out by a doctor. In 1973 three charges of abortion were laid; after 1983 it appears that there has been no record of any successful prosecutions in Victoria. It seems to have received little public attention at the time, according to Haigh. It became news however when St Kilda GP Bertram Wainer began a campaign for reform.

Bertram Wainer had referred patients for abortions from time to time, and he was horrified at the legal risks and the police corruption surrounding what he—and many other reformers—considered a practical demand of women. After police began questioning women from patient files seized from Ken Davidson’s surgery, Haigh reports that Wainer placed an advertisement in the Sun on 20 May 1969, “headed ‘Abortion Abortion Abortion’, urging women visited by police ‘not be intimidated by bullying or intimidatory tactics’ and promising, ‘You are an Australian citizen and the law is on your side’... on this claim he would be proven stunningly correct.”

A few weeks after the decision in Davidson, Wainer decided to test the effect of the ruling and turned himself in to the police, taken responsibility for an abortion for which he had referred a patient. The police did not prosecute.

As the Canberra Times headlined on June 21, 1969, there had been “No Crime” in Dr Wainer’s case: the Victorian Attorney-General announced that the Menhennit ruling made it clear that Dr Wainer’s actions did not amount to a crime.

Wainer was also not charged for two later abortions that he reported to the police. It became clear that the ‘Menhennit ruling’ had changed everything.

Wainer then turned his attention to the police, knowing that they were accepting bribes from abortionists in return for immunity from prosecution. As Haigh observes, it was Wainer who used the press to draw attention to the fact that, rather than being a story of ‘backyards and knitting needles, the illegal abortion industry was … a hugely lucrative racket of apparently respectable doctors perfectly comfortable with paying graft, and even with setting the detectives in their pay on disliked rivals’.
Ultimately the government was persuaded to set up a public inquiry under William Kaye QC, ‘the Kaye Abortion Inquiry’ of 1970. The Inquiry received much publicity but ultimately only three senior police (the then chief of the homicide squad, Inspector Jack Ford, the head of the traffic branch, Superintendent Jack Mathews, and a former detective constable, Martin Jacobson) were charged, convicted and sentenced to lengthy prison terms.

**What did the Decision Mean for Women?**

The decision effectively legalised abortion as long as the provider satisfied the Menhennit requirements. As noted earlier, the decision addressed the liability of the doctor, rather than any claim to a woman’s right to choose, but the effect was that there were virtually no prosecutions where abortion was carried out by a doctor.

Similar judge-led developments were occurring in other jurisdictions, reflecting the changing attitudes to reproductive issues that parliaments were unwilling to address. In NSW in 1971 DCJ Levine of the District Court, building on the Menhennit ruling, directed the jury in *R v Wald* that an abortion would be lawful if there was ‘any economic, social or medical ground or reason’ upon which a doctor could base an honest and reasonable belief that an abortion was required to avoid a ‘serious danger to the pregnant woman’s life or to her physical or mental health,’ a more liberal formulation, but one that expressly required the abortion be performed by a medical practitioner.

And it will be recalled that it was in 1973 that the US Supreme Court ruled, in the still-controversial case of *Roe v Wade*, that it was a woman’s constitutional right to decide (with medical advice) whether she would continue a pregnancy.

It was almost 40 years before a Victorian government was willing to turn its mind to legislating further abortion reforms.

In September 2007 the Victorian Law Reform Commission was asked to review the law of abortion and to recommend options for reform. In its *Law of Abortion: Final Report* in May 2008 it presented three possible ways of reforming the law. In August 2008, the Victorian Labor Government proposed legislation that largely moved the decision out of the criminal field and into the health arena, shifting the decision making about the need for an abortion to the woman herself. Parliamentarians were permitted a conscience vote and the Bill was passed in October 2008.
Conclusion

In 1969 no government was willing to touch the issue of abortion, but a careful and conservative judge in *Davidson* was able to clarify the law and offer women realistic access to safe abortion. As Haigh observed, the case is:

not adventurous, stopping short of abortion-on-demand. It is not prescriptive, making no specific requirement regarding numbers or nature of medical or psychiatric opinions. Yet, after a succession of accidents and a parade of the peculiar, it made a shambles coherent - a court in the business of incarceration, and even execution, proving that the law is also about emancipation.35

The significance of the case can perhaps be gauged from the obituaries of Justice Menhennit in October 1979, when the Canberra Times headlined 'Abortion-Ruling Judge Dies'. Whether he wanted it or not, this is his place in history.

Acknowledgements

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Abortion-ruling judge dies

MELBOURNE: Mr Justice Menhennit of the Victorian Supreme Court, author of the "Menhennit Ruling" on abortion, has died. He was found dead in bed at his home in North Balwyn when a doctor called yesterday morning to take him to Supreme Court.

Mr Justice Clifford Ingham Menhennit, who would have been 57 today, was sworn in as Justice of the Victorian Supreme Court on October 17, 1976.

His ruling in 1976 was: "An abortion is justified if it is necessary to preserve the physical or mental health of a woman, provided the danger of the mother does not outweigh the danger an abortion was intended to avert."

Mr Justice Menhennit was admitted to the Bar in 1946, was made a Queen’s Counsel in 1973, and had extensive practice in the High Court and Supreme Court, particularly in constitutional, commercial, equity and criminal cases.

He appeared before the Privy Council several times.

During World War II — from 1942 to 1946 — he was the assistant Commissioner of Coastal Transport.

Mr Justice Menhennit’s wife died in 1975.

The son of an industrial chemist, Mr Justice Menhennit was educated at Melbourne State School and Science College, before graduating from Melbourne University and be-

Menhennit obituary
Canberra Times, Tuesday 30 October 1979, p. 8
Notes

3  Robyn Gregory, p. 64.
5  Robyn Gregory, p. 64.
7  Baird, p. 74.
8  Baird, p. 72.
9  Baird, p. 73.
11  R v Bourne [1939] 1 KB 687, 694.
12  R v Bourne [1939] 1 KB 687, 693.
14  Haigh, The Racket, p. 94.
17  Barry, p. 246.
19  Haigh, The Racket, p. 113.
22  See Letter from F.P. McManus, 'DLP's policy on abortion', Age, 10 July 1968 and 'Liberal calls for abortion law overhaul', Age, 9 July 1968.
23  See, for example, 'Liberal calls for abortion law overhaul', Age, 9 July 1968.
24  'Abortion policy', Age, 29 July 1968.
25  Letter from F.P. McManus, 'DLP's policy on abortion', Age, 10 July 1968.
Waller, p. 44.  
Gideon Haigh, ‘Abortion: the way we were’, Sydney Morning Herald, 6 September 2008.  
http://www.smh.com.au/national/abortion-the-way-we-were-20080905-4aq7.html#ixzz2s4DHs43VV; see also Haig 2008, pp. 104-5.  
Haigh, ‘Abortion: the way we were’.  
Waller, p. 44.  
Haigh, ‘Abortion: the way we were’.  
Gregory, p. 66.  
‘No Crime’ in Dr Wainer’s case, Minister Rules' Canberra Times 21 June, 1969.  
Haigh, ‘Abortion: the way we were’.  
Waller, p. 48.  
Abortion Law Reform Act 2008 (Vic) ss 4–5:
Section 4: A registered medical practitioner may perform an abortion on a woman who is not more than 24 weeks pregnant.

Section 5(1): A registered medical practitioner may perform an abortion on a woman who is more than 24 weeks pregnant only if the medical practitioner—
   (a) reasonably believes that the abortion is appropriate in all the circumstances; and
   (b) has consulted at least one other registered medical practitioner who also reasonably believes that the abortion is appropriate in all the circumstances.

(2) In considering whether the abortion is appropriate in all the circumstances, a registered medical practitioner must have regard to—
   (a) all relevant medical circumstances; and
   (b) the woman’s current and future physical, psychological and social circumstances.

Sir Leo Cussen—A Brief Note About A Great Jurist

Justice Mark Weinberg AO
Court of Appeal, Supreme Court of Victoria

Abstract
Sir Leo Cussen, who was a judge of the Supreme Court of Victoria for some 27 years between 1906 and 1933, is universally regarded as one of this state’s greatest ever jurists. It was this country’s misfortune that he was not elevated to the High Court, an appointment that he richly deserved. However, we benefited greatly from the dominant role that he played in the development of the law in this state, where he made a lasting contribution. It is timely, at this stage in our history, to reflect upon his qualities as a judge, and in so many other diverse roles.

Introduction
On 13 April 1964, upon the occasion of his retirement as Chief Justice of the High Court of Australia, Sir Owen Dixon had this to say:

There are two things I would like to say about people in retrospect: there were two tragedies in the life of the High Court which did not depend on a particular event or a particular thing, but which just went on. One was the failure of the Commonwealth Government to appoint Sir Leo Cussen to this Bench, and the other was the failure of the Commonwealth Government … to appoint Sir Frederick Jordan to this Bench. Those of us who were on it tried, I think, a little to bring both events about. But it is not easy: vacancies do not occur where the right appointments could most easily be made to fill them.

But I should like to say to you, particularly in the presence of Mr Justice Starke, who is somewhere here, that his father told me that when he was offered the appointment to this Bench he at once wrote to Mr Justice Cussen and had a long conversation about it, about how it could be managed to have Mr Justice Cussen appointed instead of himself, and Mr Justice Cussen found on the whole proposal that there were all sorts of difficulties in it—but most of all that they had asked Starke and had not asked Cussen.¹

On the same occasion, Sir Robert Menzies, as Prime Minister, spoke on the subject of scholarship in the classical tradition. He described the outgoing chief justice as ‘a great legal scholar; a scholar who always saw
through the textbooks and statutes to the historic background and thus determined the significance of every change. Exactly the same comment could be made about Sir Leo Finn Bernard Cussen.

This is neither the time, nor the place, to set out in detail a biography of Cussen's life. A few highlights can be noted. He was born on 29 November 1859 at Portland Victoria. He studied to become an engineer and gained employment with the Victorian railways. He returned to university to study Law and was nearly 27 when he joined the Victorian Bar in 1886.

Though he soon established a successful practice at the Bar, working in all areas except, it must be said, criminal law, he elected for whatever reason not to take Silk. He was not alone in that regard.

In March 1906, he was appointed a judge of the Supreme Court of Victoria. He was aged 47 at the time. Curiously, Cabinet was divided over the matter, but the appointment was warmly welcomed by the entire legal profession and by the press. It was noted that he was, at the time, a popular and genial figure with the reputation of being the 'hardest worked and perhaps highest paid of present Melbourne barristers'.

Cussen's annual salary as a judge was £2,500. It was said that this represented a considerable financial sacrifice. No doubt, the sacrifice became greater over time since that salary was neither reviewed nor increased during his 27 years on the Bench.

It was said of Cussen that he could turn his mind to any branch of the law. He was regarded as a masterful trial judge, his jury directions being treated as classical expositions of legal doctrine for years beyond his time on the Court.

Apart from his judicial work, Cussen undertook two massive projects involving statutory consolidation for the Victorian Parliament. These resulted in the 1915 and 1929 consolidations.

In 1914, Cussen recruited Dixon, Charles Gavan Duffy and Morris Blackburn to assist him in the preparation of the consolidation of the Victorian statutes. It seems that Cussen had worked on that consolidation since 1908.

The work was carried out by Cussen in what might laughingly be called his 'spare time'. He was not paid for this work, and it is said that it affected his health adversely.

Cussen not only consolidated the Victorian statutes, he re-wrote a number of them, recasting them in language that was comprehensible.
He also provided a series of valuable annotations. With regard to the 1915 consolidation, which spread over five volumes, he received only the thanks of the Victorian Parliament.

Not content with this monumental achievement, Cussen spent some four years between 1918 and 1922 engaged in an even larger and more complex task of statutory consolidation. This project involved an exhaustive examination of over 7000 English and Australian Acts dating back to the thirteenth century, to determine which English and colonial Acts were applicable in Victoria. On completion of that work, he was given a leave of absence to recover his health. He used that leave to travel through Europe.

In 1929, he completed his second consolidation of Victorian statutes. Once again, he was thanked for his services. There was then an unseemly debate in the Parliament as to whether he should be paid an honorarium for what he had done. That proposal was rejected and he was once again given a period of leave to recover from his exertions.

It is widely known that Cussen occupied a series of public offices associated with the Public Library, various museums and the National Gallery of Victoria. He was a member of the Felton Bequest Committee. He was also a member of the Faculty of Law at the University of Melbourne for an amazing 43 years, and a member of the University Council. He was a member of the Council of Legal Education, and of the Walter and Eliza Hall Institute of Research. He was president of the Melbourne Cricket Club from 1907.

Cussen died on 17 May 1933, aged 73. He was still a serving judge at that stage, and had in fact presided in court only two days earlier. A huge public funeral and procession followed, with Archbishop Daniel Mannix conducting a pontifical mass in St Patrick’s Cathedral. He was survived by his wife, daughter, and five of his six sons.

In 1964, the Sir Leo Cussen Chair of Law was created at Monash University. In 1972, the Leo Cussen Institute for Continuing Legal Education was founded in Melbourne. At the time of his death, Robert Menzies described Cussen as ‘one of the great judges of the English-speaking world’. His contemporaries noted his deep learning, sound judgment, dignity of demeanour, natural courtesy and sense of public duty. They also commented upon his lack of ‘pedantry’.

In his classic history of the Victorian Bar, A Multitude of Counsellors, Sir Arthur Dean described Cussen as ‘one of our greatest
judges'. Indeed, he went on to say that by many standards, 'he was our greatest'. He added that most Victorian lawyers considered that Cussen should have been appointed chief justice of the High Court. Dean said of Cussen that he was 'not a spectacular lawyer', but 'a very able and learned one'.

When Cussen was appointed to the Supreme Court, it was understood that he had been appointed solely on the basis of his work at the Bar, and that he had never taken any part in politics or public life.

Dean also observed that even in the 1960s, when his book was written, Cussen's judgments were still being cited with respect, and that they carried great authority. Dean said that if Cussen had a fault, it was from an excess of virtue, for he was reluctant to believe of any person that he was a liar and a knave.

This takes me to a brief survey of some of Cussen's judgments on the Court. He obviously wrote thousands of judgments over his 27 years on the Bench, and a computer search throws up some 750 or so that found their way into the Law Reports.

Because Cussen had no background at all in the criminal law, and presumably no great interest in that subject whilst at the Bar, I thought it would be interesting to see how he handled difficult cases in that field after he was appointed a judge.

The short answer is that, as with everything he did, his criminal law judgments were, by and large, superb. A few examples will suffice.

In June of 1906, when Cussen had been on the Court for only two or three months, he delivered judgment in the celebrated case of *In re Dunn; In re Aspinall*. The facts were these. During the sittings of the Court of General Sessions at Melbourne, two women, Dunn and Aspinall, approached a man who was a prospective juror in the criminal trials then listed. They invited him to join them for a drink. He refused. Dunn said, 'My brother has got into some trouble over a cheque. His case will be next. You might do your best for him. You know one juryman can do a lot. When it is over you can see me any time you like after.' That conversation took place outside the Court.

The judge presiding over the trial imprisoned the women for three months for contempt.

On a writ of habeas corpus, it was submitted that the conduct in question did not amount to contempt since the man approached had...
not, at that stage, been empanelled as a juror in the case involving Dunn’s brother. It was further submitted that the use of the summary method of publishing offences as contempt should not be resorted to when alternative procedures were available.

The third argument advanced on behalf of the women was that the warrant of imprisonment was bad because it did not allege that the contempt had been committed in the face of the court, and the evidence showed that it had not been so committed. Finally, it was put that the Court of General Sessions had no jurisdiction to punish at large for contempt.

Cussen delivered judgment on the spot. He ordered the women be released, and published detailed reasons just over a week later. He concluded:

1. that the offence alleged in the warrant could not, in any circumstances, be a contempt of any court
2. that the Court of General Sessions could not punish summarily the offence alleged in the warrant; and
3. that in any event, the warrant did not allege any offence committed in the face of the court, and the evidence showed it was not so committed.\(^8\)

In the course of a thorough and scholarly judgment, Cussen explained definitively the principles governing the offence of contempt of court. He then analysed the history of the Court of General Sessions, distinguishing between its jurisdiction and that of the Supreme Court. He cited copious authority that he analysed carefully.

But Cussen went further. He laid down a series of general principles, classifying and distinguishing between civil and criminal contempt, a matter that still troubles the courts today. He referred to a number of historical treatises. He distinguished criminal contempt from an attempt to pervert the course of justice, conspiracy to pervert the course of justice, and the common law offence of embracery. He dealt with jurisdictional matters. His reasoning is still highly relevant today, and this case is still cited on a regular basis. In fact, I relied upon it as recently as a year or two ago in a judgment that I wrote.

A particularly interesting case that Cussen presided over was \( R v \ Long \).\(^9\) The prisoner had been tried at Ballarat for murder. The jury disagreed and he was accordingly remanded to trial to the next sittings at the Supreme Court of Ballarat.
After the trial, ten of the jurors signed a letter that was sent to the attorney-general. The letter stated that eleven of the jury had been in favour of an acquittal. They set out why, and pointed out that in their view it would be unfair to the prisoner to put him on his trial a second time in the face of such a weak case.

The letter was drawn up by the prisoner’s solicitor, and was shown to a newspaper reporter who published it in various Ballarat newspapers. It received widespread coverage. The Crown applied for the trial to be transferred from Ballarat to Melbourne.

Included in the letter was a comment to the effect that at the end of the Crown case, there had been a no case submission. The presiding judge (Hodges J) had said he thought the case was ‘very weak’, but had allowed it to go forward. According to the signatories, the accused then gave sworn evidence, and did so in a manner that the jurors regarded as ‘very satisfactory’. In addition, medical evidence called on behalf of the defence had totally discredited the medical evidence led by the Crown.

Apart from the unusual (to our eyes) feature that the jury were apparently present during the no case submission, the letter went on to say that eleven of them were positively satisfied that the accused was not guilty.

In a short, but erudite judgment, Cussen ordered that the trial be conducted in Melbourne. His Honour canvassed the meaning of the expression ‘expedient to the ends of justice’ in deciding whether to transfer the case.

Despite the compelling nature of the Crown’s application, Cussen issued the following note of caution. He said,

If there was the least possibility that he would not get a fair trial in Melbourne, I would not order a change of venue. I think this matter may be decided by reference to the converse case. I can imagine the proposed indignation of counsel for the prisoner if the other circumstances were the same, except that the majority… had wanted to bring in a verdict of guilty, but that one obstinate juror would not agree with them.10

A truly remarkable case, again handled with ease and aplomb.

The last of the criminal matters to which I wish to refer is R v Lowe.11 L, a duly qualified medical practitioner, was charged with having wilfully made false statements relating to the death of a particular individual. L
had acquired a medical practice and put B, a fifth year medical student, in charge of it. B undertook to contact L where required.

B attended a patient who died after a short illness. L never himself attended or saw that patient but provided a death certificate in which he stated, ‘I attended H. I last saw her on 16 July 2016’.

The defence was that L honestly thought that he was entitled to provide the certificate because B was his agent and had attended L in that capacity. The jury were, in effect, directed to convict L and they did.

On appeal to the Full Court, the majority held that as the statements were false and were known by L to be false, and were intentionally made by him, the conviction was correct. The fact that L genuinely and honestly believed that he was entitled to provide the certificate afforded no defence.

Cussen dissented. He held that the jury should have been directed that in order to convict L, they had to be satisfied beyond reasonable doubt that the statements were not only untrue, but were wilfully false. If the jury thought it reasonably possible that the statements were made mistakenly, they did not fall within the terms of the relevant offence.

In Cussen’s judgment, his Honour distinguished the rule, usually applicable, that ignorance of the law is no excuse. He said, ‘here, the accused does not rely on any such ignorance, but says that if there was a mistake it was a mistake of expression’.

However, his Honour went further. He said that ‘… in reference to such a charge (of making a wilfully false statement) an honest mistake even as to the general law might excuse’.

He gave this example. A person incorrectly says that he is the owner of certain property. Such a person cannot be convicted of making a wilfully false statement if he honestly believes that the property in question is his.

There then appears the following passage:

I think that some confusion arises from considering, as if it were a matter of law, the allegation that a statement is such that the accused could not have believed it. The question, Could he have believed it? is merely one of the preliminary matters to be considered, not by the Judge, but by the jury, before they answer the subsequent question, Are we satisfied that he did not believe it? If the statement is such that the jury think it would be absurd to conclude that the accused believed it, they will answer these questions against him. Illustrations
can easily be given which cover on the one hand cases where a mistake might easily be made, as well as cases where a mistake is difficult, or practically impossible. Between the two extremes the gradations are infinite. But if the maxim, “ignorance of the law does not excuse”, is applied, the same verdict, “guilty”, must be given in all such cases of mistake. There could, for example, in circumstances like the present, be no difference in result following from a statement: “I was in attendance, etc” and a statement—“I last saw, etc. Each, if incorrect, must on the suggested construction, be a violation of the Statute. In the jury-room the distinction between the matters involved in these two statements would, or might, in the view I take, be of great importance.

Considerations applicable to cases of contracts, where a person may be bound by the sense in which words would be understood by another, though he himself had no such meaning, are not in point here, where the offence is specifically dependent upon what was in the mind of the accused, the outwards act being in a very special sense merely one of the elements manifesting or proving what was in his mind.13

This analysis, favouring a subjective view of criminal liability over the objective approach adopted by the majority, was prescient. It anticipated by more than forty years the celebrated judgment of the High Court in Parker v The Queen, where Chief Justice Dixon rejected the objective theory of murder favoured at that stage by the House of Lords in DPP v Smith and put Australian criminal law on a sound conceptual footing.14

In the context of Cussen and the criminal law, I should add, for the sake of completeness, that Cussen’s charge to the jury, as reported in R v Orton, represents as clear a statement of the elements of conspiracy as could possibly be imagined.15 His Honour’s formulation is still cited today in all of the leading texts on the subject, particularly his statement that “… there must be at least on the part of the alleged conspirators a conscious understanding of the common design.”16

It must be said that Cussen blotted his copybook in relation to the criminal law in the celebrated case of Ross v The King.17 As is well known Ross was convicted, on the basis of dubious evidence, of the rape and murder of a young girl, and ultimately executed. Cussen sat on the Full Court that rejected his appeal. So too, it must be said, did the High Court, although Justice Isaacs delivered a powerful dissent, which on the law as it stood at the time, was plainly correct.18 Ross was later
posthumously declared innocent, it being clear now that his conviction
involved a terrible miscarriage of justice.

On the civil side, there are two cases to which I would draw
attention.

The first is *Ah Sheung v Lindberg*. This case was heard and
determined in April 1906, within weeks of Cussen’s appointment to
the Supreme Court. It concerned an application for a writ of habeas
corpus, and whether a state court had jurisdiction to enquire into the
validity of the applicant’s restraint given that such restraint was exercised
under the authority of Commonwealth law. The return to the writ stated
that the applicant was a prohibited immigrant within the meaning of
the *Immigration Restriction Acts 1901–5* (Cth) in as much as he was a
person who, on 28 March 1906, failed to pass the ‘dictation’ test, and
pursuant to Commonwealth law was to be prevented by the Master
from embarking from the steamship that had brought him to Australia.

Cussen delivered a lengthy judgment (for the time) of some 20
pages in the Victorian Law Reports, in which he held that the applicant,
Chinese born, but naturalised and domiciled in Victoria, and returning
to Victoria after an absence of some five years, was not an ‘immigrant’
within the meaning of the relevant legislation.

The judgment itself, granting habeas corpus, deals with a host of
matters of a kind that had never previously had to be determined. Of
course, the federal government had only come into existence a few
years earlier, and its relationship with the state courts was still being
worked out.

There were issues as to the admissibility of evidence on the
return of the writ of habeas corpus, the nature of the dictation test, the
adequacy of the facts stated in the return, and the applicant’s status in
1900 as compared with his status in 1906.

On the construction issue, dealing with the meaning of the term
‘immigrant’, Cussen took a refreshingly common sense approach,
holding that it would be absurd to describe a person domiciled and
resident in Victoria, who was also a naturalised Australian subject of
the King, and temporarily out of Australia, as an ‘immigrant’. In his
Honour’s terms, ‘it must be remembered in construing this Act, that
Courts uniformly refuse, unless compelled by express language or clear
implication, to give to Statutes a construction whereby rights previously
vested are injuriously affected.’20
Not content with considering domestic law on these subjects, such as it was, Cussen analysed closely a substantial body of English and United States law. His examination of the authorities, literally dozens of them, all in the space of a week, was not simply exhaustive, but also demonstrated great depth of analysis.

There was a sequel to all this. After landing in Melbourne, Ah Sheung was again arrested and charged with being a prohibited immigrant ‘found within the Commonwealth’. On that charge, the Magistrate treated Cussen’s earlier judgment as conclusive and dismissed the information.

The immigration authorities took the matter to the High Court, which held that Cussen’s judgment, being in respect of proceedings between Ah Sheung and Captain Lindberg (the master of the vessel) was not admissible upon a different charge, and that the magistrate should have heard evidence to satisfy himself that Ah Sheung was in fact the naturalised subject he claimed to be. After further hearings in the Magistrates’ Court and in General Sessions, Ah Sheung finally succeeded in proving his identity.21

The second was *House v Caffyn*.22 There, Cussen delivered a judgment of great importance regarding the operation of the Torrens system, and the relationship between basic principles of equity and the land registration scheme. He noted that the principles of law and equity applicable to land, and dealings with land, under the general law should, where they were not inconsistent with the provisions (express or implied) of the *Transfer of Land Act*, be applied to land, and dealings with land, under that Act. This judgment was revolutionary at the time, and is still studied by law students as part of their property courses.

**Conclusion**

I have said enough to indicate just how great a judge Cussen was. The fact that his judgments are still cited a century after they were delivered, when almost none of those delivered by his contemporaries are read, or referred to, speaks for itself.

However, Cussen was no law reformer, in any modern sense of the term. He was no Lord Denning, nor even a Michael Kirby. He was not a big picture man. Nor would one have expected him to have any great interest in broad policy issues, as such. He was very much in the tradition of the judges of his time, all of whom would have been adherents of the theory of judicial restraint. He was a black letter lawyer,
and would have voiced displeasure at the very idea that he should be thought to be anything else.

Yet his contribution to the development and improvement of the law, though incremental, was immense. His two consolidations of Victorian statutes, and his work on the *Imperial Acts Application Act 1922*, were invaluable, painstaking and backbreaking though such work must have been.

When it was said by Dixon that Cussen (along with Jordan) should have been appointed to the High Court, that assessment cannot be gainsaid. There is a parallel in that sense between Cussen, and Judge Learned Hand in the United States, generally regarded as the finest judge never to be appointed to the United States Supreme Court. It was this country’s misfortune that Cussen missed out on the ultimate judicial prize, but it was Victoria’s great stroke of luck that he lent such lustre to this state’s highest court.

**Abbreviations**

Abbreviations used in this article: Commonwealth Law Reports (CLR); Victorian Law Reports (VLR) and Appeal Cases of the United Kingdom (AC).

**Notes**

1 The most helpful and comprehensive discussion of Sir Leo Cussen’s life is to be found in the Sir Leo Cussen Memorial Lecture delivered on 14 November 1986 at the Leo Cussen Institute at Melbourne by Mr Justice Brennan of the High Court of Australia.

2 (1963–1964) 110 CLR (v). In Cussen’s *Australian Dictionary of Biography* entry, prepared in 1981 by Jenny Cook and Brian Keon-Cohen, it is said that Dixon considered it an extraordinary error by Governments not to have appointed him Chief Justice of the High Court of Australia or the Victorian Supreme Court. However, I can find no record of Dixon having made a statement in those terms. Philip Ayres, in his biography *Owen Dixon: A Biography*, Melbourne, The Miegunyah Press, 2003, records a variant of the Chief Justice’s admiration for Cussen, stating merely that Cussen and Sir Wilfred Fullagar were the two Australian judges he most admired, men with a profound sense of duty and high standards of personal conduct.


4 Philip Ayres, in his biography of Dixon, observes that the work Dixon did on the consolidation had a perverse effect upon him. It moderated some of his earlier reformist tendencies. The following quote from a paper prepared by Dixon entitled ‘Comments on Professor Kenneth Shatwell’s Paper’ delivered at the tenth convention of the Law Council of Australia in Melbourne, is illuminating: ‘I think that we were really intended only
to be proof readers, but we thought we were enlisted in the army of law reformers. We sat evening after evening and read the Bills and made notes. Sometimes in the morning we paraded before a judge of immense learning and understanding, one great in his sympathetic nature, and made our suggestions. Usually, we found them disposed of one by one. One on the ground that you could not get it through the Legislature, another because the same thing had been done before in some jurisdiction or other of which we did not know, the third because it really would not work and so it went on. I found myself, before I had passed the age of enthusiasm, confronted by a mind that really knew, one of depth and breadth. I learned that there were limits to what you really could do and to what you ought to attempt, and that the best course was to endeavour to provide an intelligible body of statutory law likely to be construed in the way which you intended'.


[1906] VLR 493. There was an application for certiorari heard by Cussen in which his Honour was asked to quash the warrant of commitment that had been issued earlier that year. This involved complex questions as to the availability of certiorari in relation to criminal proceedings, in the face of a provision of the *Supreme Court Act 1890* which operated as a privative clause. Cussen heard this application a few days after he delivered judgment on the writ of habeas corpus, and ruled some weeks later that certiorari would not go. Once again, the judgment displays extraordinary erudition, and is superbly written. See *Ex parte Dunn; Ex parte Aspinall* [1906] VLR 584.

[1906] VLR 493.

Ibid 496.

[1911] VLR 30.


[1917] VLR 155.

Ibid 162.

Ibid 163.


[1922] VLR 469.

Ibid 473.

[1922] VLR 329.

[1922] 30 CLR 246

[1906] VLR 323.

Ibid 334.

This matter is full discussed by Dean at 319ff.

[1922] VLR 67.
The McGarvie Letter: Reforming from the Inside

Michael McGarvie

Abstract

On 30 April 1984 the then Chief Justice of the Supreme Court of Victoria, Sir John Young, received a typed, 33-page letter titled 'Internal Government of the Court'. The letter was from a junior judge of the same Court—Justice Richard (Dick) McGarvie. It bluntly but respectfully analysed the poor physical state and internal governance of the Court and proposed a pathway for recovery. According to fellow judges at the time the letter had an astonishing impact. First it was treated with fear and derision, then it was seen as a hallmark for necessary reforms, and finally it formed the template for a renewed, modern court fit for the needs and demands of the Victorian justice system of the late twentieth-century.

Introduction

On Friday 8 April 2016, Governor Linda Dessau, launched the historical exhibition as part of a week of celebration of the history of the Supreme Court of Victoria at the Royal Historical Society Victoria. Her Excellency noted how it was remarkable that for 175 years, the Supreme Court had maintained a consistent contribution to constitutional and to democratic principles. It was those two elements that so strongly drove Dick McGarvie in the reforming work he did throughout his life, and which prompted him to write the letter to his Chief Justice Sir John Young in 1984 stating the compelling case for urgent and overdue reforms. This paper describes the person who put so much careful effort into the successes he achieved as a reformer. It is also significant that he reformed organisations from the inside.

Court Administration

I was very privileged to be CEO of the Supreme Court from 2006–2009. Then, the organisation had 50 judges, 100 judicial staff and 150 administrative staff. It had modern management principles and sound systems of governance. It had a well-functioning executive committee of judges. Judges carried portfolio responsibilities in the field of security, finance, information technology, staffing, appeals,
buildings, library and media. The Court conducted committee meetings and council meetings via appropriate and conventional procedures. It had an extraordinarily successful media liaison operation that was regarded by the media as about the best and most successful operation in Victoria, and probably Australia. It worked closely with the voluntary Court Network team who assisted court users and the general public to navigate their way through the court processes and buildings. The Court had functioning and respectful jury management systems and effective case flow management.

As CEO I was lucky enough to assist with a $27m refurbishment program between 2006 and 2009: an historic internal courtyard was renovated, a brand new commercial court fifteen was built, and major renovations to all courts numbered one to fourteen occurred. The court had influence on Government; it was ably supported by a modern administration; it had a close connection with the Judicial College and delivered continuing judicial education. The Court ran terrorist trials, major class actions and complex multi-party commercial cases. It developed a costs court; enhanced its commercial court; and delivered front-end management for appeals. The Court also drove the reform agenda for the appointment and creation of associate judges, shifting
from the old fashioned and outmoded concept of Master. The Supreme Court I experienced was, and still is, vibrant, agile, influential and respected.

But who was Dick McGarvie and what was the cause for overdue reform presenting itself to him and others in 1984? According to him it was undemocratic; it was inward looking; it had little or no influence on Government; no media relations; decrepit facilities; was badly funded; carried a low governance reputation; ran itself like a colonial military regiment; was at risk of losing its self-respect and it was in desperate need of help. What occurred was that a forward-thinking, reforming judge combined forces with an eventually receptive chief justice to achieve very timely and long-lasting reforms.

The five things that drove Dick McGarvie’s life and his persuasive style were internal knowledge used within networks of influence in which he set up a case for reform, proposing practical change ensuring democratic principles were paramount.

**ALP Reforms**

It started in the 1960s. Dick McGarvie was a member of the Australian Labor Party (ALP) from 1949. After the split of the Labor Party into ALP and Democratic Labor Party, the Labor Party in Victoria was in a dreadful mess. Labor was virtually unelectable to public office in Victoria in the 1960s and would have remained so. The party was controlled by the Trade Union Defence Committee, which ran the Central Executive of the Party along Marxist principles. They had no interest in public appeal or any policies of relevance to the balanced middle-of-the-road voter. They wanted philosophical purity—they wanted institutions destroyed and they had no concern about constitutionally governing the Party that they controlled, nor any interest in applying democratic principles to the way it was run. Only five per cent of members ever went to the Party’s State Conference and had influence there; 95 per cent of Conference delegates were affiliated with the trade unions from the socialist left. Some delegates were members of the Communist Party of Australia and were not even members of the Labor Party. They disregarded outsiders and all sensible reforms were shunned.

Dick McGarvie and others spent six years failing to introduce constitutional reforms to a Party that was undemocratic to the core—in fact the Victorian Central Executive of the Party scorned democracy. What formed was a group of people who called themselves ‘the
Participants’. It consisted of about 140 disgruntled but reform-driven party members, including people such as John Cain—eventually a Victorian premier; John Button—eventually a senator; Xavier Connor—eventually a Federal Court judge; Jim Beggs—Waterside Workers’ Federation president; and Vin Gawne—eventually listing master of the Supreme Court of Victoria. Dick McGarvie was the one who volunteered to write an excoriating nine-page letter with a full set of additional documents in support to the Federal Executive of the Labor Party on behalf of ‘the Participants’. The letter announced and explained his reasons for resigning from the party a day earlier, and it then built the case for reform.¹

¹ ‘Who’s Driving?’. Cartoon by Peter Russell-Clarke, published by the Herald (n.d.)

Dick’s letter to the Party had an extraordinary impact. It stated a comprehensive case against the Victorian division. He said it was in an appalling situation where members didn’t count, the affiliated unions dominated, and there was no way to implement any of the ideals through democratic means. If that was not possible he said, then our national youth would decide to bypass democracy, and resort to revolutionary means to have their say. In response, the Federal Executive of the Party set up a process that led to federal intervention into the affairs of the Labor Party. These Participants prepared 60 pages of evidence involving statutory declarations and documents with statements from people
proving how undemocratic and how hopeless that party was. This triggered federal intervention by the federal branch of the Party into the affairs of the Victorian Branch in September 1970 led by Edward Gough Whitlam.

The Party was reformed ahead of the 1972 federal election. A newspaper cartoon of the time displayed Dick McGarvie leaping off the old train leaving Bill Hartley and George Crawford fighting and brawling ahead of a crash.² Of course, steaming fast towards the old dilapidated state ALP train in the opposite direction on a crash course, in the modern federal ALP train, was one Gough Whitlam. In fact Whitlam could not have won the 1972 federal election without the decks having been cleared in Victoria two years beforehand by the reformist acts of McGarvie and ‘the Participants’. By election-day in December 1972 the ALP had electable, appealing, moderate candidates for public office, and Gough later said that it was Victoria’s electoral success that got Labor into government federally.

**The Incendiary Letter**

In 1976, Dick McGarvie was appointed a Supreme Court judge by Haddon Storey, the Attorney-General in a Liberal conservative Hamer Government. He was appointed for his pre-eminent legal skills and his highly respected, non-partisan reputation. If it might be suggested Dick’s moves for reform of the Court in 1984 were divisive and party-political, that would be wrong.

![Justice McGarvie](image)
Having been a judge from 1976, by the early 80s he realised the Court was in need of urgent reform. In a carefully worded, respectful, 33-page letter Dick set out the case he needed to present to the Chief Justice. The letter concluded with a confirmation to the Chief Justice that Dick had spoken to the Chief in advance of delivering the letter; that His Honour was pleased to learn he was going to receive this letter; and that by receiving this letter there would be no friction between them. Dick had prepared Chief Justice Young for his critique and he used all of his five driving principles to achieve his purpose. In doing so, he carried internal knowledge using his network of influence to set up a case for reform, where he proposed a practical change under which democratic principles were paramount.

McGarvie’s key point was that this prodigious institution, the protector of the constitutional affairs of the state and of democratic traditions wasn’t conducting its own internal operations democratically. Dick kept his complaints completely confidential: there was no media; the letter was not conveyed to anyone but the Chief Justice; there was no leaking; and no backgrounding. It remained top secret to most of the Victorian legal profession for decades. In fact it was so secret that he had his daughter type the letter at home on one of Australia’s first word processing typewriters. That secret typist, my sister, Her Honour Magistrate Ann McGarvie, is here today.

The case McGarvie presented was that with a nineteenth-century outmoded model of internal governance, the Court could not cope with modern conditions. The letter (shown on the following pages) said the court could prevent its reputation from sliding by addressing the problem immediately. Dick presented a set of facts as compelling as the facts he delivered so persuasively to the Federal Executive of the Labor Party fourteen years before. He described the building as deteriorated and that to juries and court users, the Court presented itself as a neglected institution. He described its dirty, seedy, shonky jury facilities where there were no windows and its ‘bring your own fan’ for the jurors on a hot day. He said the library conditions filled judges with shame; the threadbare carpet and flaking paint projected an image of the Court as a fading ineffectual institution whose self-respect had seriously eroded. Dick stated that the Court had a third-rate messenger service that no judge could rely on or trust.
The Honourable Sir John Young,
Chief Justice,
Supreme Court,
William Street,
Melbourne, 3000

Dear John,

Internal Government of the Court

In this letter I set out my views on the ways in which, I am confident, the Court can successfully overcome present problems and build a structure capable of effective performance of its future responsibilities. From recent developments which you have proposed or supported, and from discussion with you, I think that my basic approach is similar to yours. I have in mind such developments as your Chairmanship of the Civil Justice Committee, the constitutions of the Administration Committee and the adoption by Council of its recommendations, the emergence of the policies of holding more frequent and extensive Council meetings, of utilising the annual report to the Governor to draw attention to improvements needed for the proper administration of justice and functioning of the Court, of improving communication with the judges and of having them better informed about the affairs of the Court. These are some examples. There are many others.
This is a letter which I have intended for years to write to you. It is not written as a member of the Administration Committee and no other judge except yourself, is aware that I proposed to write such a letter. Your telling me on 13 April that you looked forward to receiving the letter and that it would create no friction between us, has encouraged me to write with frankness.

I add that this letter is confined to limited aspects of the Court and does not purport to be an overall assessment. I could write an even longer letter on the virtues of the Court and my colleagues.

Yours sincerely,

R.E. McGarvie
He proceeded to argue that there was no process within the Court to discuss or decide issues and then act individually or collectively as a group of judges. As a result the Court was not having any impact, it was not influential and it was not getting the resources it needed as a Supreme Court. He also said some things that were pretty tough. He said the chief justice in this structure was isolated and that he was the lone governor of the court. He said to this Chief that he relied on two or three out of touch senior judges, removed from the views of the bulk of the junior judges, to govern the place. Dick suggested this placed an unfair burden on the chief justice under the existing structure that followed a management model that was hardly different from that of a 'colonial government, a regiment or a warship'. Dick suggested the arrangements made the chief justice oblivious to the deep dissatisfaction that was held by other judges about governance, where any suggestions of change were regarded as acts of disloyalty. The letter argued that the then Council of Judges structure produced disharmony; that puisne judges were impotent; that there was a collapse in the collective will of the judges of the Court and there were low levels of self-esteem at the Court.

McGarvie proposed a new model. He argued that Sir John Young should abandon the 132-year-old prerogative held by all chief justices. He suggested the introduction of a majority rule process, operating on democratic principles. The case put was that new ideas should be welcomed and that Council meetings must follow proper rules of meeting procedure. The new model had to avoid the creation of bias only towards the prevalence of a chief justice's personal views. It was suggested the Court could create an executive committee of portfolio judges to run the organisation like a modern corporation or government. Then Dick suggested in the letter, 'you could lead us Chief Justice, you could lead us to make the changes'. The response of the Chief Justice was remarkable: first resentment; second realisation; and third, he embraced the reforms.

In the late Justice Ken Marks' book, he talks about the letter as a fellow Supreme Court judge at the time and the impact it had on the Chief and the Court. Marks wrote that after Justice Sir John Starke was shown the letter by the Chief, he was so incensed he advised the Chief Justice to distribute the letter to all of the other judges to show Dick as an upstart. Until then, the letter was completely personal and
confidential between Dick and the Chief. Sir John Young distributed it acting on Starke’s advice. In fact, the opposite occurred. When all the other judges received a copy of the letter from Sir John most of them said they agreed with its sentiments and expressed the view that the Court just had to do something about it. In response Chief Justice Young eventually did something about it, although his first written response to Dick was a month and three days later, on 3 June 1984. Dick received a ten-line letter that said,


Yours John.6

This Chief did move however, and in doing so it did make a difference. In August 1985 the very next year, Dick McGarvie was the Chair of the then Australian Institute of Judicial Administration (AIJA). He arranged for the Chief Justice to present the opening speech of the 1985 AIJA Conference. That speech revealed everything: the Chief announced that some months earlier he had introduced reforms to the Supreme Court of Victoria. The Chief announced that the Court was starved of resources; that he as the Chief Justice and the judges were not doing enough in relation to court administration; that the court struggled to influence. The Chief said:

‘We’re groping, experimenting and learning in how to administer our Court. We have beefed up the Council of Judges so it meets regularly, and we now run the court through an executive committee in which each member carries a portfolio of judicial administration, buildings, legislation, planning, and computers’.7

Chief Justice Sir John Young promoted the notion of a Courts’ Commission to take over the full financial governance of all Victorian courts and he suggested that some time in the future this may occur—and we know that it did eventually occur 30 years later. Dick McGarvie’s persuasive ideas were very much at the core of the Chief Justice’s significant 1985 reforms.
Republic Debate

One other aspect of Dick McGarvie’s contribution to reform and democracy was his role in the republic debate and his influence in avoiding a flawed model for a republic. Again, he achieved this with his internal knowledge—having been Governor of Victoria from 1992 to 1997. Dick also applied his networks of influence and his ability to establish a persuasive case for achieving reform with a practical model that was safe for that paramount principle of democracy.

In the republic debate Dick proposed a minimalist model for a republic that would not diminish the institutions of stability and security that we enjoy in this country. His proposal was called ‘The McGarvie Model’. Dick was strongly sceptical of an elected president, whether by popular vote or parliamentary majority. He argued Australia should not design a system that would allow a rich populist or a media manipulator to run for public office and get elected president. He suggested it would be unwise to have as a president, a person who could claim a mandate greater than the prime minister of the country. The McGarvie Model would create a system where the queen’s only remaining power to appoint or dismiss a head of state would be repatriated into the hands of a constitutional council that would act on the advice of the prime minister and appoint a governor general or in a state’s case, a governor.
Dick's case was based on a thorough and personal understanding of the way conventions influence the way people behave within the Australian constitutional structure, including the operation of the governor general's reserve powers for the dismissal of a government.

Dick was a member of the Constitutional Convention, conducted in Canberra in February 1998. The Convention was established to consider whether Australia should choose a republic, and if so, what model. Dick McGarvie played an influential role in highlighting the weaknesses and dangers of many of the models proposed without taking a monarchist stance. In fact, as a model that was treated as a rank outsider at the start of the Convention, the McGarvie Model was eventually the runner-up proposal to be put forward in a subsequent referendum. It was the flawed Turnbull model that prevailed. Malcolm Turnbull, now Prime Minister of Australia, was then chairman of the
Australian Republican Movement, and its delegate at the Convention. That model proposed that a governor general could be appointed by a two-thirds majority of the parliament. In retrospect, the fundamental flaws in the Turnbull Model are manifest. Imagine, Julia Gillard as Prime Minister and Tony Abbott as Opposition Leader: would they vote harmoniously for a satisfactory governor general by appointment through a two-thirds majority of parliament? The notion was fanciful and anyone elected by a two-thirds majority of the parliament would have more of a mandate than the prime minister herself or himself.

Dick understood the rough and tumble way that politics is played in Australia. I am reminded of his persuasive determination when I recall a shot of him at the launch of his book *Democracy: Choosing Australia’s Republic*. With weeks to go before the November 1999 referendum, he stood amongst a media scrum in Canberra explaining again why democracy was too precious to be clothed in a flawed model for the selection of head of state. As we know, the Turnbull model was selected by the Convention in 1998 and was put to a referendum in 1999 and failed. Dick knew it would fail because he knew, like juries in a courtroom, the voters get these things right. Dick felt the Australian electorate would not adopt a model for selecting an Australian head of state that was any less safe than the system we already lived under. His McGarvie Model devised a safe way to proceed, but his model was not put to the people.

**Conclusion**

Dick McGarvie’s five principles of operating emerged in these three examples of his work that spanned half his lifetime: internal knowledge; networks of influence; setting up a case for reform; proposing practical change; and where democracy is paramount. This is the consistent thread through all his work. He was a kind compassionate man, hard wired to risk rejection and failure for the sake of reform; and he made a difference for the sake of democracy.

**Notes**

7. www.aija.org.au—Papers presented at a seminar held 31 August 1985 in Adelaide SA.
Notes on Contributors

The Honorable Justice Victoria Bennett was appointed to the Family Court of Australia, in Melbourne, in November 2005. She is the senior judge in the Melbourne Registry. Her Honour’s first judicial appointment was in 2004 as a Federal Magistrate sitting across all areas of that court’s wide jurisdiction. Prior to her Honour’s judicial appointments, she was a member of the Victorian Bar for seventeen years. In 2015, her Honour accepted an additional appointment for five years as a Presidential Member of the Administrative Appeals Tribunal.

Justice Bennett represents the Court in the cross-jurisdictional committee on family violence convened by the Chief Justice of the Supreme Court of Victoria, the taskforce on family violence convened by the Chief Magistrate of Victoria and on the judicial Indigenous awareness committee convened by the Supreme Court and the Judicial College of Victoria.

Her Honour has had many years of experience in transnational family law with a particular interest in the 1980 and 1996 Hague Conventions. She regularly lectures on both Conventions domestically and internationally. Since 2008, Justice Bennett, together with our Chief Justice, has been designated a judge of the International Hague Judicial Network for Australia.

Michael McGarvie is currently both Victorian Legal Services Commissioner and CEO of the Victorian Legal Services Board. He was appointed by the Governor in Council in 2009. Prior to this, Michael was the CEO of the Supreme Court of Victoria for three years having previously been a partner in a major Melbourne law firm for 18 years. The Victorian Legal Services Board and Commissioner are the regulatory bodies for the Victorian legal profession. Michael is also a Director of Western Water Corporation. Michael is a son of former Supreme Court Justice and former Victorian Governor, the late Richard E. McGarvie.

Katie Miller was President of the Law Institute of Victoria in 2015—only the sixth woman to be so in its then 156-year history. Katie is a career government lawyer and is grateful to have been born in an era where she did not have to choose between public service and marriage—unlike the women of generations prior.

Bronwyn Naylor is a Professor of Law at RMIT University in the Graduate School of Business and Law. She has degrees in Arts and Law from Monash University, and a Doctorate in Criminology from Cambridge University. Bronwyn has worked with the Victorian Law Reform Commission over the years, on homicide law reforms, and on the reforms to the law of abortion. She teaches and researches in criminal law, criminal justice, prisons and punishment, and law and gender. She is also a co-author of Waller and Williams Criminal Law Text and Cases (13th edition, 2016) Lexis Nexis.
Janine Rizzetti commenced her teaching career at Thornbury High School, with an increasing emphasis on literacy instruction. She worked at the Koorie Services Unit at Northern Metropolitan College of TAFE for several years, before moving to RMIT Business as an educational designer. She completed her PhD thesis on the colonial career of Justice John Walpole Willis through La Trobe University in 2015. She is a member of the RHSV and Secretary of the Heidelberg Historical Society. She has maintained the blog The Resident Judge of Port Phillip for several years.

Simon Smith is an Adjunct Professor with the Sir Zelman Cowen Centre at Victoria University, and a lawyer and historian holding the academic qualifications of BJuris, LLM and PhD. In a professional life spanning four decades, he has been a pioneer in his work as a community legal centre lawyer, university clinical legal education teacher, ombudsman, senior insurance executive and insurance industry archivist. Simon has been the President of the Society of Consumer Affairs Professionals in Business and Vice President of the Royal Historical Society of Victoria. He is a founding editor of the Lawyers Practice Manual Victoria and the author of Maverick Litigants: A History of Vexatious Litigants in Australia, 1930–2008 and Barristers Solicitors Pettifoggers: Profiles in Australian Colonial Legal History.

Chief Justice Marilyn Warren was appointed as Chief Justice of the Supreme Court of Victoria in November 2003. She is the longest serving of all current Australian Chief Justices. She is a graduate of Monash University. The Chief Justice commenced her legal career in the Victorian Public Service in 1974. She was later appointed an assistant chief parliamentary counsel. The Chief Justice signed the Roll of the Victorian Bar in 1985. In 1997 she was appointed Queen's Counsel. In 1998, she was appointed to the Supreme Court of Victoria. The Chief Justice was admitted to the degree of Doctor of Laws (honoris causa) by Monash University in 2004. In June 2005, the Chief Justice was made a Companion in the Order of Australia (AC). She was appointed Lieutenant-Governor of Victoria on 7 April 2006. The Chief Justice is also the Chair of a number of Victorian legal bodies including; the Judicial College of Victoria and the Courts Council of Victoria.

The Honorable Justice Mark Weinberg has had a distinguished career in the law. He is currently a Judge of the Court of Appeal, Supreme Court and a former Judge of the Federal Court of Australia (1998-2008). In 2017, Justice Weinberg was appointed an Officer of the Order of Australia for distinguished service to the judiciary and to the law, particularly through reforms to criminal law and procedure, to legal education in Victoria, and to the administration of justice in Fiji and Norfolk Island. He was the 1970 Supreme Court Prize winner at Monash University Law Faculty and in 1972 he received the Vinerian Scholar for top BCL graduate at the University of Oxford. At the University of Melbourne Mark was Dean of the Faculty of Law as well as Acting Dean and Deputy Dean. In 1975 he was called to the Victorian Bar. Between 1988 until 1991 he was Commonwealth DPP.
About the Royal Historical Society of Victoria

The Royal Historical Society of Victoria is a community organisation comprising people from many fields committed to collecting, researching and sharing an understanding of the history of Victoria. Founded in 1909, the Society continues the founders’ vision that knowing the individual stories of past inhabitants gives present and future generations, links with local place and local community, bolstering a sense of identity and belonging, and enriching our cultural heritage.

The RHSV is located in the heritage-listed Drill Hall at 239 A’Beckett Street Melbourne built in 1939 on a site devoted to defence installations since the construction of the West Melbourne Orderly Room in 1866 for the Victorian Volunteer Corps. The 1939 building was designed to be used by the Army Medical Corps as a training and research facility. It passed into the hands of the Victorian government, which has leased it to the society since 1999.

The RHSV conducts lectures, exhibitions, excursions and workshops for the benefit of members and the general public. It publishes the bi-annual Victorian Historical Journal, a bi-monthly newsletter, History News, and monographs. It is committed to collecting and making accessible the history of Melbourne and Victoria. It holds a significant collection of the history of Victoria including books, manuscripts, photographs, prints and drawings, ephemera and maps. The Society’s library is considered one of Australia’s richest in its focus on Victorian history. Catalogues are accessible online.

The RHSV acts as the umbrella body for over 320 historical societies throughout Victoria and actively promotes their collections, which are accessible via the Victorian Local History Database identified on the RHSV website. The Society also sponsors the History Victoria Support Group, which runs quarterly meetings throughout the state to increase the skills and knowledge of historical societies. The RHSV also has an active online presence and runs the History Victoria bookshop—online and on-site.

More information:
Royal Historical Society of Victoria
239 A’Beckett Street
Melbourne, Victoria 3000, Australia
Telephone: 03 9326 9288
www.historyvictoria.org.au
office@historyvictoria.org.au
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1. The VHJ is a refereed journal publishing original and previously unpublished (online and hard copy) scholarly articles on Victorian history, or on Australian history that illuminates Victorian history.


3. Articles from 4000 to 8000 words (including notes) are preferred.

4. The VHJ also publishes historical notes, generally of 2–3000 words. A historical note contains factual information and is different from an article by not being an extended analysis or having an argument. Submitted articles may be reduced and published as historical notes at the discretion of the editor and the Publications Committee, after consultation with the author.

5. The review editor(s) commission book reviews – suggestions welcome.

6. The RHSV does not pay for contributions to the Journal.

7. The manuscript should be in digital form in a minimum 12-point serif typeface, double or one-and-a-half line spaced (including indented quotations and endnotes), with margins of at least 3 cm.

8. Referencing style is endnotes and must not exceed 10% of the text. They should be devoted principally to the citation of sources.

9. The title page should include: author's name and title(s); postal address, telephone number, email address; article's word length (including notes); a 100 word biographical note on the author; a 100 word abstract of the main argument or significance of the article.

10. Suitable illustrations for articles are welcome. Initially send clear hard photocopies, not originals. Scanned images at 300dpi can be emailed or sent on disk. Further details about final images and permissions will be sent if your article is accepted.

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12. Send an electronic copy of your manuscript, either on disk or preferably as an email attachment (.rtf or .doc file format). Email attachments should be sent to office@historyvictoria.org.au. Telephone enquiries to the RHSV office 9326 9288.

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