



Newsletter

DECEMBER 2002

Geoff Flatman

Vol 6 Issue 2, December 2002

One of the sad landmarks since the August annual general meeting of the Association was the death of Geoff Flatman. Geoff was a decent, congenial and constant criminal lawyer for many years. He was a former committee member and Secretary of this Association. He brought stability and effectiveness to the office of Director of Public Prosecutions and promised the same balance, decency and fairness as a judge of the Supreme Court. He will be sadly missed by our Association.

Graham Thomas, a pall bearer at Geoff's funeral, has written this tribute to his friend;

Geoff Flatman's contribution to the law and life is difficult to put into a few words. True it is that at the bar for over 20 years he appeared as defence counsel in many leading cases, including Walsh Street, and as prosecutor, including the RSPCA case.

Geoff was secretary to the Criminal Bar Association when he was appointed as DPP. Phillips CJ at his eulogy described him as a great DPP.

His time as judge was short due to his illness, but he was obviously suited to the bench. The writer observed him ruling on a prior inconsistent statement by a prison informer being cross examined by Jim Montgomery. It was a masterpiece of understated judicial control.

But to emphasise his accomplishments in the law is to miss the essence of Geoff. Those who knew him well all say that even under pressure his cast iron integrity provided a sure base for his decisions and actions.

Foibles – well there were only a few but they stood out. He was skipper to a tennis team for 25 years which included at various times Gordon Hammet, Peter Fox and Graham Thomas from the bar, Mirko Bagaric contributing author to Bourke's Criminal Law, Miles Walker associate to Judge R Lewis. He led the team he loved from a potent force initially to a battle-hardened damp squib. Over protest he often drove the team to matches in far flung eastern suburbs in

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Geoff Flatman (cont..)

his beloved Citroen Goddess or Peugeot 404 rather than the DPP limo.

An invitation to the Flatman home was frequently given and always eagerly accepted. Little wonder for at work in the home was love and respect which when combined with obvious intelligence and wit made a winning combination.

Geoff is greatly missed in the law and in life.

Judge John Hassett Michael Rozenes QC Chief Judge Waldron

John Hassett

The retirement of John Hassett from the County Court represented the departure from that Court of one of its Brownlow Medal judges – a best and fairest. John retired after nearly 20 years on the bench. He had been a foundation member of the Criminal Bar Association and maintained his relationship with us through out his time on the Court

Michael Rozenes QC

When John Hassett was leading counsel for the Crown in the murder trial of *R v Clarkson, Flannery and Williams* in 1981, John Walker QC's junior for the now infamous accused Chris Flannery was a young Michael Rozenes (as he then was); now Chief Judge of the Victorian County Court designate. We congratulate Michael on his appointment which caps an outstanding career. His service to the Criminal Bar Association as Chairman was significant and he joins an illustrious line of executive office holders appointed as judges –Chief Justice Phillips, Justice of Appeal Vincent, Justice Flatman, Justice Weinberg, Judge Kelly, Judge Hassett, Judge Neesham, Judge Barnett and Judge Kent. The Association looks forward to working closely with Michael on the large range of issues affecting the criminal jurisdiction of his Court.

Chief Judge Waldron

Michael Rozenes arrival as Chief Judge on Tuesday 26 November 2002 follows the retirement of Chief Judge Waldron after twenty years in that position. His Honour has been widely and justifiably congratulated on his leadership of the County Court over that period culminating in the move to the new Court this year. We also offer the sincere congratulations of the Criminal Bar Association to His Honour.

More will be said about John Hassett and Michael Rozenes at the CBA Annual Dinner on Thursday 5 December 2002.

Lex Lasry QC

Committee News

Legal Aid

The Law Institute and Bar Council have already publicly commented, on the Government's welcome promise of further funding for Legal Aid at \$3.5million per year over 4 years. Funding for Legal Aid has been

an issue for many years, it is a significant commitment to the system. The lobbying of the Government by the Legal Aid Taskforce (in which the Criminal Bar Association participates) together with the calling of the election obviously had the desired effect.

Summary Crime Funding

Whilst the Government promise on Legal Aid funding is welcome, the Legal Aid fees for summary crime remain inadequate. The Association is keen to pursue the issue and is organising a meeting of those who do this kind of work at 5pm on Tuesday 3 December 2002. Association chair Lex Lasry QC and committee member Reg Marron will both attend to discuss with practitioners "at the coal face" issues including briefing practices and the fees paid. Further detail to be provided.

"Law and Order"

By the third week of the State election campaign the expected "law and order" bidding war between the parties has hardly been the centrepiece of the public debate, generating little public interest with the possible exception of speeding motorists. The issue of most contentious interest to the Criminal Bar Association has been the Opposition's proposal for minimum mandatory sentencing as part of their law and order policy, and the Association position is made clear in the media release re-printed in this edition. The Opposition proposed amendments to legislation in the last session of Parliament to give effect to that policy but were defeated in the Legislative Assembly. Thus far in the campaign the policy has generated scant debate

The Law Institute has recently issued its media release on the so-called law and order issues calling for a more reasoned debate on law and order issues. Amongst other things, they echoed the position put by the Criminal Bar Association at the end of 2001 that guideline judgments would be an unnecessary fetter on the sentencing discretion.

International Criminal Bar

Dr Jennifer Balint, from Melbourne University, is attending a committee meeting in Paris in the week commencing 25 November 2002 concerning the establishment of an International Criminal Bar. She is attending as an Australian representative but is also representing the Criminal Bar Association. The steering committee intends to establish a group for lawyers appearing as defence advocates before either the International Criminal Court or the *ad hoc* international criminal tribunals for Yugoslavia and Rwanda. The organisers have sought Australian input and Dr Balint will be able to make suggestions on our behalf on matters such as the constitution of the organisation and the proposed code of conduct for counsel.

Confiscation Act

The Association has provided a joint submission with Liberty Victoria to government prepared by Jeanette Morrish QC and Elizabeth Brimer for this proposed legislation. The forthcoming election has intervened to mean it will now be considered by the incoming government.

ASIO Legislation

The Federal Government has proposed legislation to increase the investigative powers of ASIO. As the proposed legislation gives ASIO increased powers in terrorism investigation including the right to detain without charge, with limited access to legal advice and no privilege against self incrimination. The Association has supported the position adopted by Liberty Victoria, namely that the investigation of activities involving terrorism are essentially criminal investigations, and that those subject to such investigations ought not be denied the rights that are ordinarily available to those in such situations.

Committee News (cont..)

These rights include the right to silence, the right not to incriminate oneself, and the right to independent legal representation prior to being interviewed by an investigative authority.

Though these are undoubtedly frightening times, the Association position is to be vigilant of unjustified attacks on civil liberties. Members will be kept updated as to the progress of the legislation.

Donna Bakos

Congratulations and thanks go to now former Association Committee member Donna Bakos on her appointment to the Magistracy. Donna has been a tireless and enthusiastic committee member for the last two years and her contribution will be missed. Good luck Donna with your new challenge!

New Committee member

Donna's appointment created a vacancy on the committee which has been filled by the appointment of Kellie

Blair pursuant to Rule 22(4). Oscar Roos has also been appointed a non-voting consultative member of the committee. We thank both for their commitment to the Association.

Judicial Conduct

The Association made a submission to the government on this issue prepared by Jeanette Morrish QC, the thrust of which supports the case against the establishment of a formal oversight body while agreeing that there needs to be a series of administrative steps taken to improve the system of self regulation.

Summary Offences Act

The Association has responded to proposed changes to the Summary Offences Act to deal with "sex tourism". The amendments proposed a new offence of "offensive behaviour by a person in a motor vehicle near a residence, and was aimed at the problem of "gutter crawlers".

The Association submission opposed the proposed changes,

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Committee Details

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Committee News (cont..)

on the basis that the offence created was one of strict liability where there are already sufficient laws to deal with the problem.

Bar Council

The appointments of Justice Redlich and Chief Judge Rozenes have created two vacancies on the Bar Council to be filled at the upcoming by-election. Both departing members had backgrounds in the Criminal Law and were members of the Association, it is noted that Association members Roy Punshon SC and Paul Holdenson QC

are standing to fill the vacancies.

Website

www.crimbarvic.org.au has had a makeover. The website is now back, updated, with new links to international legal sites. The whole site is in the process of being totally revamped, and members will be advised of the "new" site shortly.

The Criminal Bar Association wishes all its members a happy Christmas and successful and rewarding New Year.

Media Release: 7 November 2002 Mandatory Minimum Sentencing

The Chairman of the Criminal Bar Association of Victoria, Mr Lex Lasry QC has today expressed his Association's objection to the policy of the Victorian Opposition on mandatory sentencing.

"The Victorian Government has made it clear that it objects to such a policy and we agree. Before the election was called, we expressed our view to the Shadow Attorney-General that such a policy is unnecessary and an offensive restriction on the discretion of judges and Magistrates", Mr Lasry said.

"Apart from political reasons, there does not seem to be any legal or intellectual explanation as to why the Opposition considers this policy is necessary. The sentencing of offenders at every level is subject to prosecutorial appeal to the next level. As any Magistrate or Judge will attest, sentencing is a complex and difficult process because several interests must be balanced in the outcome. The object is to achieve a result, including the fixing of a minimum sentence, which is as fair as it can be to those involved in the case. That includes the victims of the crime, the offender and the community. As is known in the community, in criminal cases before the County and Supreme Court, sentences passed on offenders by judges of those Courts are subject to appeal by the Director of Public Prosecutions to the Court of Appeal. The Director has not been reluctant to appeal in appropriate cases and the Court has increased sentences where the judges of the Court thought it was necessary. The imposition of a harsher sentence more likely to deter others is a regular point of debate in such cases. That process is an entirely appropriate, independent and fair judicial safeguard in the sentencing process."

"The community's understanding of the sentencing process is likely to be enhanced by the activities of the Sentencing Advisory Council and the regular publication of sentencing statistics."

Enquiries: Lex Lasry QC - 9225-7434; Ed Lorkin - 9225-8047

RepriveAustralia **A chance to help fight the** **Death Penalty**

RepriveAustralia was launched in Melbourne in May 2001 at a function sponsored by the Criminal Bar Association and with speakers, the Hon. Justice Michael Kirby AC CMG and Clive Stafford Smith OBE. Since that time Justice Kirby has graciously agreed to become a patron of the organization.

Since May 2001 *RepriveAustralia* has established a number of programs and undertaken a range of activities in seeking to provide effective legal representation and humanitarian assistance to impoverished people facing the death penalty at the hands of the state.

RepriveAustralia provides the rare opportunity for its members to become directly involved in providing assistance to those at risk of execution and we have developed a number of ways that members of the Australian legal community, including, in particular Victoria's criminal Bar, can make a direct contribution to our efforts.

The activities of RepriveAustralia

Since its launch *RepriveAustralia* has: established an international internship program sending volunteers to work on capital cases overseas; established a local volunteer scheme allowing volunteers to work on capital cases from Australia; established a website; published seven quarterly newsletters; supported the development and production of the death row monologue, *This is a True Story* in Melbourne, London and Brussels; worked directly with lawyers seeking to repatriate indigenous Australian, Russell Moore; advocated on behalf of Australian citizen le My Linh who is on Vietnam's death row; and, developed a program to highlight and condemn the continuing use of the death penalty in the Commonwealth of Nations.

How you can participate?

Death penalty work is in many ways the ultimate field of endeavor for criminal lawyers, particularly in criminal defence. Nowhere is the lawyer's role in securing justice and protecting the rights of the individual from the power of the state more acutely defined than when the stakes of the case are life and death. Fortunately, it has been some time since Victorian lawyers have had to shoulder this burden at home but the work is at the heart and soul of our profession and should not yield to geographical boundaries.

Membership

The first and simplest way that you can support the work of *RepriveAustralia* is to become a member of the organization. As a member, at an annual cost of only \$30, you will receive our quarterly newsletter providing information about our activities and developments in the fight against the death penalty worldwide as well as invitations to *RepriveAustralia* events and the sure and certain knowledge that you are making a direct contribution to fight the inequities of capital punishment, particularly for the indigent.

Membership forms are available at the *RepriveAustralia* website as detailed below.

Volunteer scheme

For those who are able to become further involved, we have now

RepriveAustralia (cont..)

launched our local volunteer program. Through this program, members in Australia can perform volunteer work locally in a number of areas. Of particular interest to criminal lawyers is our volunteer legal research scheme. Members can sign up as a part of a pool of people available to perform legal research for use in actual death penalty cases being conducted by non-profit offices in the US. Research briefs are forwarded from the US at least a month ahead of time and allocated to those members of the volunteer pool with time and an interest in completing the work.

The scheme commenced operation earlier this year with a group of six volunteers performing invaluable research on the use by police of unfair interview tactics in the case of a man facing the death penalty in Louisiana. Resources in the US are such that if the volunteers had not performed the work, it would simply not have been done. As it was, it formed a valuable part of the defendant's brief seeking prerogative writs from a refusal by the trial court to suppress his confessional statements.

For more details or to sign up for the program please contact the volunteer program coordinator Marissa Dreher at volunteers@reprive.org.au.

International internship scheme

For those who are able to give more time and wish to become more involved, RepriveAustralia conducts its international internship program, a voluntary service scheme that places Australian volunteers in capital defence offices in the US.

This is not a work experience program; rather it involves people in providing volunteer labor to non-profit capital defence offices working with defendants – real work on real cases. In November 2001 five volunteers were sent to two capital defence offices in Louisiana, a further three volunteers followed in March 2002. This month, only a year after the program was launched, we have sent thirteen volunteers to seven capital defence offices in four states in the southern United States. As the scheme expands, we will place volunteers in jurisdictions outside the United States.

A detailed internship information sheet is available from our website. For more information or to apply please write to contact@reprive.org.au.

Money

Last, but by no means least, you can provide direct and meaningful support by making a financial donation to *RepriveAustralia* itself. *RepriveAustralia* is an organization staffed and managed entirely by volunteers, our funding is derived solely from membership subscriptions and donations. We have been fortunate to date that a large number of our members have supplemented their annual subscriptions with donations to assist us to continue our work. However, as is always the case, we continue to need your financial support and every little bit helps.

Please visit our website at www.reprive.org.au for more information about our activities or to download membership forms or information sheets.

Richard Bourke

rbourke@reprive.org.au

**His Honour Judge Gullaci
By Rowan Skinner**

Drink Driving Cases in the Supreme Court and Court of Appeal

By Warwick Walsh-Buckley

Hrysikos v Mansfield (1/11/02) VSCA 175:

In *Hrysikos v Mansfield* the Court of Appeal dismissed a Crown appeal against Smith J's decision in *Mansfield v Hrysikos* (2000) 32 MVR 491.

Smith J held that an implication of reasonableness should be read into all police requirements under s 55(1)RSA, including a requirement to remain for a breathalyser test and allowed a motorist's appeal against conviction on a s 49(1)(e) offence of refusing to remain for a breathalyser test on dual bases.

The Court of Appeal heard that Smith J dealt with a motorist's s 92 MCA appeal involving conviction for a s 49(1)(e) refusal offence. After she furnished one breath sample the breathalyser produced a certificate "alcohol in mouth". The operator told her she must wait another 15 minutes for a second breath test. The motorist said she wished to go outside the booze bus to smoke. She was told if she left she may lose her licence for 2 yrs and receive a fine. She left the bus, was followed by police and was again warned. She had a cigarette, remained close to the bus and in company of the 2 police. Outside the informant said to her that she was required to furnish a breath sample and if she refused she may be fined and lose her licence for 2 yrs. At no time did she say she would not give a further sample nor that she would leave the site and remained close to the bus and police. She was charged with refusing to remain.

Smith J applied to s 55(1) requirements Ormiston J's observations in *DPP v Webb* [1993] 2 VR 403 who stated that the only requirement to be read into s

53 (police power to require a preliminary breath test) is one of reasonableness – if a requirement to undergo a PBT is unreasonable it is no offence to refuse. Smith J held the requirement to remain must be reasonable and there is no unlawful refusal if the requirement is unreasonable. The Court of Appeal held it was unnecessary to consider whether once a person accompanied police to the bus, it was unreasonable not to let her leave to have a smoke although Eames JA discussed examples of reasonable and unreasonable requirements. Smith J's decision was not reversed. Thus, there is an arguable new defence to refusal to remain charges, ie., 'unreasonable requirement'.

The Court of Appeal confirmed Smith J's alternate reasoning, ie, she did "remain there" within the meaning of s 55(1) notwithstanding she left the bus against police directions to stay until the breathalyser was ready for her second sample - the requirement to remain simply means a requirement to remain linked to the place where the test is to be carried out. What is critical is proximity. A person can remain at the place notwithstanding she is outside its four walls.

Goodey v Clarke [2002] VSC 246:

In *Goodey v Clarke* the Supreme Court dismissed a refusal charge in a motorist's s 92 MCA appeal against a conviction for a s 49(1)(e) offence of refusing to furnish a breath sample. The motorist complied with a first police requirement but refused to comply with a police requirement to provide a further sample.

0.05 cases (cont..)

Bongiorno J held that a magistrate erred in holding that an offence of refusing to furnish a breath sample into a breathalyser in response to a 55(1) requirement was cognate to that of refusing to comply with a s 55(2A) requirement to furnish a further breath sample and erred in allowing a charge under s 49(1)(e) (pleading that the requirement alleged to have been refused was under s 55(1)) to be amended more than 12 months after the offence.

The Court of Appeal in *Clarke v Goodey* [2002] VSCA (23/8/02) refused the Crown leave to appeal. Accordingly, Bongiorno J's decision placed a further case in the armory until its effect was legislated out prospectively from 23 October 2002 by amendments to s 49(1)(f)RSA caused by s 8 *Road Safety (Responsible Driving) Act 46/2002*. The amendments do not interfere with this application of a 'defective charge' type defence to refusing to furnish breath sample offences occurring prior to 23 October 2002.

DPP v Moore [2002] VSC 29

DPP v Moore is still under Crown appeal to the Court of Appeal and unlikely to be reached until mid-2003.

Balmford J held that a magistrate was not shown to have erred in excluding a

certificate of analysis and to dismiss an exceeding prescribed alcohol concentration charge under s 49(1)(b) RSA.

The magistrate accepted a defendant's evidence that, after a breathalyser test revealed a reading of .074% , the defendant requested a blood test under s 55(10) RSA but took the operator's advice that his blood alcohol level would probably be higher than .07 when the doctor arrived and stated "...if I was you, I'd cop the .07 and forget about the blood". The defendant declined to continue with his right to a blood test.

Until the outcome of the Crown appeal Balmford J's decision effectively creates an arguable new defence to exceed prescribed alcohol concentration charges, ie, 'bad police advice' creating unfairness.

By Warwick Walsh-Buckley
10 November 2002

Judicial Appointments

The Association congratulates the following members who have been appointed to the Magistrates' County and Supreme Court benches in recent months;

- **Her Worship Donna Bakos**
- **His Worship Peter Reardon**
- **His Honour Judge Joseph Gullaci**
- **His Honour Judge Michael Bourke**
- **Her Honour Judge Elizabeth Gaynor**
- **His Honour Justice Robert Redlich**



PROVOCATION

TO BE OR NOT TO BE

DEFENCES TO HOMICIDE ARE SOON TO BE REVIEWED BY
THE

ER2002

5:00 P.M.

READERS LECTURE THEATRE

LEVEL2

DOUGLAS MENZIES CHAMBERS

180 WILLIAM STREET

AN INTRODUCTION TO THE ISSUES BY NETTE MORRISH

THE HONOURABLE JUSTICE PHILIP CUMMINS

PROFESSOR GEORGE HAMPEL Q.C.

YOUR CONTRIBUTION WILL BE WELCOME

Drinks at the Essoign Club to follow

CRIMINAL BAR ASSOCIATION

Annual Dinner

Featuring:

Pre-dinner Drinks, a sumptuous three course dinner,
Beer, Wine, Champagne and Something for non-alcoholics

To mark

The appointment of Chief Judge Michael Rozenes

- and -

The retirement of Judge John Hassett

Foundation and Life member of the Association

Details:

Venue The Victorian Club - 41st floor (Rialto) 525 Collins St, Melbourne

Date Thursday 5 December 2002

Time 7.00pm for 7.30pm

Dress Jacket & Tie or Frock

Cost **\$95** per head, including all "special" requirements.

Members who have signed the Bar roll since 2001 inclusive **\$70** per head. As usual, **CBA** will subsidise some of the cost.

Strictly FINANCIAL members only. (Time to get serious about paying membership dues.)

Members may bring ONE guest as seating is STRICTLY limited to 140.

Tables of 10 - please forward any special requests to me at ngobbo@melbpc.org.
or c/- Clerk Meldrum

=====

Nicola Gobbo c/- Clerk Meldrum

I will be attending the **CBA** dinner at **the Victorian Club** on 5 December 2002.

I will / will not be bringing a guest.

I signed / have not signed the Bar Roll since 2001.

Accordingly, I enclose cheque/cash for **\$70** or **\$95** per person.

Name: _____

Clerk: _____

Guest's Name: _____

RSVP by 29/11/02