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THE AUSTRALIAN BAR GAZETTE

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A Message
from
The Attorney-General for the Commonwealth

I salute this first number of the "Australian Bar Gazette", on its appearance as a publication of the Australian Bar Association, established last year. Through the Gazette, I salute also the new Association itself, in both its aspects—on the one hand as a nation-wide organisation, potentially if not as yet actually, with members in all States and Territories; on the other hand as an organisation distinctively of the Bar in the English sense, an organisation of barristers.

It is perhaps characteristic of a federal community that its national unity is more readily perceived from the outside than from within. Whether the practice of the Law Reports, now more than a generation old, of recording appearances in the Privy Council as "A . . . B . . . , Q.C. and X . . . Y . . . , both of the Australian bar" is more truly explained as prophetic insight or rather as an Olympian disregard of differences merely provincial, does not for present purposes matter. The formation of the new Association will speedily create the thing whose name it bears.

In this aspect, the creation of the Association is but part of a movement towards unity in the law of Australia, particularly in matters of private law such as commercial and family law. The work of the Standing Committee of Attorneys-General of the Commonwealth and the States, established recently, is another illustration of this trend. In respect of the Bar itself, whilst not unaware of the difficulties, I would hope to see the establishment before long of complete reciprocity throughout Australia. There is no need for complete uniformity of requirements—only a common awareness of the need for high standards of training and outlook.

In time past, it has always been difficult, or at any rate tedious, to explain to a visitor from abroad the organisation of the legal profession in Australia. The formal separation of the two branches in New South Wales and Queensland has stood on one side of Victoria, where barristers and solicitors practising separately have peacefully coexisted within a system of formal admission to practise as both. On the other side have lain the "amalgam" States, South Australia, Western Australia and Tasmania, with the two mainland Territories. This year, the organisation of the Australian Bar Association has testified to a growing breach in this symmetrical pattern—the emergence of small groups, in the "amalgam" communities, of practitioners practising as counsel only. As an altogether impenitent past-president of the New South Wales Bar Association, I applaud the initiative and resolution of those in Western Australia, in South Australia and now in the Australian Capital Territory, who are offering to professional clients the specialist forensic skills of independent counsel.

The simultaneous emergence from the "amalgam" profession in so many places of nuclei of an independent Bar is a sign of growth and confidence, within the profession, that the older-established Bars have likewise exhibited. Historically, the use of a common building for chambers has been not merely characteristic of an effective Bar but really an indispensable condition of its effectiveness. Of this truth, the Inns of Court in London are the richest and most enduring example. The Victorian Bar could scarcely have been built, in the very teeth of the Legal Profession Practice Act 1892, had it not been for the ownership by the existing Bar of Selbourne Chambers. The great new buildings for Chambers in Sydney and Melbourne—Wentworth Chambers opened in 1957, Owen Dixon Chambers in 1961 and the new building adjoining Wentworth Chambers in Phillip Street to be known as Selborne Chambers—testify bravely to what the Bar can do for itself if it will lift its sights. They testify also to the amount of outside help that will be forthcoming to a Bar that really believes in itself. It is my strong hope that within these buildings a fuller and more active common life will develop, in proportion as better facilities are provided.

The constitutional historian, Stubbs, wrote of Magna Carta as "the first great public act of the nation after it had realised its own identity". Research in the present century has rather discounted this "national" view of the Charter. But the theme itself is a suggestive one. What, let me ask, should we expect to be the public acts of the Bar of Australia, conscious of its own identity? Adequate provision for itself, of course. Full contribution, also of course, to the work of the Law Council of Australia, as representing the legal profession as a whole. But I think the distinctive thing that the Bar can do, the Bar I mean in its strict English sense, must be intimately concerned with the administration of justice in the courts. Its task is to maintain the proud tradition of independence, courage and skill which have characterised the Bar in its best days, and without which no community can properly secure the continuance of the Rule of Law.

G. E. Barwick.

Canberra,
12th September, 1963.

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Presidential Letter

Anthony Sampson in a penetrating Chapter in his book, "The Anatomy of Britain", speaks of the law as being the most striking example of a profession which has become trapped in its conservatism and mystique. This is, unfortunately, not completely untrue.

The Bar is also described as a learned profession. Is it learned or is it merely excessively conservative? It is possible to be both learned and constructively forward-looking?

In the weaving of the pattern of the political history of the Commonwealth, a strong thread has been the statesmen that the Bar has produced, but it is apparent that in Australia the thread is ever becoming finer. Is this because Canberra is a long way away or because the lure of State politics is not as lustrous as it was, or because the stress of professional life from day to day tends to increase as the years run down and make it ever more difficult for the practising Barrister to practise his profession and, at the same time, to be active in politics? If we, as a profession, have a legitimate excuse for taking less part in the political life of the community, what are we doing as a reasonable alternative to it? Are we making up for this by developing an interest in public affairs in some other way? Are we doing anything to avoid the perils of dead conservatism and empty "learning"?

In Australia, we have as neighbours or near neighbours the peoples of New Guinea, Indonesia, the Philippines, Malaysia and Burma.

The maintenance of the rule of law is a resounding catchcry, but, as a problem piece, it is a triviality in this country compared with that of many of our neighbours. It is possible to do no more than mouth this catchcry but it is also possible in a learned, active, and constructive way to do something about the spread and maintenance of the rule of law in the countries to our north.

What future safety lies here if police States surround us? Who is there legally trained in New Guinea to sit in the Councils of State in that country, when it achieves independence and to fight for the maintenance of the rule of law as we understand it? Which of us belongs to or appreciates the importance of the work of the International Commission of Jurists or the vital and urgent necessity of a Regional Law Association consisting of Australia and its neighbours, with Australian lawyers playing a leading part in establishing and fostering the maintenance of the rule of law, as we know it, in the near East.

It does us no harm to recall Squire Knowell's admonition to his nephew—

> "Nor stand so much on your gentility, which is an airy and mere polite thing from dead men's dust and bones; and none of yours unless you make or hold it".

Is this spur of "learning" won by a handful of years of tertiary education? If not, is it earned as a result of experience in practice?

One has little time for the philosophy, variously expressed, but which is caught by the cry, "Marshal Hall is dead, long live the appellate lawyer", but, in truth, as a result of the increasing percentage of causes concerned with accident claims of one sort or another, it is fair comment, perhaps, to suggest that the horizon of some of us is, to an extent, limited by clouds of pedestrians, motor car passengers, skid marks and dangerous machines.

The skill required and the importance of the work of the common law advocate is not to be decried, but would any such not readily admit that he tends, if anything, to know less law rather than more, as a result of his everyday activities. If this be so, and if it be desirable to counteract the tendency in this direction, it is preferable for this to be done as part of a conscious movement to broaden our legal knowledge by special studies. It is not desirable to attempt to counteract the suggested trend by abolishing the trial of accident cases at common law.

In these days, there is talk of the lists being cluttered up with accident cases and of the need to streamline procedure, and, as a solution, there is advocated in various quarters a system of liability without fault.

I believe that, if any State or country adopts such a system applied to highway or other accidents, it will in history enjoy the reputation of having unleashed an animal that will eventually run amok through any system of jurisprudence that is worth while.

Perhaps one may be pardoned in this connection for posing four questions:—

1. If such legislation be right in relation to highway accidents, why is it not right for the majority of damages claims wherever and however suffered?
2. What would such legislation cost the public as a whole or those that own motor vehicles?
3. Is the fact that personal accident cases tend to clutter up our Court lists a logical reason for advancing the scheme, or should we, on the other hand, attempt to face up to adjectival problems by appointing more Judges and streamlining the procedure, rather than running away from it?
4. How many countries have considered the scheme and rejected it?

The answer to the latter question is that, in the English speaking countries, most have considered it and all have rejected it. The New South Wales Bar Association is making a detailed study of this concept of liability without fault and hopes to be able to offer its report for distribution and consideration by the profession in the near future.(1)

But as to being "learned", in what post-graduate learning do we indulge? How, for instance, do we, in this respect, measure up to the medical profession as an example.

A comparison of legal literature in the U.S.A. with that in the British Commonwealth is somewhat startling.

As to the extent of it, compare Wigmore with Phipson, Scott with Lewin, Willesden with Anson, and then delve

(1) The Victorian Bar Association has also set up a sub-committee to study the subject.

in any large American attorney's library and find there countless different law reviews, lectures, papers, and orations on every conceivable legal subject, and one of the few publications that one will recognise is our own Commonwealth Law Reports.

This suggests to one that that country is far ahead of the British Commonwealth and of Australia in academic legal research, study and thought.

We all, understandably perhaps, can be accused of spending too much time in the engine room and too little on the bridge.

By the engine room, I mean the place where we experience the stress and problems of our practice from day to day and, by the bridge, I mean the place where we can and should look towards the wider horizon of the maintenance of the rule of law and towards a comparison of our legal systems with those elsewhere. It is on the bridge that we may learn how to combine a true interest in knowledge and learning with a constructive and forward-looking approach to the problems of the profession. It is only by imaginatively scanning the legal horizon that we can escape from the inhibiting pressures of dead conservatism and dead "learning".

The Australian Bar Association and this Gazette, we hope, represent two steps forward in the direction of such an horizon.

We feel confident that those who initially felt that the Association would detract from the stature of the Law Council are now assured that this is not the case. There may exist some who still indulge in the petty whimsies of interstate jealousies and those who find the legal affairs and systems of their fellow practitioners in another State of little interest.

I do not know, but I respectfully adopt the thoughts of Mr. Justice Schaefer of the Supreme Court of Illinois, expressed in speaking to the Paper on Restrictive Trade Practices in Hobart recently when he said:—

> "Our problems are so much more similar than we realise, and we can learn so much from seeing how each of the other (i.e., common law States and countries) have dealt with what is really the same problem."

It is our earnest hope that the Australian Bar Association will prove not only to be viable, but that it will flourish and grow as the years run down and will play an ever-increasingly important part in advancing the traditions, dignity and status of the Bar and of the law.

As to the Gazette, its editorial staff will welcome your criticisms as well as your contributions.

We should wish that it will contain not only matters of merely topical interest but articles and correspondence that will stimulate and interest lawyers in this country and throughout the world.

The Constitution
of the Australian Bar Association

In this first issue of the Australian Bar Gazette, it is appropriate that the Constitution of the Australian Bar Association should be published. It is accordingly set out in full below.

1. The name of the Association is "THE AUSTRALIAN BAR ASSOCIATION".

2. The office of the Association will be situate in such capital city in Australia as the Council shall from time to time determine. The first office shall be situate in Sydney in the State of New South Wales.

3. The objects of the Association are:

(i) To advance the interests of barristers as such in the Commonwealth of Australia and its Territories;

(ii) To maintain and strengthen the position of the Bar in the Commonwealth of Australia and its Territories;

(iii) To form a bond of union among members of Bar in the Commonwealth of Australia and its Territories and to provide means whereby:

(a) their views can be easily ascertained and expressed.

(b) exchange of information and views on matters affecting barristers can be facilitated.

(c) common standards or rules may, where it is considered desirable, be adopted.

(iv) In relation to Federal Courts and tribunals and such other courts and tribunals as the Council thinks fit, to consider and, if considered desirable, to form a common policy for the Bar in the Commonwealth of Australia and its Territories regarding all matters of concern to barristers, including:

(a) Admission to practice;

(b) Provision of court facilities and amenities for barristers;

(c) Fees to be allowed on taxation;

(d) Rules regarding retainers, briefing of senior and junior counsel and the like.

(v) To arrange and supervise superannuation funds, benevolent funds, sickness and accident insurance and other forms of security or provision for barristers.

(vi) To co-operate and maintain liaison with the Law Council of Australia.

(vii) To provide or arrange for the provision of library, common room, chambers or other facilities for any barrister away from his own chambers.

(viii) To maintain and improve standards of instruction and training of barristers and of those intending to become barristers.

(ix) To establish and publish a periodical Australian Bar review or journal.

(x) To undertake the occasional publication of transactions and other papers.

(xi) To make representations on behalf of barristers to Federal and other Government departments or bodies.

(xii) To encourage the continued existence and growth of an independent Bar in Australia including the Territories.

(xiii) To maintain the rule of law.

(xiv) To prepare and maintain a roll of members of the Association.

4. (i) Subject to sub-clause (ii) of this clause the members of the Association shall consist of the members from time to time of the following:

The Bar Association of Queensland
The New South Wales Bar Association
The Victorian Bar Association

and such other practising barristers as may from time to time be admitted to membership by the Council.

(ii) No person shall be entitled to become or remain a member of this Association who practises as a solicitor in any State or Territory of the Commonwealth.

5. There shall be an Australian Bar Council which shall consist of two representatives appointed by each of the abovementioned Bar Associations.

6. If any representative be unable to attend a meeting of the Australian Bar Council the body by whom he was appointed may appoint as his substitute a practising barrister who is a member of the Australian Bar Association.

7. The officers of the Council shall consist of a President, two Vice-Presidents, a Secretary and a Treasurer. These officers shall be elected annually by the Council but only the President and the Vice-Presidents need be members of the Council.

8. The business and affairs of the Australian Bar Association shall be under the control and management of the Council.

9. There shall be meetings of the Council at least twice in each year at times and places to be fixed by the Council.

10. Each representative on the Council shall have one vote. The quorum for the transaction of business shall be three.

11. No resolution shall be passed by the Council unless there be cast in favour of it at least one vote by a representative of each of the abovementioned Bar Associations.

12. The Council shall have power to appoint Committees consisting of members of the Bar of the States or Territories. Such Committee shall have no executive power other than to report to the Council.

13. The funds of the Council shall be provided by annual contribution to be made by members in such sum as from time to time may be determined by the Council.

14. This Constitution may be amended from time to time by resolution of the Council.

Law Council News

The Annual Meeting and a meeting of the Executive of the Law Council of Australia were held in Sydney on the 9th and 10th August, 1963. A great amount of constructive work was done at these meetings, and the Law Council moved further in the direction of demonstrating that its modern role is one of national significance, both in relation to internal affairs and on the international stage, when legal issues are involved.

On the international side of its activities, the Council had the benefit of reports from its President, Mr. J. B. Piggott, C.B.E., and from the Chairman of the Organising Committee of the Third British Commonwealth Law Conference, Toose Q.C. They had just returned from a trip around the world primarily as guests of the American Bar Association. Their main objectives on this tour had been—

(a) To attend the Athens Conference on World Peace through Law;

(b) To undertake a goodwill mission to the U.S.A.;

(c) To explore with countries of the ECAFE region the possibility of a Regional Law Association for South and South East Asia; and

(d) To further the Third Commonwealth Law Conference at Sydney in 1965.

It is not possible, in the time available before this issue of the A.B.A. Gazette goes to press, to arrange for a detailed summary of their reports to be published for the benefit of the Bar of Australia, but some of the matters dealt with by them affected decisions made by the Executive. The reports are to be more fully debated at the next meeting of the Executive.

However, in furtherance of objective (b) above, the President presented a piece of Australian sculpture to the American Bar Association on behalf of the Law Council.

Regional Law Association

One matter of importance, which has been receiving the attention of the Law Council and which was taken a stage further by the work of Mr. Piggott and Toose, is the possible establishment of a Regional Law Association for South and South East Asia. Mr. Piggott and Toose brought together in Athens an informal gathering of representatives of most of the countries in that region from Afghanistan and Pakistan in the west, to Japan and the Philippines in the east. These representatives welcomed the idea of such a regional association and gave encouragement to the Australian Law Council in any steps it might see fit to take towards its establishment. This report confirmed the Council in its pre-