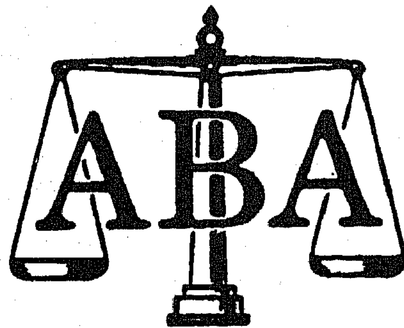


The Independence Of

The Judiciary

A STATEMENT
BY
THE AUSTRALIAN BAR ASSOCIATION

March 1991

1. Preface

1.1 This statement is issued by the Australian Bar Association, which represents all those barristers in Australia who practice as members of an independent Bar. Each President or Chairman of each constituent body of the Association has signed the statement. It represents the considered views of the Association on a matter of national importance.

1.2 The statement is concerned primarily with the independence of the judiciary: judges, masters, judicial registrars and magistrates. They are members of the various Australian courts. There are, however, in addition to the courts, other bodies which are not courts but which must exercise their powers in a judicial manner: one aspect of which is that they must operate independently of those directly affected by such exercise. Hence the Statement is also concerned with the independence of the members of these tribunals or other judicial or quasi-judicial bodies.

2. Introduction

2.1 The institutions of a democratic society require careful guardianship. Even Australia, with its rich democratic tradition, cannot assume that the foundations of its liberty are impregnable. On the contrary, those foundations are necessarily fragile; and although not now in danger of direct attack, they are susceptible to many corrosive influences. These in turn are made the more dangerous by that complacency which inevitably accompanies an absence of a present and immediate threat.

2.2 An independent judiciary is a keystone in the democratic arch. That keystone shows signs of stress. If it crumbles, democracy falls with it.

2.3 This is not likely to happen with dramatic speed. The situation is nevertheless of sufficient concern to warrant a public warning of the danger. Moreover, although somewhat paradoxically, the fact that the danger is not immediate is its own justification for giving present attention to it. Just as the prudent sailor does not wait for the storm before commencing necessary repairs to his ship, so there are advantages in addressing the question of judicial independence at a time when it is not among the political issues of the day.

2.4 But these are not the only reasons for the publication of this statement, or for its timing. It is at times helpful, even necessary, for any society to re-assess its constitutional structures. As Australia approaches the centenary of federation, it is appropriate that the Constitution and the institutions which underpin Australian society be the subject of careful and balanced scrutiny. If this paper stimulates reasoned debate among reasonable people in an atmosphere conducive to rational argument, then it will serve one of its purposes. If it persuades those in positions of leadership and influence, whether lawyers or not, then its primary purpose will have been accomplished.

2.5 The subject is not of merely academic interest. It touches upon the eternal conflict between authority and freedom. At its core is the general truth that if power is coupled with the opportunity to use it in ways which are, or are perceived by the wielders of power to be, in their interests, then it will be so used, whether legitimately or not. It is the task of the judiciary to ensure that power is only exercised according to law. Without judicial independence, that task is impossible.

2.6 Power in contemporary Australian society resides increasingly with the executive arm of government. Parliament, for all its strengths in other areas, does not consistently control, but rather is often controlled by, the executive.

2.7 In these circumstances, it is inevitable that the executive will from time to time exceed its lawful authority unless checked by an independent body the decisions of which are binding. The judiciary is the only instrument equipped to act as guardian of the public interest in this field; and there appears to be almost unanimous community acceptance not merely of that proposition, but also of its corollary: that only a judiciary independent of the executive will be able effectively to ensure that executive power is exercised lawfully. In these circumstances, it is not surprising that the rhetoric of politics commonly includes expressions of support for an independent judiciary.

2.8 The Australian Bar Association does not doubt that, in general, these expressions are sincerely meant. In practice, however, rhetoric and reality do not invariably coincide. Those, including members of the executive, who have the power and the incentive to achieve a particular end are not always astute to guarantee a correspondence between fine sentiments on the one hand and the end, or the means adopted to achieve it, on the other. Moreover, the generalities of rhetoric are not uppermost in the minds of those preoccupied with the pressing problems of the day. Politicians and bureaucrats do not necessarily appreciate the impact which their actions and decisions may have upon the delicate structures on which judicial independence depends. It is a matter of extreme regret that some do not even

appreciate the crucial role of the judiciary in the maintenance of the democratic system which it is their duty to uphold and without which their own liberties as politicians, public servants and citizens would disappear. The result is a piecemeal, insidious, and very dangerous atrophy of judicial independence.

2.9 We emphasise at the outset that the independence of which we speak does not have as its end the provision of personal benefits to individual judges. It is conferred for a purely public purpose: to insure that the courts dispense justice and are seen to do so. Moreover, that independence is, generally speaking, restricted to the freedom from pressures which might influence a judge to reach a decision other than that which is indicated by intellect and conscience following an honest and careful assessment of the evidence and application of the law. No judge is ever independent of the law itself. He or she, of all people, must be the servant of the law.

2.10 The maintenance of judicial independence is in part the responsibility of the judges themselves. If they are to be independent, they must be impartial; and if they are to be impartial, they must free themselves of prejudices which might interfere with their ability to make a balanced assessment of the facts.

2.11 This does not mean that judges should divorce themselves from a general framework of beliefs. That would be impossible, even if it were desirable. Nor does it mean that judges should enter a cloistered world away from the pressures and influences which bear upon mankind generally. To the contrary, a good judge understands these things, has an empathy with his or her fellows, and recognises that "the great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by ": "Judicial Reasoning": paper presented by Professor C.G. Weeramantry (now Judge Weeramantry of the International Court of Justice) at the Commonwealth Law Conference, Auckland, New Zealand, 16-20th April, 1990, pp.14-15.

2.12 All of which is to say that good judges are persons of rare quality. The community, and particularly governments, must for their part maintain those conditions in which the independence of the judiciary is best nurtured and protected. It is to this issue, and to Australia's record in relation to it, that we now turn.

3. The Conditions for Independence and Australia's Record in Maintaining Them

3.1 In the first place, judges must be appointed to office until a specified retirement age appropriate for the end of a career. As a corollary, they must be protected against removal except on the address of both Houses of Parliament (a unicameral system would obviously require a slightly different provision) seeking such removal on the grounds of proved misbehaviour or incapacity. The reason is obvious if independence is to be protected. The Constitution (s.72) enshrines such a provision.

3.2 The Constitution, however, does not protect judges of State courts. Nor does it protect the members of bodies (whether Commonwealth or State) which, although having powers of adjudication over disputes between the parties before them, are not courts. Their protection, to the extent that they have any at all, comes from legislation or from the common law. That given by both combined may not amount to much. For example, the effect of ss. 7 & 99 of the Conciliation and Arbitration Act 1904 (Commonwealth) was that presidential members of the Australian Conciliation and Arbitration Commission should not be removed except by the Governor-General, on an address from both Houses of Parliament in the same session, praying for removal on the ground of proved misbehaviour or incapacity. But those provisions did not protect Mr Justice Staples (as he then was).

3.3 In early 1975, James Staples was appointed a presidential member of the Commission. Sections 7 & 99 of the Conciliation and Arbitration Act applied to him. He was appointed until he reached the age of 65 years. This will not occur until 1994. No address from either House of the Commonwealth Parliament has sought his removal. Yet he has lost his job.

3.4 The Conciliation and Arbitration Commission has been replaced. All its presidential members, except Mr Staples, were appointed to its successor, the Australian Industrial Relations Commission. By this device, the Commonwealth rid itself of someone who was not a judge, but who held an office which demanded of its occupants the independence which judges must have.

3.5 The Staples case is not unique. Indeed, the shameful record extends beyond the cases of members of bodies such as the Conciliation and Arbitration Commission to members of courts to which the Constitutional protection applies. This was graphically demonstrated when, in 1977, the Federal Court of Australia acquired the jurisdiction of the Australian Industrial Court. All the judges of the latter, except two, were appointed to the former. The two who were not so appointed, Justices Dunphy and Joske, nominally retained their seats on the Industrial Court, but the jurisdiction of that

court had been absorbed by the new body. They were, therefore, in effect selected by the Government for compulsory retirement. The appointment of each had been for life. No step was taken against either for removal based upon misbehaviour or incapacity. As with Mr Staples, a fair inference is that the Government did not like some of their decisions.

3.6 The same thing occurred in 1982. The Government of New South Wales declined to appoint to the new Local Court five magistrates who had sat in the Courts of Petty Sessions, which the new court replaced.

3.7 State judges are generally much more exposed in relation to tenure than their Federal counterparts. For example, it is within the competence of a State Parliament (except perhaps that of New South Wales) to pass legislation by which a judge is deemed to have retired. In other words, the Parliaments of the States other than New South Wales are legally empowered to remove a judge at pleasure: McCawley v The King (1918) 26 CLR 9 at pp. 58-9. They need not proceed to effect a removal by the device of forwarding an address, passed by each House, to the Governor - although, of course, such a course is open to them. And even here it is only convention which limits such an address to proved misbehaviour or incapacity. A parliament, not being bound by convention, might forward an address seeking the removal of a judge simply because he or she had, for example, ordered the production of government documents to a private litigant opposed to the Government.

3.8 The expedient of sending a judge into involuntary retirement was adopted in New South Wales early this century. Mr Justice Sly was retired by the Judges Retirement Act 1918. In Queensland, the Judges Retirement Act 1921 retired Chief Judge Cooper and two other judges of the Supreme Court (Justices Real and Chubb).

3.9 The Australian Bar Association has sympathy for any person who is wrongfully dismissed. But the personal fate of the judicial and quasi-judicial officers referred to above is not the point. We are here concerned with the public dimension of the wrong done by those who removed them. By that action, the ability of courts and tribunals to act, and be seen to act, impartially, is diminished. The colleagues of those dismissed cannot but be mindful of what has happened. The vast majority of those remaining will have that moral fortitude which will not allow the relevant events to affect their judgment. There will be some who are not so robust. Even if all remain unaffected, a public perception of partiality will be encouraged. The losing litigant is likely to think that he or she has lost because the judge was influenced by fear of the consequences if judgment went the other way. To illustrate the point, one need only imagine the reaction if the committee of a sporting club were to seek (or the consequences if it were to obtain) the power, which no other club in the association was to have, of adding persons to, or removing them from, the panel of umpires. Yet that is precisely the power which the Victorian Government, one of the litigants most commonly before the Victorian Administrative Appeals Tribunal, has over the majority of members of that Tribunal.

3.10 If the judiciary is to be independent, then judicial officers must also be protected against a diminution in their remuneration during their period in office. That principle is recognised throughout Australia. There are a number of associated principles. First, the value of judicial salaries must not be allowed to decline against wages and salaries generally, nor against the most nearly comparable salaries in particular. Secondly, judicial salaries must be set by a body independent of government: and both governments and parliaments must be bound by its decisions. Thirdly, those salaries, and the working conditions of judges, must be such as to attract to the office persons capable of meeting its extraordinary demands.

3.11 These associated principles are frequently disregarded by those who should be bound by them.

3.12 Examples of the matters about which the Australian Bar Association complains are not hard to find. We will use here but one of many. On 15 December 1989, the Federal Government, in submissions to the Remuneration Tribunal, argued for an increase in the remuneration of Federal judges. Before any decision on the matter was made by the Tribunal, the Government revised the submissions so as to argue for a lower increase. The Tribunal accepted the revised submissions, and accordingly on 23 May 1990 recommended that an increase of 6% should apply as from 1 January 1990 with a further 6% from 1 July 1990. Thus, for example, the Tribunal supported an increase in the salary of the Chief Justice of the Family Court of Australia from $135,650 per annum to $144,000 per annum as from 1 January 1990, and $154,000 per annum as from 1 July 1990.

3.13 In spite of all this, the Government, in another change of mind, refused to accept the determination of the Tribunal. First, it set the amount of the initial increase actually paid (in the case of the Chief Justice of the Family Court) at $143,709. Secondly, it determined that although this increase was smaller than that fixed

by the Tribunal, its introduction should be delayed by six months until 1 July, 1990. As from 1 January 1991, the salary of the Chief Justice of the Family Court was increased to $152,416. Other judges were treated in like fashion.

3.14 The end result was a reduction, actively promoted by the Government, in the real value of the salaries of Federal judges. Doubtless the Government believed that there was justification for this. And the Australian Bar Association accepts that wage restraint in the community generally should be taken into account, and in appropriate cases reflected in, the level and rate of increases in judicial remuneration. What is quite unacceptable is government interference in the process.

3.15 The Australian Bar Association stresses an additional fact. Judicial salaries have not kept pace with those with which they were formerly, and properly, comparable. For example, the salary of the Chief Justice of the High Court of Australia was for many years at the same general level as that of the Governor of the Reserve Bank. The latter now enjoys remuneration considerably greater both in absolute and comparative terms. The Association views this situation, which extends far beyond this one instance, with grave disquiet.

3.16 The Association of course recognises that the argument here has, again, a personal as well as a public dimension. We are concerned only with the latter. It is on the latter alone that the argument stands or falls. Thus, the Remuneration Tribunal might consistently determine levels of judicial salary below those accepted by government. That would not be a proper reason for returning the issue to government control.

3.17 Over recent years, governments have created a large number of different tribunals. The jurisdiction of many of these might with equal or greater appropriateness have been conferred upon or left with the courts. There is little legitimate point in giving independence to judges while removing from them jurisdiction which is then conferred upon tribunals which are not independent. In particular, it is totally inappropriate that presiding members of a tribunal which must decide matters in which governments or public authorities are directly interested do not have the independence of a judge.

3.18 There are many examples, apart from those to which we have referred, which illustrate, at best, government insensitivity to issues of judicial independence. We trust that the point has been made. The independence of the judiciary is not appropriately protected in Australia. Reform is therefore necessary, and must be initiated at once. It is to this that the statement now turns.

4. Reform

4.1 Removal from Office

4.1.1 Machinery appropriate to deal with judicial misbehaviour should be put in place forthwith, by suitably entrenched legislation; and judges should not be removable except on the proper operation of that machinery.

4.1.2 Allegations (which have been appropriately vetted) of such serious behaviour as would, if proved, warrant the removal of a judge should be placed before a special tribunal the membership of which is not subject to political manipulation: an appropriate scheme would include a tribunal, brought into existence only as occasion requires, consisting of not less than three judges or retired judges of superior Federal, State or Territory courts selected according to pre-determined procedures established by statute. In short, the appropriate machinery and the principles upon which it operates, should not be left to ad hoc arrangements.

4.1.3 It may be that, after proper investigation, the special tribunal or commission will not find that the case for dismissal has been made out. If so, the matter should go no further. If, on the other hand, it were found that an allegation concerning the ability or behaviour of a judicial officer is substantiated and could justify removal, then that finding should be laid before both Houses of Parliament. On the address of both Houses, the Governor-General or Governor (according to the circumstances) may remove the judge concerned.

4.1.4 The misbehaviour which might set the machinery for removal in motion should be limited to that which, if proved, would undermine to a serious degree public confidence in the fitness of the judge to perform judicial functions. Any complaint which if substantiated would, by contrast, not so undermine public confidence can be left for resolution to the court of which the judge is a member.

4.1.5 Investigations into the conduct of a judge must be confined to specific allegations which appear to have substance in fact. Disappointed litigants will always have a motive to complain about the judiciary. Care must therefore be taken to ensure that unwarranted complaints are not given more credence than they deserve. Accordingly, proper vetting processes must be introduced to guard against action upon unjustifiable complaints from disgruntled litigants. These complaints, to the extent that they are baseless, constitute a threat to

the independence of the judiciary.

4.1.6 There is another reason why investigations into the conduct of a judge must be confined to specific allegations which appear to have substance in fact. The point is made in the second report of the Commission of Inquiry into the conduct of Mr Justice Vasta. One of the tasks of that Commission was to investigate whether "any behaviour of the judge warranted his removal from office". The three retired judges who constituted the Commission said at p.39 of that report:

"The Commission, as a result of its experience in conducting this inquiry has formed the clear opinion that the holding of an inquiry into the question whether "any behaviour" of a judge warrants removal is open to grave objection. It is one thing to inquire into specific allegations of impropriety but it is quite another to conduct an inquisition into all aspects of a judge's life. An inquiry of the latter kind exposes the judiciary to unacceptable risks that pressure will be applied to its members and becomes especially dangerous if instigated by pressure groups or as a result of media clamour."

4.1.7 The protection for which the Australian Bar Association argues in this statement should extend to the judges of all superior and intermediate courts. Magistrates should perhaps be placed in a different position. They should not be removed except on motion brought by the Attorney-General before a Full Court of the appropriate Supreme Court and after incapacity or serious misbehaviour has been proved.

4.1.8 Appropriate provision, always embodied in legislation, should be made for presiding members of tribunals before which governments or public authorities are or may be parties. In many cases, such members should be given at least the same degree of protection as is urged for magistrates. In every case, the extent of protection must match the extent of exposure of the office in question to illegitimate pressure.

4.1.9 From time to time governments appoint acting judges. This is usually for the purpose of disposing of a temporary backlog of cases waiting to be heard. Often the temporary merges into the permanent. The special danger is the creation of a permanent system of temporary judges. Those who hold acting appointments but who seek or are thought to seek permanency cannot be seen to be independent of government. It would be difficult, under such circumstances, to be independent in fact. Moreover, no politician who had recently been on the wrong end of the judgment of an acting judge could be seen to be impartial if the question of that judge's permanent appointment were before that politician.

4.1.10 It is for this reason that the Australian Bar Association has grave reservations about acting appointments. It may nevertheless be that, given the strictest possible safeguards (for example, only appointing those who do not seek permanency), acting appointments can be justified on the grounds that in the particular circumstances of a particular jurisdiction there is no practicable alternative. But a permanent system of acting appointments cannot be justified.

4.1.11 One safeguard has been suggested. It is that, to ensure that the expedient of temporary appointments was only availed of in circumstances which justified that measure of last resort, no acting appointment should be made until the Chief Justice or Chief Judge (as appropriate) certified accordingly; and such appointments should only continue for such period as the Chief Justice or Chief Judge certifies to be necessary.

4.2 Control of the Administration and Operations of the Court

4.2.1 Courts cannot dispense justice according to a formula. Likewise, ordinary principles of administration do not apply to the judicial process. Their application would result in injustice, as well as much other harm. It is nevertheless tempting for a bureaucrat to assess the efficiency of the courts in terms which are incompatible with their true function. In order to avoid this, the judges must themselves be responsible for the administration of the courts of which they are members. The Australian Bar Association agrees with Mr G.E. Fitzgerald QC who, in the Report of a Commission of Inquiry pursuant to Orders in Council into possible illegal activities and associated police conduct said (at p.134):

"The independence of the judiciary is of paramount importance, and must not be compromised. One of the threats to judicial independence is an overdependence upon administrative and financial resources from a government department or being subject to administrative regulation in matters associated with the performance of the judicial role. Independence of the judiciary bespeaks as much autonomy as possible in the internal management of the administration of the courts."

4.2.2 The judicial arm of government relies upon the legislative and executive arms for the resources necessary to fund the operations of the courts. This reliance cannot be eliminated. It nevertheless carries with it the inherent risk that he who pays the piper will try to call the tune. It is vital that this risk be reduced to

the irreducible minimum.

4.2.3 Courts must therefore have the right to control their premises, facilities and staff. This is a necessary element of an independent judiciary. Otherwise, to take an extreme example, a government could hamstring the courts by removing staff and other support facilities. The Australian Bar Association agrees with the Chief Justice of South Australia, who in an article entitled "Minimum Standards of Judicial Independence" published in (1984) 58 Australian Law Journal 340 at p.341 said:

"It is essential that control of court buildings and facilities be vested exclusively in the judiciary. The court must have the right to exclusive possession of the building or part of the building in which it operates, and must have power to exercise control over ingress and egress, to and from the building or part thereof. The court must have power to determine the purposes to which various parts of the court building are to be put and the right to maintain and make alterations to the building. If a court is not invested with such rights of control over its buildings and facilities, its independence and its capacity to properly perform its function are impaired or threatened in a number of respects."

4.2.4 It is nevertheless appropriate here to make a general point. It is the duty of each court, within the limits of the resources and powers available to it, to dispose of its business as quickly and efficiently as is compatible with its primary duty: the dispensation of justice. In this context, the Australian Bar Association recognises that the involvement of government may be necessary if a particular administrative problem is to be solved. Extreme care must be exercised in those cases to ensure that such involvement does not compromise judicial independence. It should never encroach upon the judicial functions of the court. It should never be initiated until the relevant Bar Association and Law Society have been consulted.

4.2.5 An independent judiciary is a judiciary in which each individual judge is free from improper pressures. Subject of course to appropriate appeal structures, it is incompatible with an independent judiciary that one judge should be subject to the control of another in the execution of the duties of his or her office. This danger is reduced if the administration of the courts is the responsibility of the judges as a whole (or a representative committee of them) rather than the head of the court or an unrepresentative committee.

4.2.6 The right of a court to control its premises, facilities and staff should be entrenched by statute. It must then be a first priority of government, subject only to unavoidable budget constraints, to provide the courts with the necessary funds.

4.2.7 Without adequate funding, ostensible independence is reduced to a myth. The Australian Bar Association wishes to emphasise that a social order compatible with an advanced, civilised society is unattainable unless governments are prepared to provide the courts with the facilities required for the proper discharge of their duties. It follows that the number of judges must be adequate and that their support staff and facilities must be such as to enable them to work at their optimum level.

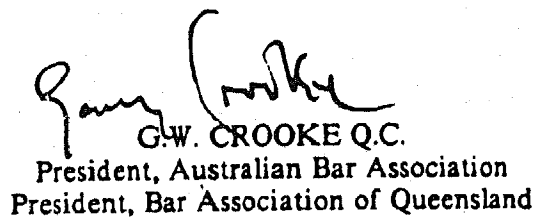
5. Conclusion

5.1 Civilised society may be judged, in part, by the restraints which it imposes upon the use of power. Human nature being what it is, unchecked power will inevitably be used in ways which are unjust. The misuse of power, and mankind's attempts to combat the tyranny which results, are central themes of the history of civilisation.

5.2 Human ingenuity has been able to devise only one effective mechanism for restraining the misuse of power. That mechanism is the rule of law, which may be roughly defined as the governance of society by laws, to which all citizens, bodies corporate and governments are subject, made with the general concurrence of society and enforced impartially. The rule of law therefore has as one of its opposites the imposition of order by the use of arbitrary might. Another opposite is the absence of order. At its apex is an independent judiciary.

5.3 An independent judiciary is an indispensable requirement of the rule of law. Only an independent judiciary can enforce impartially the exercise of power in accordance with the laws which were enacted to control that power. And it is the universal and impartial application of the law, so that the actions of every man, woman and child are ultimately controlled and limited by laws enforced by somebody else, that is the essence of a society in which freedom and order and justice each receive their due.

5.4 The legal profession has not in the past done enough to secure the independence of the judiciary, or to guard against the at times grossly improper interference with that independence. The Australian Bar Association will in the future do everything in its power to ensure that these mistakes are not repeated.



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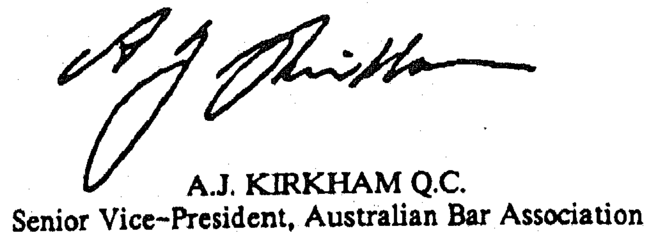

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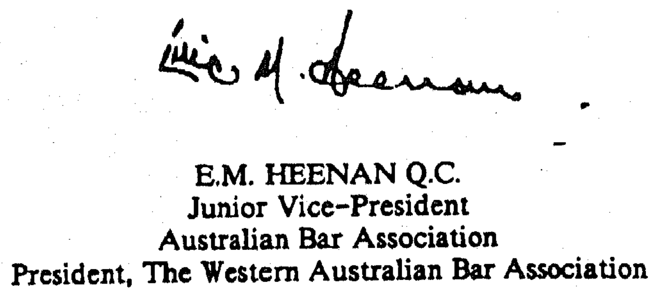

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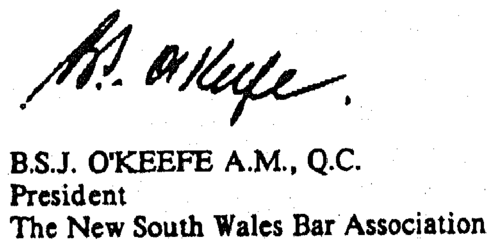

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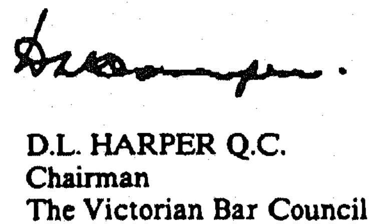

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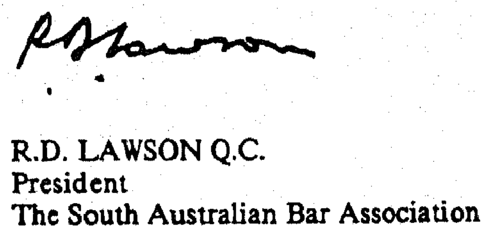

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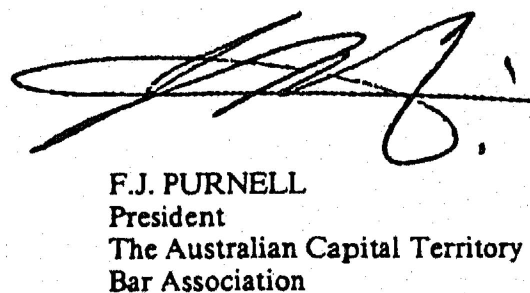

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