

Wisdom's Legacy

Chief Justice Robert French AC

Francis Burt Chambers 50th Anniversary Dinner

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To speak of 'the Bar' as an institution is to speak of an abstraction expressed as a metaphor in that untidy, historically grounded way that is one of the laws more maddening charms. To speak of 'the Bar' is to speak of the whole body of persons who practice as barristers, so named by reference to the physical barrier which divided the public area of courtrooms from that reserved for use by advocates. To speak of 'the Bar' in that way and to expound upon its strengths and virtues evokes memories of an endless parade of legal dinners and toasts down the years, rescued from mind-numbing generality and repetitiousness only by the occasional war story which had not been told before.

The abstraction that is 'the Bar' finds its concrete expressions in particular places and particular histories. In Australia, it is possible to speak of a national Bar in which all barristers can participate. Importantly, it is also possible to speak of State and Territory Bars, each with its own distinctive history, and each with its own rich and colourful spectrum of personalities from its origins to the present day.

We are not here tonight to celebrate the Bar in general. We have come together to celebrate this Bar, the Western Australian Bar, and these Chambers, Francis Burt Chambers, which began it all 50 years ago under the name 'Bar Chambers'.

In speaking to Bar Associations around the country in the last few years, I have often looked for a title which expresses a theme vaguely relevant to the particular Bar. In New South Wales it was 'Don't You Know Who I Am - Ego and Identity in the Administration of Justice'. In Victoria it was 'Singers of Songs and Dreamers of Plays', a line borrowed from a poem against lawyers by Carl Sandburg.¹ In the Northern Territory, it was 'It's Not Whether

¹ The poem is titled 'The Lawyers Know Too Much': See Carl Sandburg, *The Complete Poems of Carl Sandburg* (Harcourt Brace, revised ed, 1970) 189.

You Win or Lose', borrowed from a tee-shirt I saw at the Katherine Show which read 'It's not whether you win or lose it's the piss-up after that counts'.

A first thought for a title for tonight was 'An Irresponsible Thing to do'. Those words were used by Francis Burt to describe his decision to begin practicing solely as a barrister and to begin the WA Bar. In his 1992 interview for Brief he said:

It was an irresponsible thing to do. I had three kids at school and Jamie had just been born. He was born in November before I went out to the Bar.²

That element of irresponsibility, that moment of choice and uncertainty about the future is familiar to all who make the decision to practice as independent barristers, however long their experience, however secure the position they have reached within the legal profession.

If Francis Burt's decision was irresponsible, it was also informed by a practical wisdom characterised by those who joined him: John Wickham and Terry Walsh, both of whom are here this evening, and the late Gresley Clarkson. That wisdom has characterised many of the leaders at the Bar who followed them. The 50 years of these Chambers and the WA Bar that we celebrate tonight can properly be called 'Wisdom's Legacy' and that is my title.

Francis Burt recognised the importance of ensuring that the Chambers which he founded should be seen by the whole legal profession in Western Australia as compatible with its history and character as a fused profession. The Bar was not to be a band of legal virtuosos superior to the rest of the profession. It was there to serve the profession and the public and to stand or fall upon the quality of its service. That vision was brought out in Burt's remarks in his 1992 interview for Brief in which he said:

What was very central to the success of the Bar as it got under way was that ... you had to provide a service to all the solicitors. And not have any regard to rules such as whether you could go to their office and talk to them. We never really observed those Bar rules ... which have become ingrained in the Sydney practice of the Bar.

² Interview with Francis Burt QC, 'The Foundations of the Independent Bar' (1992) 19(7) *BRIEF* 11, 11.

We always tried to make it as easy as you could, and you had to. They were paying you and you had to do the work.³

Burt took the view that the Bar would not survive if its members pretended that they were superior to the solicitors and were setting up in competition with advocates practicing as both solicitors and barristers. As for silks who thought it was beneath their dignity to settle pleadings, he called them 'weak in the head'. He said:

If you haven't got your pleadings right, what's the good of going in and trying to fight a case on pleadings drawn by some incompetent junior. So I insisted on doing the pleadings when I was going to do the case. So that was not accepted Bar practice. My view all the time was that we were there to give a service and that service had to be done.⁴

The practical wisdom of Francis Burt and his successors as leaders at the Bar meant that they were not distracted by individual or institutional self-regard. Those practicing at the Bar had no difficulty appearing with juniors from the amalgam who might also be acting as their instructing solicitors. That was a reflection of the character of the Western Australian profession. For those who practiced as advocates in the amalgam and intended eventually to go to the Bar, it gave them access to the best kind of guided experience in the work of advocacy with people who did only advocacy work.

Francis Burt and his successors were also quite relaxed about the inclusion in their ranks of counsel from all other jurisdictions in Australia. There was no equivalent in Western Australia of the so-called 'Dingo Fence', which imposed a minimum residency requirement on those wishing to practice at the Bar in Queensland - a fence which was, in any event, dismantled by the High Court for non-compliance with s 117 of the Constitution in *Street v Queensland Bar Association*.⁵ As a result of that openness, practitioners at the Western Australian Bar and, indeed, in the amalgam, had the opportunity to appear with and against

³ Ibid 12.

⁴ Ibid 12.

⁵ (1989) 168 CLR 461.

senior counsel from other State Bars sometimes to be inspired by their excellence, on other occasions to be reassured by the fact that the usual percentage did not exceed fair average quality.

I did not have the opportunity of observing or working with Francis Burt as an advocate. He was appointed to the Supreme Court in 1969 and I did not commence my articles until 1971. However, the experience of appearing before him in his judicial role was, I am sure, no less educational than the experience of appearing with or against him as an advocate. Those of us who knew him as a judge and later as Chief Justice of Western Australia, became only too familiar with the powerful and incisive intellect which sometimes found its expression in direct and pithy observations from the Bench. His directness could disconcert. I once cited to a Court of Criminal Appeal on which he was presiding an unreported decision of that Court which seemed to me to be right on point in favour of my case. He said, 'well if we said that, we were wrong'. So on to plan B. On another occasion, which fell out more in my favour, I was cross-examining a rather assertive and confident businessman who was keen on putting some gratuitous spin on his answers. Francis Burt, who was the trial judge, looked at him after a while and said: 'Probably nobody has ever told you this, but you talk too much.'

The practical wisdom which informed the foundation of the Bar has a strong ethical component, not only in the way its members conduct themselves in practice but also in taking on the responsibility of mentoring new young entrants. My wife, Valerie, who was the first woman to chance her arm at the Bar, remembers learning experiences she had as junior counsel to Howard Smith who would sometimes finish a conference in his chambers at the end of the day with a glass, or two, or possibly more, of Black & White Whisky. On one occasion they did a trial together in which a letter was used in cross-examination of their client to which she had not attached much significance when reviewing the discovered documents. Mortified she received a memorable and appropriate debriefing advice from Howard - it doesn't matter how clever you are as an advocate, success depends upon mastering the detail.

Among those at the Bar with whom I worked, or who assisted me as a young practitioner in one way or another, were John Toohey, Barry Rowland, Terry Franklyn, Paul Seaman, Phil Sharpe, Terry Walsh and David Malcolm. Each of them represented in

different ways those qualities which, I would like to think, inform the essential culture of the WA Bar and Francis Burt Chambers in particular.

The size and composition of the legal profession and of the Bar has changed significantly since 1962. There are now 38 women practicing solely as barristers, two of whom have taken Silk. Women make an increasing proportion of the judiciary at all levels. Toni Kennedy, from these Chambers, was their trail blazer in a trend which is Australia-wide. It is significant that three of the seven members of the High Court today are women, and there is a possibility that, as a result of one or more of the impending appointments, they will be in a majority. Indeed there is a possibility of a five to two majority in which Justice Hayne and I are the only men left standing.

Interestingly, we, in Australia, seem to be well ahead of our United Kingdom counterparts in that respect. Despite selection mechanisms which are dominated by forms and processes and expressed concerns about diversity, there is only one woman on the Supreme Court of the United Kingdom.

Although I only practiced three years as a member of these Chambers before being appointed to the Federal Court in 1986, I remember those years with great fondness. I remember also the 11 years before then when I briefed, worked with, and appeared against, members of the Bar in my practice as a barrister and solicitor. Each of us carries our own suite of memories and experiences of particular personalities who have made up the history of these Chambers. I have mentioned a number already. There are many others. Among those who have passed from our ranks, I would like to remember Geoffrey Kennedy, who was a great Western Australian jurist with a national reputation for excellence.

Among long-standing members of the Bar still with us, I should like to acknowledge Paul Nichols, who I remember as a durable example of that larger than life independence of mind and thought in which the true objective of what it is fashionable to call 'diversity' should lie. It was not so long ago I looked for Paul's book on police offences in the library as it still offers a comprehensive coverage of the mysteries of duplicity in complaints. I would also like to acknowledge the contribution that elder statesman Chris Zelestis has made to the profession and to these Chambers.

Many of your members have made significant contributions in a variety of ways to the public interest through their pro bono work and in continuing legal education, as well as the core business of delivering quality legal services. Many of your members have been appointed to the judiciary at all levels in this State and beyond. I sometimes find difficulty with the words 'senior judiciary' to describe a Supreme Court, two of whose members were once my articulated clerks. But that is a perspective of advancing age. You don't get older. Everybody else just seems to get younger.

Mr President, I congratulate Francis Burt Chambers on this its 50th Anniversary. It has much to celebrate. It has given much to the profession and the public. Long may it continue and keep on giving.