

## **THE RISE (AND FALL?) OF THE BARRISTER CLASS**

**BY THE HON MICHAEL McHUGH AC**

### **COMMENTARY ON JUSTICE McHUGH'S PAPER**

**The Hon Justice Michael Kirby AC CMG**

As was to be expected, in his essay on rhetoric Michael McHugh has not only recorded the stories of the mighty advocates of our tradition of the past. He has also displayed the reason why he has earned his own acknowledged membership, while still alive, in the Pantheon of advocates. In his paper on leading barristers from England and Australia, he has taken us on a rollercoaster journey. By describing and illustrating the lives of great advocates of the past, he has lifted us up, prodded our imagination, stimulated us by example and made us proud. Then, in his conclusions, he has cast us down.

It would not be hard to go away from this lecture with a feeling of discouragement that the 'glory days' are over for all of us. Yet is that the true message of Michael McHugh's description of the barrister class and their skills? Should we be discouraged by the changing times in which barristers now practise their profession?

## 2.

Certainly, things have greatly changed. The almost total elimination of civil jury trials. The rise and rise of written submissions. The advance of case management<sup>1</sup>. The triumph of the photocopier and the three trolley silks. These and other changes have changed the opportunities of advocacy and the occasions for stirring rhetoric at the Australian Bar. There is no getting away from these changes. The old ways will not be restored.

Yet barristers know that the world does not owe them a living. Those who are introspective enough, will accept that there were a few restrictive practices of the past that were difficult to justify. Cartels can, as has been said, be conspiracies against the public. Some of the old rules would be hard to sustain in a modern, open, democratic society.

Yet the Bar continues to flourish. In fact, it is probably trimmer and leaner than in the 'good old days'. Indeed, if we think about it, we will probably agree that many things have actually improved. The increasing numbers of women at the Bar help to bear out Mary Gaudron's reminder that skills in advocacy may be genetic and individual. But they do not reside solely on the Y chromosome. The full impact of the arrival of women at the Bar has yet to be felt. However, it is surely beneficial.

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<sup>1</sup> But see *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 at 155, 172.

### 3.

A greater concern with efficiency is itself generally defensive of litigants for whom going to court is inescapably expensive, distressing and costly. Written submissions require a precision of thinking that oral flourishes may sometimes lack. Some of the great moments in barristerial advocacy, like Sir Edward Carson's cross-examination of Oscar Wilde, may not have been so glorious in retrospect. In the state of the law as it stood at that time, what an easy quarry Wilde was before Carson.

In accessible form, Michael McHugh has recorded the stories of the great English advocates of the past. Those, like me, who are of his generation, grew up with these stories. They were told and retold to us. They still carry many lessons for us. It is precious that they have been chronicled. They will now be accessible to future generations of barristers in Australia. We must thank him for that.

I used to attend a dinner at which Sir Garfield Barwick presided. It was the annual dinner of the Order of St Michael and St George in Australia. We were members together. After dinner, in one of the Sydney Clubs, Sir Garfield would rise to speak to us. Even in very old age, he displayed the gifts of simple expression for which he was rightly famous. Every year, the speech was much the same. It was about the Law Lords he had known and addressed in the Privy Council. Each year he would tell the same stories. We, his audience, would always laugh in the same places. Yet, as time went on, his stories seemed less and less relevant to our country, its society and its legal profession. This was no-

one's fault. It was just a result of the change in experience and of institutions.

In the future in Australia, the towering figures of advocacy will be Australian figures. Michael McHugh will certainly be one of them. We should collect and celebrate those stories. Their chronicle is ongoing. It is written every day. I hope that the next chapter in this lecture series will tell more lessons of rhetoric in Australian courtrooms, for they are many.

Despite the loss of cartel protections, we can go from this lecture feeling optimistic and confident about the Bar. Why do I feel confident? It is simple really. Every working day, come ten o'clock in the morning, courts and tribunals, boards and inquiries, coroners and High Court Justices will open their proceedings throughout this nation. A small *cadre* of trained people will be required to help them discharge their functions. These people, skilled in advocacy, will subject themselves to the tasks of intellect and challenges to emotion that are bound up in the skills of advocacy. Not many people will be willing to accept the stresses and dangers that are involved in that life. Not all who attempt it will succeed. Yet those who do, offer most precious gifts to their fellow citizens. Moreover, in our tradition, some of them will later have opportunities of higher public service as judicial officers serving the institutions of government - an opportunity not held out in the same way by any other profession.

5.

That is the reason why we can be grateful to Michael McHugh, master rhetorician. He has given us the great advocates of the past. He has reminded us that we, like everyone else, live in a time of great change. In our hearts, we know that most change is good. The institution of the Bar remains strong.

We should continually strengthen the cohesion of the Bar by occasions such as this. We should rebuild times and places to meet and celebrate together the shared perils and triumphs, joys and pain. If the Victorian Bar can meet and dine and think together every day, something similar should be possible in New South Wales. At least it should be possible on occasions such as this. And then a bright future will surely beckon.

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