president's column

THE LAW OF 22 PRAIRIAL

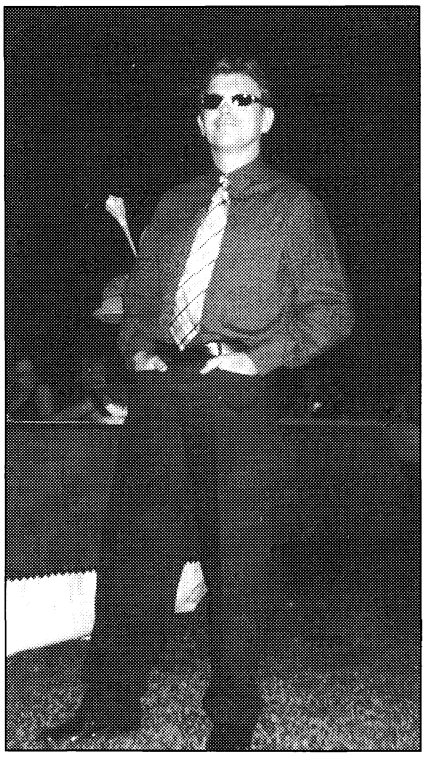
When New South Wales Magistrate Pat O'Shane remarked that "a lot of women manufacture a lot of stories about men" the reaction in some quarters was as swift as it was predictable. She was denounced as a destroyer of decades of progress towards encouraging women to speak out about sexual abuse. She was castigated for drawing her judicial office into a cauldron of controversy and for breaching the rather sanctimonious views of Lord Kilmuir that judicial officers should always keep their opinions to themselves.

In the aftermath of her comments a jouncing arose in the media propagated by a number of parties who either did not hear or understand what the Magistrate was saying or who preferred not to do so. At the time Pat O'Shane made her comments she was endeavouring to point out that a mere allegation of sexual abuse is not evidence of the fact that it occurred. She also committed the heresy of observing that in sexual cases sometimes and for a variety of reasons people make things up. As is common in these types of situations a few words that form part of a sentence or even a lengthy discourse are seized upon to support a conclusion that was neither intended by the speaker nor reasonably available once the entire context has been considered.

Perhaps if she had been dealing with a topic other than sex Pat O'Shane's words might have been greeted as a timely wake-up call to the idea that in a society which calls itself "free", allegations of erstwhile criminal behaviour are either admitted or subjected to extensive examination at a trial before they can be seen to amount to more than a hill of beans. However the first step is for authorities to charge the person who is supposed to have acted unlawfully with a crime. In the case of the Chairman of ATSIC, Mr Geoff Clark, even that fundamental measure is missing. Yet the hounds chose to eat early and the baying for blood began with banner headlines in two of this country's most respected daily papers. In the wake of those headlines the idea of due process seems almost arcane as if it was some silly little social habit to be snuffed out The concept of evidence flickers like a weak and dying flame before the stiffening wind of the "public's right to know" and circulation figures. It is my experience that those who would scream loudest about their own rights are often prepared to obscenely deprive others of theirs. The justifications that are commonly made in defence of such public outings usually exemplify the carnal art of sophistry and are delivered as if by a bloated diner picking the meat from between his teeth.

It has always been recognized that there is a distinct forensic advantage to the mere allegation being relied upon as a determinant of guilt. No questions need to be asked of the accuser, any denial from the accused can be ignored, no investigation need be carried out and the expensive and pernickety process of a public trial can be avoided. More importantly the dreadful thought that the accused may be acquitted need not be considered thus preventing the rest of us from rolling about in another's misdeeds as a dog does upon a dead carcass.

Prior to June 10 1792 those jaunty jokers of the French Revolution, Saint-



Jon Tippett, Law Society President as Quiz Master at the NT Young Lawyers Tropical Twilight Trivia Quiz Night

Just and Robespierre were having a lot of trouble getting opponents like Danton onto the tumbril"s of Monsieur de Paris and off to the guillotine. The trouble was two fold, first, finding an appropriate charge to level against each opponent and second , the gathering of sufficient evidence to support that charge in order to secure a conviction.

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the idea of a fair trial. A Fair trial, they concluded, was inefficient, lengthy and in terms of the outcome unreliable. It had to be dispensed with. Equally a show trial was dangerous. The accused might not keep to the script and incidently might have a better gift of the gab than the accusers. They were wide-awake blokes and it didn't take them long to solve the problem. On 10 June they forced upon the deputies to the Committee for Public Safety a decree that remains unique in the annuls of jurisprudence. It refused the accused a basic right to a defence since it stipulated that accusation is tantamount to conviction. The decree became known to posterity as the Law of 22 Prairial (10 June).

Of course those bon vivants of The Terror were not the first to come up with such an idea but they were the first within western legal systems to make it law. Somehow the lawyer Robespierre seems to have missed the irony of introducing such legislation within the three principles of the French Revolution, Liberty, Equality, and Brotherhood. Then again it is difficult to subscribe a sense of humour to a man of such unmerciful logic.

The Law of 22 Prairial may no longer reside in the legal codes of France but it has a tendency to occupy spaces in the human mind. It's victims can unfortunately be lawyers as easily as any other person. The quality of a person's education does not always make a difference. It seems to be about what we would like to believe or want to believe. It is about prejudice and politics and our secret enjoyment at seeing another in the stocks. Who cares if a person is presumed innocent until proven guilty, we are all having too much fun to give that old maxim of fairness a run. It is the hunt, the flying tufts of fur and that delicious scent of blood that often occupies our collective attention. When someone like Pat O'Shane comes along and says things like "hold on everybody it is only an allegation you should not jump to conclusions, people can and do lie, a number of lies is no better evidence than one lie, and an accusation does not amount to a conviction" we hate them for it. They take away our toy. We scratch like a cat that has had a bird ripped from its claws.

Women have been right to attack our system of justice in relation to the manner in which it has dealt with allegations of sexual abuse and assault in the past. Significant changes have taken place to make investigative procedures and the courts more accessible and sympathetic to the very real and destructive effects that such a very personal and devastating crime can cause. Minimum non parol periods for such offences have been increased to 70% of the head sentence. The Sexual Offences (Evidence and Procedure) Act has introduced new procedures in relation to the taking of and reporting of evidence in sexual cases. Counseling services are readily available at least for urban women and men. We know that Aboriginal women suffer significant levels of abuse that we are yet to properly address as a community let alone a legal system.

As lawyers we must continue to be open to changes in our system that can assist and encourage people who have suffered sexual abuse to come forward. However in our efforts to make things better we have no business in making our system worse by elevating the allegation of a sexual crime into a form of proof. A finding of guilt must remain the province of a judicial officer or jury once the evidence has been heard and the quality of the evidence has been subjected to the criminal standard of proof. Anything less is Law 22 Prairial.

Perhaps Pat O'Shane could have approached some of the issues she commented on with greater circumspection given that charges may ultimately be laid and the matter go before a Court. Perhaps she might now agree that some of what she said could have been better expressed and more carefully constructed so that her experience as a sitting Magistrate did not become part of the argument. But that is hindsight. As a women, a lawyer, a judicial officer and an Aboriginal Australian she has taken on the big issues in her life and her profession and fought them with vigor and bravery. She has railed against violence suffered by women and in particular indigenous women all her professional life while others have remained silent. Is she now to be vilified for making the observation that not all sexual allegations are true and that some are for various reasons manufactured? That is merely the experience of human kind. There have been laws against violence for centuries. A law does not stop violence it is a sanction that deals with the event. Political and social will can reduce the incidence of violence. That is the point Magistrate O'Shane makes and it would be to our collective benefit to listen to her.

It may be that the New South Wales Judicial Commission to which her remarks have been referred finds fault with her outspokenness. That remains to be seen. However if she is to be censured for saying that not every sexual allegation is true, as a profession and a community, we have returned her to Salem.