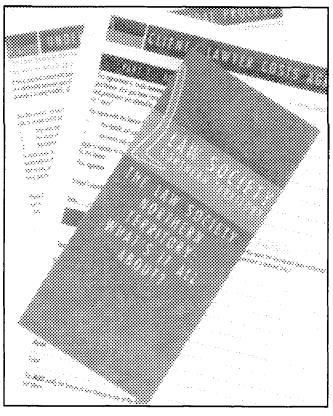
BALANCE
LAW SOCIETY NORTHERN TERRITORY

RESPECT THE INSTITUTION OF THE JUDICIARY: ANGEL J

Client Costs Agreement and Law Society brochures launched

The Law Society has launched an information pack for clients of solicitors which includes the Client/ Lawyer Costs Agreement.



Law Society Vice President Mr Ian Morris said the information pack has been made available to all firms and sole practitioners in the Territory.

"The Society hopes the brochures and Costs Agreement will be accepted as a basis for all practitioners to follow in their dealings with clients," Mr Morris said.

The information pack will include brochures titled: ***Information for Civil Litigants, Understanding the Legal Process*** and ***Common Legal Terms*** which are designed to assist clients understand the language and steps involved in the legal process.

See page 18 of *Balance* for further details.

Comments made by Supreme Court judge Justice Angel at an admission ceremony in Darwin on Tuesday 6 February sparked national media interest following his criticism of the NT Government's attempts "to create a subservient and compliant legal profession". The Judge's admission address is reprinted here in full:

Congratulations to each of you upon being admitted as practitioners of the Supreme Court of the Northern Territory. This is the culmination of years of study and you have now entered the Northern Territory legal profession.

I have spoken previously on occasions such as this of the need for a strong, independent legal profession in our community and of the need for professional non-attachment on the part of legal practitioners. Some of my remarks have been published in the most recent Balance magazine, a publication of the Northern Territory Law Society. Other remarks on an occasion such as this have been published in the Australian Bar Review.

A worthwhile legal profession, like the judiciary, is required and trusted to have a spirit of independence. Although a legal practitioner's services are for hire by all including the Executive, the conscience of a good lawyer cannot be organised or rented by any political party.

This year is the three hundredth anniversary of the Act of Settlement which secured judicial independence from the Executive, and it is appropriate and interesting to consider the present circumstances of the profession you are joining. Of course the profession of law consists of solicitors and barristers, magistrates and judges and legal academics.

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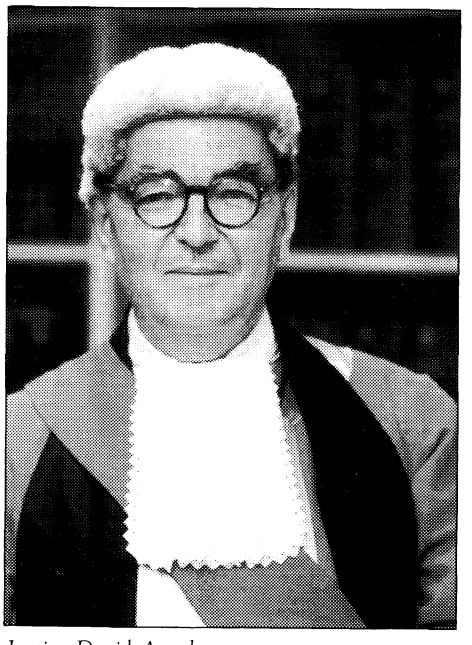
In April 2000, NAALAS requested the Chief Magistrate to desist from hearing a Juvenile Court case on account of perceived bias arising from the then understood circumstances of his appointment. The Chief Magistrate refused to disqualify himself and NAALAS commenced proceedings in the Supreme Court. On 19 April last year, Olney J said there was a prima facie case against the Chief Magistrate that there was a perception of bias. NAALAS's action was dismissed after the Chief Magistrate withdrew from hearing the Juvenile Court case, at what was described in the press as 'the eleventh hour'. Counsel for NAALAS was published in the press as saying the Chief Magistrate's action in withdrawing from the case was a ploy to prevent the case from being decided on its merits. Counsel for the Chief Magistrate was published in the press as saying the case against the Chief Magistrate was 'totally without foundation'. On 20 April 2000 NAALAS commenced proceedings challenging the validity of the Chief Magistrate's appointment. It is alleged that he was appointed for an improper purpose and that his appointment compromised the principles of the independence of the judiciary. That litigation is yet to be concluded by a judicial decision in the Courts. The Chief Magistrate continues to sit in his Court. The NT News in April last year commented upon these matters in an Editorial headed, 'Bradley Witch Hunt', saying, amongst other things, that NAALAS, 'is simply playing politics'. In the NT News of May 11 last year, the Editorial spoke of 'the role of some members of the legal fraternity in the witch hunt of Hugh Bradley'. At that time Mr Jon Tippett, the present President of the Law Society, was one of the Counsel for NAALAS. The Honourable the Attorney-General has been quoted in the press as giving various versions of the circumstances of Mr Bradley's appointment. The Honourable the Attorney-General has also been quoted in the *NT News* as saying NAALAS is wasting tax-payers' money in pursuing the action. On 18 April last year, the Honourable the Attorney-General said on ABC TV: 'I think that there is a scurrilous and irresponsible and childish attack by some sections of the legal profession against the Chief Magistrate'. NAALAS is currently represented by Mr Brett Walker, senior counsel from Sydney. Mr Walker, a former President of the national law body, the Law Council of Australia, has not, so far as I am aware, yet been publicly called scurrilous, irresponsible or childish.

The present President of the NT Law Society, Mr Jon Tippett, on behalf of his profession has been an outspoken critic of the present NT Government's mandatory sentencing regime, and of the lack of freedom of information legislation in the Northern Territory, and of the alleged circumstances of the Chief Magistrate's appointment. Late last year Mr Tippett was nominated for appointment as Queen's Counsel pursuant to a protocol agreed between the Government and the Supreme Court and the legal profession for the appointment of Queen's Counsel. Mr Tippett's nomination was rejected without explanation or any stated justification. The Honourable the Attorney-General has yet to inform the Chief Justice whether the name of Mr Tippett advanced to or beyond the Cabinet or to or beyond the Executive Council. Presently in this regard there is but the sound of silence. It is timely to remind you of the words of Bentham, cited by Lord Shaw of Dunfermline, in the celebrated case of Scott v Scott [1913] AC at 477: 'in the darkness of secrecy, sinister interest and evil in every shape have full swing...where there is no publicity there is no justice'. 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity'. 'The security of securities is publicity'.

In the most recent NT Law Society *Balance* magazine, Mr Tippett, in the President's column, poses the question, 'Do we have a real democracy in the Northern Territory ?'. Last week, the NT Bar Association unanimously supported Mr Tippett's nomination for appointment as Queen's Counsel.

The NT News on 19 December last year published a letter from Mr John Waters QC wherein he said, inter alia:



Justice David Angel

> 'For only the third time in almost one hundred years in Australia an Executive Government refused to follow a Chief Justice's recommendation and Jon was not appointed.
>
> The Chief Minister has refused to explain or justify his Cabinet's decision.
>
> However, no-one in the Territory legal community is left in any doubt that this decision is a cowardly and vindictive blow delivered in retaliation for Jon Tippett's role as a spokesman for his professional associations on the issue of mandatory sentencing. This is at least the third time that the power to appoint Queen's Counsel has been abused by a Territory Government.'

In the same letter, Mr Waters QC also said:

> The health of our society dictates there be a balance of personalities, background and opinions among the Queen's Counsel as well as among our judges and magistrates.
>
> Jon Tippett will not be intimidated by his treatment, but attempts to develop a subservient and compliant legal profession reflects not only on the maturity of our Government but on the maturity of our community if it is tolerated.
>
> Queen's Counsel appointments, like appointments to the magistracy, must not be a matter for political patronage.'

You will notice those strong words include an allegation that the Government has attempted or is attempting 'to develop a subservient and compliant legal profession'. The Honourable the Attorney-General has not publicly refuted that allegation. In this instance, again, there is but silence.

Only last week, Justice Mildren was the subject of a very personal, vituperative and unbridled attack in the letters column of the NT News in respect of a gaol sentence he passed in the ordinary course of his duties. The NT News on Saturday last contained a lengthy letter from Mildren J's wife defending her husband. That defence was published absent any defence of the judge by the Honourable the Attorney-General.

What I have just stated are facts, not sentiments.

It was the famous English artist Francis Bacon, a distant relative of the famous 17th century Lord Chancellor, who coined the phrase, 'the brutality of fact'. Facts, though they have no tongue, speak.

The facts I have related, amongst other things, demonstrate an increasing tension between the present NT Government and your profession, or at least, certain responsible, independently-minded members of your profession, and a disturbing and an increasing trend in the Northern Territory.

You may wonder why I mention these things. You may legitimately ask when should judges speak out?

The circumstances when judges should speak out publicly are presently the subject of much debate. The circumstances when judges should speak out publicly undoubtedly include circumstances when the rule of law and the independence of the legal profession and of the judiciary are, or may be, put at risk. After all, judges are sworn to uphold the rule of law. So I speak today, not to criticise or to answer or to forestall criticism, but because I deem it in the public interest to do so.

The rule of law is never at risk in a healthy democracy. A healthy democracy cherishes the rule of law which is one of its lynch-pins. What are the indicia of a healthy democracy? There are, it has been said, certain constitutional essentials. They are:

- separation between the Executive, the Legislature and the Judiciary;
- diffusion of authority as a check on absolute Executive power;
- a politically neutral civil service – ie. where there is security of public service jobs without fear of Executive reprisal;
- an independent Police Force;
- an independent Prosecutor;
- an independent legal profession, most particularly, an independent Bar;
- a free Press, controlled by diverse interests;
- freedom of religion – and the separation of Church and State;
- freedom of speech, which includes freedom of dissent without reprisal;
- freedom of association.

If you look about you, you may judge for yourselves how the Northern Territory measures up at the present time.

The Northern Territory is not a moral community — by which I mean a society having one moral identity. That is, there is no moral consensus. It would be surprising and perhaps rather dull if it were so. The Northern Territory contains many diverse and distinct cultural identities. It is a society characterised by cultural diversity and as such, that is to be respected. Common decency dictates no less. Live and let live. 'Diversity is the protectress of freedom', as Bray CJ once said. Cultural diversity necessarily means lack of moral solidarity. Political solidarity does not depend on shared moral community. There is political solidarity (not withstanding the absence of moral solidarity) when people agree that the Government's task is that of preserving liberty (of diversity) in civil association under the rule of law.

It is the rule of law that dictates the relation between the Executive and the Courts:

— the Courts respect acts of the Executive within the law

— the Executive respects decisions of the Courts as to what is lawful

— the Executive carries out law as declared by the Courts.

The rule of law was the subject of Chief Justice Gleeson's Boyer Lectures, now published by the ABC. As his Honour says, the rule of law is meant to be a safeguard not a menace. Our whole system of government, is or ought to be, infused with the principle of legality. Law is not the enemy of liberty but its partner and one of the ways in which the law seeks to promote justice and individual liberty is in its function as a restraint upon the exercise of power, whether the power in question is that of governments or of others. I strongly commend the whole of Chief Justice Gleeson's lectures to you. I also commend them to the Honourable the Attorney-General, in the hope that it fosters a better understanding of what is at stake here.

An Executive which commands a majority in Parliament does not therefore have dictatorial or arbitrary power in the name of the people to ignore long-standing conventions, least of all in the absence of explanation and justification, or to act otherwise than in accordance with ordinary decency, or, most particularly, to imperil or put at risk the rule of law.

It is interesting to consider the duties of the Honourable the Attorney-General in the light, if that is the right word, of the facts I related earlier. The Honourable Len King AC QC, a former Attorney-General and Chief Justice of South Australia, whose authority and experience in this area are perhaps unrivalled, at all events which far exceed any witnessed in the Northern Territory, has written about the proper role of an Attorney-General in a democracy. His article is to be found in Volume 74 of the *Australian Law Journal* at page 444.

At page 453 he said:

> The Attorney-General as law minister has, beyond the political responsibilities of a ministerial portfolio of the same nature as the responsibilities of other ministers, a special responsibility for the rule of law and the integrity of the legal system which transcends, and may at times be in conflict with, political exigencies.
>
> The Attorney-General has the unique role in government of being the political guardian of the administration of justice. It is the special role of the Attorney-General to be the voice within government and to the public which

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articulates, and insists upon observance of, the enduring principles of legal justice, and upon respect for the judicial and other institutions through which they are applied.'

If the Northern Territory Attorney-General disagrees that his role is as described by Hon Len King AC QC, he owes it to the NT legal profession and the Northern Territory public to say so and why.

There are certain universal principles that are right and others that are wrong, wherever and whatever the year or season, and it is they that sometimes indicate the proper course of conduct in a given situation. Of course, Darwin is different to Darlinghurst, and of course Alice Springs is different to St Kilda, but no Territorian, however parochial, would deny a common humanity and sense of decency, a common respect for the rule of law and a common distaste for portentous ignorance in those who wield governmental power. It was Aldous Huxley who wrote that insensitive stupidity is the main root of all other vices. There is in each jurisdiction in Australia a need of an Executive that respects the rule of law and of an Attorney-General who holds himself or herself responsible for upholding the rule of law and thus the integrity of the legal system and who respects the institution of the judiciary and the enduring principles of legal justice which the judicial system administers.

You who have been admitted to legal practice today are now members of the Northern Territory legal profession, an honourable profession, and it is for you as it is for your fellow practitioners to uphold fearlessly your profession's highest principles and to assist ordinary people to understand their supreme worth in our community.

The Court congratulates you and wishes each of you success and satisfaction in your chosen profession.

Finally, in the words of Dylan Thomas:

"Do not go gentle into that good night.

Rage, rage against the dying of the light.".

CYBERLEX

Democracy in the comfort of your own home

Australia is one of the world's leaders in e-government. What would on line government be without e-voting? The ACT Legislative Assembly has passed legislation allowing the use of computers in voting and vote counting. Use of online voting via the internet is not likely before the 2004 elections, however electronic voting at polling stations is set to be a feature at select locations for the October 2001 elections.

What is electronic voting? It can be described as widely as any process where some form of electronics is incorporated in the polling process or as narrowly as the actual casting of a vote in an online medium such as the internet (AEC Online Action Plan). It should be noted, that while we still vote using a paper ballot, the process behind administering an election involves extensive use of technology, from maintaining the electoral role on a national integrated computer network to the tracking of equipment used in polling stations to tally rooms on the internet.

The ACT will be using a 'secure network' at selected polling stations. The network of polling computers will not be connected to the internet. The main difference to current paper practices is that the voter will submit an electronic ballot at the polling station. The real savings are expected to come from the simplification of the counting process.

E-voting is being considered by many and used by a few, but why has it not taken off? E-commerce is becoming an every day occurrence, the internet is everywhere, we are surround by the dot.com phenomena: why not e-voting as well? The problems seem to be as fundamental as democracy.

An election process is crucial to the functioning of a democracy. A democracy with elections that are free and fair and based on principles such as transparency; security; professionalism; accuracy; secrecy; timeliness; accountability and equity. Any electronic system will need to satisfy all these principles and ultimately ensure a free and fair election before it will replace the current system.

One of the biggest issues facing the use of internet based voting systems is security. Regular reports of databases being compromised, credit card details being exposed or stolen and web sites being crashed, means that the integrity of any e-voting system is still suspect. What are the consequences if an online voting system is compromised?

Add to security the problem of accuracy. How do you know the person voting is in fact that person. In the American Democratic Party's Presidential Primary in the US State of Arizona, voters were sent, in the mail, a unique PIN. This PIN was then entered when casting a vote online (only 4.2% of voters sent a PIN actually voted online). This PIN of itself cannot provide accuracy. Some readers will say that the current system is also imperfect. Yes it is, but a 10 year old child in another country cannot vote 1000 times under the current system employed in Australia. The exposure to risk under an internet system of voting is far greater due to increased assess to the process.

E-voting will continue to be investigated and some say it is an inevitability. But ask yourself, what will life be like without the polling station? Will we have a polling day or a polling period? The internet will most likely change the way we conduct elections and through this change in process, our perceptions of democracy. Likely, but not just yet.

For more information, check out these sites:

Australian Electoral Commission (www.aec.gov.au)

ACT Electoral Commission (www.elections.act.gov.au)

Election.com

VoteHere.net

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