

# Visit by Justice Ruth Bader Ginsburg

By James Remwick

In 6 February this year, Justice Ruth Bader Ginsburg, an Associate Justice of the Supreme Court of the United States, spoke to the Bar Association and its guests in the Common Room on the work of her court.

Justice Ginsburg is the second woman<sup>1</sup> appointed to the United States Supreme Court. She was a Professor of Law for many years and also a fellow at the renowned Centre for Advanced Study in the Behavioural Sciences at Stanford. She was general-counsel for the American Civil Liberties Union, and was instrumental in launching the Women's Rights Project of that organisation. She served as a judge of the United States Court of Appeals for the District of Columbia between 1980 and 1993, and took her seat as an Associate Justice of the Supreme Court on 10 August 1993.

In a wide ranging but informal address, Her Honour dealt with many aspects of the work and life of the Supreme Court. She emphasised that 'the Court is not an error correction instance; it will not take up cases simply because a lower court reached an arguably wrong decision. For the most part, the Court will consider for review only what we call deep splits – questions on which other courts have strongly disagreed.'

Her Honour then described the process of granting review – a daunting task given that 7,000 requests for review are filed with the Court each year, of which about 15 per cent are put to a vote on whether or not to review, and about 70 to 100 cases per term are eventually heard.<sup>2</sup> She noted that there is a unanimous result in nearly 40 per cent of the argued cases.

Her Honour also said that on occasions 'when the court wants to know more about the importance of a case to the sound development of



Justice Ruth Bader Ginsburg

federal law, the justices may invite the view of the Solicitor-General before voting on the review petition'.

Justice Ginsburg then spoke about a typical day in court. She quoted with endorsement a description of a day in the court by journalist Anthony Lewis:

Oral argument does not play a part in the work of the Supreme Court as it did in the 19th century, when counsel would argue a case for days the modern Supreme Court limits arguments severely to half an hour [per side]. But argument still has an important function. It is the one chance the justices have to grapple directly with the lawyers who represent the clashing interests before them. It is also a rare opportunity for the public to gain insights into the minds of those who

actually make the decision. More than any other officials in Washington, the justices still do their own work, assisted only by a handful of young law clerks. To observe them as they question counsel in the courtroom is to see an extraordinarily open process, unaffected, human. In a capital puffed up with bureaucracy and public relations, the Court seems old fashioned, small, personal. For the lawyers, oral argument is a direct opportunity to reach those nine minds – with an idea, a phrase, a fact. Not many cases are won at argument, but they can be lost if a lawyer is unable or unwilling to answer a justice's question [honestly and persuasively].

Her Honour went on to say:

questions from the Bench give counsel a chance to satisfy the Court on matters, the questioner, at least thinks, significant, and might resolve less satisfactorily without counsel's aid. Sometimes, it is true, a question is asked with persuasion of a colleague in mind; at such times, the lawyer may sense she is being talked through, not to. Other times, the question that may be trying to cue counsel that an argument pursued with gusto is a certain loser, so counsel would be well advised to move on or shift gears. Counsel too intent on adhering to a prepared script may miss the cue.

Finally, Her Honour made some remarks about decision making by the Court as a collegial body. At meetings of the Court, the Chief Justice circulates opinion writing assignments made by him whenever he is in the majority, and when he is not he advises

the justices of the assignments made by the most senior justice in the majority. The Chief Justice speaks and votes first on the result of a case, the junior justice speaks and votes last.

Her Honour described her own (admirable) approach to writing opinions as follows: 'I prefer and continue to aim for opinions that get it right and keep it tight, without undue digressions or decorations or distracting denunciations of colleagues who hold different views.'

Her Honour concluded her address as follows:

Most impressive, I think, despite sharp differences on certain issues – the Court's disagreement on the recount of votes in Florida is a prime example – we remain good friends, people who respect each other, and genuinely enjoy each other's company. Our mutual respect is only momentarily touched in most instances, by our sometimes strong disagreement on what the law is. The institution we serve is ever so much more important than the particular individuals who compose the Court's bench at any given time.

A transcript of Her Honour's remarks is held in the Bar Association Library. Her Honour had spoken to an audience in Melbourne the week before she came to Sydney. Justice Hayne of the High Court of Australia then responded with remarks that can be found on the High Court's web site.<sup>3</sup>

- 1 After Justice O'Connor
- 2 Her Honour also noted that on occasion important cases appear so clear to the court that it will decide the matter summarily based on the petition for review and the brief in opposition, without further briefing or oral argument.
- 3 [Http://www.hcourt.gov.au/speeches/haynej/haynej\\_ruthbad.htm](http://www.hcourt.gov.au/speeches/haynej/haynej_ruthbad.htm) 'Reply to The Honourable Ruth Bader Ginsburg: Remarks on judicial independence: The situation of the US federal judiciary'.



Left to right: Richard L. Greene, US Consul-General, Ruth McColl S.C., Associate Justice Ginsburg and Professor Martin Ginsburg.

## ADDRESSES

# Law and literature

On 20 April 2001 the Bar Association hosted a breakfast seminar on 'Law and literature', presented by The Hon. Justice I D Callinan of the High Court.

The seminar, presented as part of the Continuing Legal Education Programme, will be published in the forthcoming edition of *Australian Bar Review*.



Justice Callinan.  
Illustration by Poulos QC.