Barristers and elected office

By David Ash

The Australian Senate. Photo: Alex Proimos

Earlier this year, I woke up and decided to run for the Senate. I found a policy, I found a supporter, and I found a prime minister who set a date well in advance. At the time of writing, it's three steps forward and only one back…

This short piece doesn't look at my policies or beliefs. In a periodical dedicated to forensic advocacy, this would be unethical. It does look at who has given it a go; the difference between forensic and political advocacy; how Barwick faired; and what judges think about politics anyway.

Who has done it?

The barrister who wants to go into politics will tell you that 26 of 44 US presidents practised as lawyers before taking office. The barrister who will fail in politics will tell you that this is wrong, as there have only been 43 presidents, Grover Cleveland being a non-consecutive two-termer.

This is more than twice the next gig (generals at a dozen). Moreover, averageness is no criterion, as both the shortest and tallest – Madison and Lincoln – were counsel. I am not sure who was the lightest but William H Taft was surely the heaviest.

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Leaving the peculiar office of the Lord Chancellor to one side, Taft is the only political leader I can recall who later led his nation's judiciary. His Australian contemporary Sir Edmund Barton – likewise an epicurean – failed to succeed Griffith but gave a gracious welcome to former barrister Billy Hughes's choice, Adrian Knox, a former and to be again billionaire who had entered and left politics at a much younger age.

The first New South Wales Bar Council was chaired by the attorney. Other members included former premier and prime minister in waiting Reid; the Reid ministry's attorney Want; former Legislative Assemblyman Knox; and future premier and attorney Wade.

Half a century later, Barwick was president, while EG Whitlam was on his committee. Other names from the fifties included Nigel Bowen and Ted St John. St John would spend some turbulent years in the

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federal lower house before returning to the council's embrace in the late '70s. Ellicott would serve in Fraser's ministry, while Hughes was president after doing a term as Gorton's attorney.

Hughes was the member for Parkes. Parkes had almost trashed his own career with misplaced anti-Fenianism. It is a fine irony that barristers Hughes (schooled by the Jesuits) and McTiernan (schooled, despite his middle name, by the Marists) would hold the seat named for him. Nothing with Parkes is simple, though, and the nineteenth century barrister and politician Edward Butler should not be forgotten:[1]

> In many ways Butler was probably the most attractive of New South Wales nineteenth-century politicians. More than any other citizen he nullified the bitter sectarianism that flared after the O'Farrell affair. His whole career exemplified tolerance and gave practical proof that Catholics could accept and nurture democracy. He had serious trouble with various bishops but no one doubted the deep sincerity of his religious belief and practice. He showed that Catholicism was not antagonistic to learning, urbanity or a sense of fun and that being an Irishman was subversive neither of colony nor Bar. He injected a radical note into his profession's conservativism and helped to open the law to talent unaided by birth or influence.

Butler and Parkes were close for 20 years, and the former worked hard to get Catholic votes for the latter, a force behind Parkes's repeated ability to shoot himself in the foot before growing a new leg. Needless to say, Parkes was as loyal as politics allowed, and at Butler's funeral (upon dropping dead in court), he was the notable absentee.

I think I am correct in saying that Helen Coonan and Victorian Sophie Mirabella are the only female barristers who have sat in federal parliament. Margaret Thatcher, who died this year, practised after doing the English equivalent of the Barristers Admission Board. Tax was her forte, with patents on the side. Her university background was science.

There are many other members who have been or continue to be involved. A recent example is Speakman, who is stomping at Cronulla on behalf of the O'Farrell government.

Both Speakman and Coonan achieved professional success before standing, doubtless mindful of the explanation provided by John Bennett in his 1969 *History* of the NSW Bar, himself quoting legal writer Philip Acland Jacobs from the 1943 *Famous Australian Trials*:

> The careers of Wade, Holman, Reid and Hughes cannot be said to typify the Bar as a body. Interest in entering politics declined consistently with the advance of the twentieth century. One writer thus explains the reasons:
>
> > Alas for the youthful barrister who seeks political honours as a stepping-stone to success in his profession! The law is a jealous mistress. A candidate for Parliament may be defeated and find that he has lost time and money and such connection as he previously had at the Bar. Let him think of politics, if at all, when he has gained a firm footing on the professional ladder.
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> At the same time, the influence of the barristers referred to here does show that the principles of the Bar and the high standards for which it stood as a salutary effect on politics for the benefit of the community.

Forensic and political advocacy – the difference

Aristotle opens *Rhetoric* with the assertion that it is 'the counterpart of Dialectic'.[2] In modern terms, we might say that form is the counterpart of substance, or that the adversarial system is the counterpart of the inquisitorial system. At a broader level, the first is about competing versions of a truth whose criterion for victory is acceptance, while the second is a competition for a truth for which neither competitor might have been advocating. The first, while recognising and embracing life's larger uncertainties, produces minor certainties, albeit ambulatory, while the second cannot; so said Socrates, so saith Heisenberg.

What is the key to good advocacy? Advocacy, it is said, is the art of persuasion. And so it may be. Aristotle puts in rather different terms:

> Rhetoric may be defined as the faculty of observing in any given case the available means of persuasion.

Much learning in relation to advocacy is directed to

the ability to persuade. But surely the first thing to be learnt is the forum; who is it we are seeking to persuade? If we do not understand this, then what is the measuring stick we are supposed to use? It is no surprise, then, that Aristotle divides formal advocacy – my 21st century understanding of what he meant by 'rhetoric' – by reference not to the advocate but to the forum:

> Rhetoric falls into three divisions, determined by the three classes of listeners to speeches. For of the three elements in speech-making – speaker, subject, and person addressed – it is the last one, the hearer, that determines the speech's end and object. The hearer must be either a judge, with a decision to make about things past or future, or an observer. A member of the assembly decides about future events, a juryman about past events: while those who merely decide on the orator's skill are observers. From this it follows that there are three divisions of oratory:(1) political, (2) forensic, and (3) the ceremonial oratory of display.

A barrister is a speaker by trade, but that does not mean that the barrister is a public speaker, any more than that any swimmer can do the Channel, or that any athlete can sprint. The difference is time. Forensics is about the past, while politics is about the future. Aristotle again:

> Political speaking urges us either to do or not to do something: one of these two courses is always taken by private counsellors, as well as by men who address public assemblies. Forensic speaking either attacks or defends somebody: one or other of these two things must always be done by the parties in a case...The political orator is concerned with the future: it is about things to be done hereafter that he advises, for or against. The party in a case at law is concerned with the past; one man accuses the other, and the other defends himself, with reference to things already done.
>
> … the same systematic principles apply to political as to forensic oratory, and although the former is a nobler business, and fitter for a citizen, than that which concerns the relations of private individuals.

The future is always nobler, for the past involves humans. Unless everyone is dead and politicians can romanticise. Anzac Day gives better hope than Vietnam.

Sir Garfield Barwick

Also, the future is a place where things get done. A colleague recently reminded me of Sir Paul Hasluck's remark about Barwick as attorney: unlike other lawyers who told you why you couldn't do something, Barwick looked for how you could.

Barwick fascinates. 1975 refuses to die, and readers will be repaid by another visit to David Marr's *Barwick*, and Barwick's own *Radical Tory*. I confess I had forgotten Marr's definition of lawyers as 'shadows falling over other people's lives'.

It should be remembered that Barwick got under Whitlam's skin to the extent that the latter was named in the early '60s after referring to him as a 'truculent runt' and a 'bumptious little bastard'.

On 14 August 1958, Elvis Presley's mother died. Barwick gave his maiden speech, and his former colleague on the bar council rose to reply:

> Honorable members have listened to the maiden speech of the greatest lawyer to enter this chamber since the Leader of the Opposition, and the greatest advocate to enter it since the Prime Minister. Mr Chairman, every member who serves in this place has gained satisfaction and status from the fact that a practising lawyer who has probably no equal in this country and no superior in the English-speaking world has, at a not inconsiderable sacrifice, similar to that made before him by the two leaders whom I have mentioned, come to serve with us here. His maiden speech was, as one would have expected, disarming, polished and demure. One can well believe, after the first two characteristics that I have described, that there is great truth in the axiom, which has been followed ever since the war by all the principal commercial interests in this country, that if you had a good case at law it did not very much matter whom you briefed to appear for you, but if you had an unmeritorious, an unsympathetic and an unlikely case, your only hope was to brief Barwick.

Of course, Whitlam quickly moved in for the kill. Nor do I claim a bygone age of elegance. It should be remembered that Barwick got under Whitlam's skin to the extent that the latter was named in the early '60s after referring to him as a 'truculent runt' and a 'bumptious little bastard'.

Whatever, it is telling that on that first day, Jim Cope called across the chamber to Holt 'Bad luck Harold'. And, despite the Indonesian fiasco, Barwick was the likely successor. But, as many a would-be Cabinet minister or would be appellate judge will acknowledge, and as any minister or judge should admit, timing is, or is almost, all.

One version of the timing is that Barwick's tragedy, if it can be called that, was that he was a likely successor not to one but to two people, Menzies and Sir Owen Dixon. Menzies could have retired in pomp and circumstance before 1964, but did not. So when the latter did retire in that same year, Barwick's choice was stark. And he opted for the chief justiceship.

A different version was given by the *Independent* in its obituary:

> In 1964, troubled by his diabetes, Barwick asked to leave parliament at the next election, and Menzies almost immediately appointed him Chief Justice. At the time some said that Menzies wanted him out of the way, but it is more likely that Barwick was simply the best person available for the post.

Both can be true. Whichever, the rest is history. And as I have said, it is a history which continues in a life of its own. Not in defence of Barwick, but because I think they are valid alternatives to the various orthodox histories that both the conservatives and the social democrats continue to espouse, I proffer two observations on 1975.

The first is the observation that it belongs to the New South Wales Bar as much as any other person or institution. I have just recited Whitlam's assessment of Barwick in 1958. Reread it and go if you will to the photographs between pages 208 and 209 of John Bennett's history. The last photograph, at the opening of some of Wentworth Chambers in 1957, shows Premier Cahill speaking, with Barwick to his left. In between, a row back, is John Kerr. One can – and we do – analyse, reanalyse, and overanalyse Kerr's Labor Party relationships and his alleged desire to cloak himself in the regalia of high office. One can – and we do – point, point again, and pinpoint the propriety of the executive seeking advice from the judiciary and not from the solicitor general. But I cannot be surprised that a person confronted by a huge legal problem and who had been a member of the Sydney bar from the 40s to the 60s went to the one person who towered above all others in that milieu.

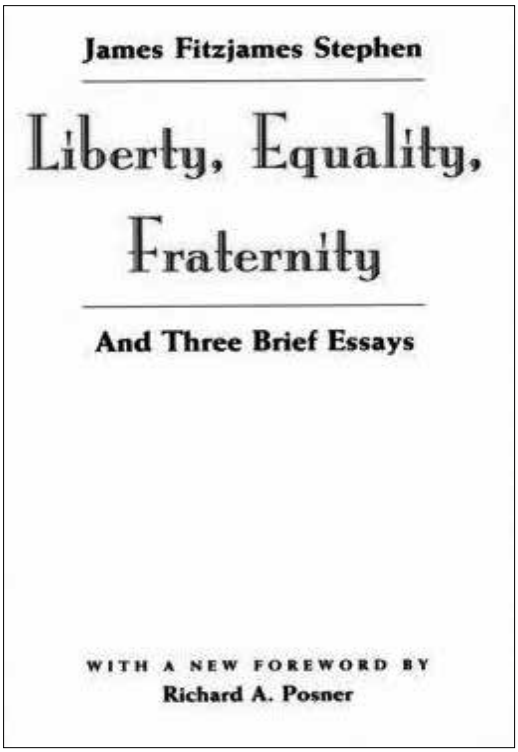
The second observation is founded upon Marr's final words:

> … the repercussions of Whitlam's appointment to the court forms the theme of the final chapters of this book. In Kenneth Jacobs, Whitlam found a man of the sort of broad liberal sympathies that may characterise the best labour appointments, and with Lionel Murphy Whitlam broke with a long tradition of Labour timidity in choosing candidates for the High Court bench. The price for breaking with tradition was high: resentment at Murphy's appointment was a key factor in the fall of the Whitlam government.

When launching Stoljar's *The Australian Book of Great Trials: The Cases That Shaped a Nation*, Dyson Heydon said:

> The book reminds us, too, of the strange posthumous career of Justice Murphy. In Miller v TCN Channel Nine Pty Ltd, delivered one hour before his death, all the other six judges opposed his contention in that case that there was an implied guarantee of free speech in the Constitution. Yet less than six years later, three of those six judges, together with three new judges, said in the Australian Capital Television Case that there was; and numerous other ideas of Justice Murphy propounded on the court and emphatically rejected in his lifetime were taken up after his death. It would be good to have a detailed study of Justice Murphy, neither hagiographical nor abusive, but penetrating.

Heydon, who has since put back up his shingle after a distinguished judicial career, is better placed to comment on Murphy than most, as jurist and as a scholar of the Trade Practices Act, still our most effective attempt to untangle the disastrous and unnecessary legacy of *Salomon v Salomon*. And it is to be hoped that when that penetrating study comes, it comes with a fair answer to the question 'Which attorney and member of the New South Wales Bar did so much to reform the viciously difficult areas of marriage and corporations?' The only fair answer is 'Do I have to choose between Murphy and Barwick?' The former's revolution is well remembered; the latter's pioneering work against the



conservatives of his own party should not readily be forgotten.

Judges on politicians

The journalists called Heydon J conservative, then capital-C conservative. Mindful that they could never improve on Ronald Reagan's own 'Sometimes my right hand doesn't know what my far right hand is doing', they gave up on hyperbole and settled for tautology in 'the lone dissenter'.

Whatever the correctness of these tags, one can recall with relative safety that Heydon has expressed admiration for a leading conservative (or, probably better, non-utilitarian liberal) thinker of the nineteenth century, Sir James Stephen.

In the Anglophone world, the influence of the Stephen family and its related entities from William Wilberforce to Virginia Woolf can hardly be understated. Apart from its activities in the northern hemisphere, we've had three generations of Stephens on the NSW bench. This particular Stephen left as his legal legacy his work on crime, and the

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title of Heydon's 2011 lecture was 'The influence of Sir James Stephen on the law of evidence'.

But it is Stephen's political legacy which is relevant for current purposes. In 1873 he published *Liberty, Equality, Fraternity*, an attack on John Stuart Mill. Fastforward to *Re Castioni* [1891] 1 QB 149. He and other members of the Queen's Bench had to consider what comprised the 'political character' of an offence which would otherwise render a person extraditable to the country where the offence was committed.

The country was not the US, and the fugitive was neither Mr Assange nor Mr Snowden. Rather, he was a sculptor and redbearded revolutionary from Italian-speaking Switzerland who had shot dead a conservative Swiss MP who had come to parley. The court set the man free. Consider the observations of 'rational' judges on the 'real world' of politics. For Sir Henry Hawkins:

> I cannot help thinking that everybody knows that there are many acts of a political character done without reason, done against all reason; but at the same time one cannot look too hardly and weigh in golden scales the acts of men hot in their political excitement.

The by now Mr Justice Stephen continues on the same page:

> I am of the same opinion. I published some years ago a book which has been considerably quoted to-day [his History of the Criminal Law] and in the passage in which I stated my views upon the subject, I gave what appeared to me to be the true interpretation of the expression 'political character' it is very easy to give it too wide an explanation. I think that my late friend Mr Mill made a mistake upon the subject, probably because he was not

> accustomed to use language with that degree of precision which is essential to everyone who has ever had, as I have had on many occasions, to draft acts of Parliament, which, although they may be easy to understand, people continually try to misunderstand, and in which therefore it is not enough to attain to a degree of precision which a person reading in good faith can understand; but which it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it. Having given my view upon that subject, I shall say no more with regard to the interpretation of the act of Parliament.

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As to ease of understanding, events have overtaken us. A few months ago, I am sure that I heard a parliamentarian say that his party had 'succeeded' in getting some 70,000 pages of legislation through in the previous year. I assume I did not mishear. I assume he was serious. I stand corrected on both.

Conclusion

Barristers describe themselves as self-employed. Perhaps the better truth is that they are unemployable. In the past, this has led them to politics. Today, however, the only prerequisite for high office may be longterm employment in one or other of the major parties. At the least, a cv should contain 'my gap year as an apparatchik'. Moreover, the flavour of parliamentary oratory seems to have moved from the political – from the future and the noble – to the forensic, with its emphasis on raking over old enmities to establish a past truth.

I accept that politics requires opponents, for one does not argue in a vacuum. At the same time, my one wish if elected would be the abolition of the expression 'both sides of parliament'. A parliament has no sides. The bar succeeds because a system of forensic advocacy works best when adversaries hire dispassionate advocates to speak for them. Politics is failing because a system of political advocacy works worst when people whose opposition should be in how to go forward, fall back against walls built on the past. Passion and politics go together, but that does not mean that dispassion is left to the unwinnable place on the ticket.

Endnotes

1. Australian Dictionary of Biography, http://adb.anu.edu.au/biography/butler-edward-3127 [accessed 9 Jul 2013].
2. I use the translation by W Rhys Roberts, http://classics.mit.edu/Aristotle/rhetoric.1.i.html [accessed 8 Jul 2013].