COLIN LOVITT QC

Edited interview with Juliette Brodsky for Foley's List oral history and filmed by Elisabeth Crosbie, 20 April 2015

Part 1 - An Early Taste for Publicity / Ron Lovitt

Q Colin Lovitt QC, thank you very much for agreeing to be interviewed for Foley's List oral history.

A Pleasure.

Q: You're a living legend of the Victorian Bar, and a founder of the Criminal Bar Association, more of which we'll talk. You live and breathe criminal law, and long before that, you were photographed by your father for the Age newspaper when you were just three years old.

A: Many times actually.

Q: That was your first appearance in the media!

A I was photographed stark naked during a heatwave. That photo found itself into a Bar dinner some years ago, and they wanted some photos, so I couldn't resist - my good self hosing the garden. Because (Dad) was a photographer – he was always thinking a bit ahead. At Christmas time – I'm looking up the chimney – "that'll make a good photo" and bang – it's in the paper. His first born son, albeit that I have an older sister, seemed to be the object, I'm afraid, of most of the photographs.

Q: This caused a little bit of sibling rivalry?

A: My sister used to show the photograph of me hosing the garden to her girlfriends, much to my horror when I was a small boy.

Q: Your first taste of widespread exposure.

A: In more ways than one!

Q: Indeed. I'm interested in your father (Ron Lovitt) – he became the Age's pictorial editor?

A: Yes, my father was a good friend and work colleague of (former Age editor in chief) Graham Perkin – they were friends for many years. When he became editor, my father became the pictorial editor. (Graham) lived in Mentone and we lived at Highett. They were often home after the editorial meeting, late at night, and I'd be studying. They'd have a drink or several in the loungeroom. I could hear them – I was a night student - you could hear them talking and arguing. They were passionate newspaper men.

Q: Did your father take a lot of crime scene photos? Was he that kind of photographer?

A: No, not at all. He was a war-time photographer, he was in the airforce and took all sorts of horrific photos. He was very good at sporting photos: the best-known is the Tied Test Match photo in 1960, of Meckiff being run out when Joey Solomon threw the stumps down – the first tie in World Test history – there's only been one since. He took this wonderful photo. It's got Solomon throwing Meckiff out, the ball as it hits the stumps, and all these West Indians in whites – they all look fantastic, and they're about three feet in the air. It's a great action photo and one of the most historic (cricket photos) ever taken.

Q: Did it inspire you in any way to perhaps think about a newspaper career?

A: I was supposed to be a journalist. My mother sent (Dad) a telegram when I was born: "you've had a son". Back came the response: "good, he'll be a journalist". It was assumed – and I assumed - that I was going to be a journalist, but around the age of 14, as I was saying to a friend of mine (Age reporter) John Silvester recently, the thought of sitting in front of a blank page on a typewriter started to worry me a little. Although I loved mathematics, I didn't have innate skills in physics. Latin, history, English – those are what I did and they pointed me towards law.

Q: Were there any other formative influences?

A: Don't think so. I was a good Latin student – it's handy (for a career in law) if you know a bit of Latin. It's not exactly a prerequisite – it's not exactly a *sine qua non***!**

Q: And there wasn't anyone else in the family whose footsteps you followed?

A: No, no lawyers in my family.

Part 2 – Melbourne University

A: When I started university in 1963, there was no Monash law school (it started in 1964), it was Melbourne University or nothing. The law faculties in those days were far smaller than they are now, and there was only a handful of women doing law. In 1963 - I did Law Arts - there were about 6-8 women in my year of law at the very most.

Q: Did any (women contemporaries), like you, go to the Bar?

A: Women? Not then – the short answer is no.

Q: Who was running the law faculty at the time you went to University?

A: Originally Sir Zelman Cowen was dean of the law faculty and he was pretty inspiring – he became the Governor General – following someone of whom it was thought we needed a change of direction. (Zelman Cowen) was a delightful fellow. Harry Ford was a very likeable fellow who taught me one of the subjects you necessarily didn't take to without a lot of work, certainly in my case – and that was equity.

Q: You thought it wasn't going to be for you?

A: I got an honour in it because I worked my bum off. It wasn't something I innately understood - it was like physics – you had to work hard at it.

Q: So, who was lecturing in criminal law?

A: Colin Howard. Very colourful fellow.

Q: Oh – very much his salad days.

A: Colin also taught Constitutional Law II. "Con. Law I" was what you'd now call Administrative Law. He was an excellent lecturer. I was one of these smartarses who always had their hand up asking a question, just showing how little I understood (Laugh).

Part 3 - Doing articles

Q: You did your articles and then went to the Bar quickly. You did only a few months as a solicitor?

A: 18 months. I know a few barristers who came straight to the Bar - who were in the same year or two as me at Melbourne Uni – several well-known (barristers) come to mind - Chris Canavan and Philip Dunn are two that went straight to the Bar and didn't practise as solicitors at all. Henry Aizen was another one. Henry gave me some advice - he said "get on Foley's List - you might earn income but you won't get any money for a few months". The idea was, according to Henry, to make sure you have a bit of money in the bank (first). The only way for that to happen was for me to work as a solicitor for a while, so I worked as an employee solicitor for 18 months.

Q: (At) Slonim, Velik and Emanuel.

A: Slonim, Velik and Emanuel was where I did my articles. I was articled to Morry Slonim who developed a brain tumour that year (1968) and died. Morry was a wonderful man – a real leader in the Jewish community. At the interview, he asked "Where did you go to school?" I said Melbourne High. "So did I!" He asked who did I barrack for and I said Carlton. "So do I!" He said "Well, you've got the job!" (Laughter)

Q: If it were only as easy as that now!

A: If all job interviews were like that, it would be a much happier world.

Q: Where was the firm situated?

A: My memory is saying 17 Queen Street, and then we moved to the Fink Building, a big tall building in Bourke Street just west of Elizabeth Street.

Q: Is the building still there, or doesn't it exist anymore?

A: Yes, it's had a makeover. Slonim Velik was a big firm. It and Arnold Bloch were the two big Jewish firms and they were great business houses too. S & V Investments was their financial arm with a lot of clients' money being invested and lent as mortgage loans – all very much above board, I might add. A wonderful source of income for the firm.

Q: Morry passed away - you still only spent about 18 months there?

A: I did my articles there and was there about 14 months, and then I did 6 months at Hall and Wilcox, where I did common law completely. And then did a couple of appearances in the Magistrates' Court – I was a bit underdone - in contested crash and bash – car repair cases. The first case I ever appeared in was at Chelsea (Magistrates Court), Mendkhorst was the magistrate and Kingsley Davis, who's still at the Bar, was my opponent, but that was before I came to the Bar. Then I did a year at a firm called Dimelows where I did everything. I did very little crime then, and virtually none at Dimelows. I was tossing up to do crime or tax. When I had an arts degree and was doing final year law, I taught maths three days a week at Hadfield High School - and I loved it. I loved teaching kids and I loved mathematics. If you paid teachers more, I'd be doing it now.

Q: So you were that close (to becoming a teacher)?

A: I never really seriously considered being a teacher, but gee, I loved doing it. Then I thought about doing tax because I was pretty good at figures. I didn't know (then) that the topics of tax and criminal law would eventually "amalgamate" after the Costigan Royal Commission!

Q: You could have ended up at Arnold Bloch Liebler after all, doing tax!

A: We took Costigan out for dinner the night he was appointed to the Painters and Dockers Commission, and made jokes about underwriting his life insurance. Little did we know just what a major effect the Costigan Royal Commission would have on every Australian

Part 4 - Jim Foley, Facial Hair and Betty King

Q: So who was it you were mentioning before who'd suggested you sign up with Foley's ?

A: Oh, it was Henry Aizen.

Q: Right.

A: Henry was a barrister on Foley's List who was a couple of years senior to me at Melbourne High School.

Q: So you met Jim Foley?

A: My original interview was with Jim Foley – he was a lovely man. He died within a few years of my coming to the Bar.

Q: What was it like to deal with him?

A: He was terrific to deal with - a bit conservative – but he came from that era. I remember I grew a moustache. I went to the Bar in 1970 and by the end of the year, I was growing a moustache. Jim said to me, "Colin, that's not a good career move". At that stage, there was only one man at the Bar with a moustache, Peter Furness who had a great big handlebar moustache, and I suspect had had it for a long long time. Within a year, half the young blokes at the Bar had a moustache. Within two years, it was compulsory if you were going to join the police force to have one.

Q: Really? I thought for a long time, they weren't allowed?

A: From 1971, they were growing moustaches. If you got a photo of the police in the mid 70s, they all had a moustache.

Q: So you set the trend here?

A: No (laughs) - I might have been a precursor for about five minutes. Hadn't thought of myself as a trendsetter in terms of facial hair.

Q: Jim Foley was a little disapproving. He thought it was a bit hippie?

A: He was. Well, I was a 25 year old smartarse. He didn't change my mind, nor did he say anything to convince me to shave it off. A couple of years later everyone had one. And there you go.

Q: In those early years, you appeared against (Justice) Betty King –

A: In her first case. We're good friends, but her first case was against me.

Q: In the mid 70s.

A: It was the day after she came to the Bar. It was a crash and bash in the Magistrates' Court. She lost and we won. We had a secret witness, a law student who'd just got out of his parents' car and witnessed the collision, He was a very good witness. His father was the defendant! I told Betty at the start (she was the complainant and we were the defendant, counter-claiming) that we could settle by walking away at the beginning. Betty soldiered on, and in the end, there was an order - we recovered 100% and she had to pay cost and she's never forgiven me. If I'd known what I know now, I probably wouldn't have won that case.

Q: You had a slightly unfair advantage – it was her first case.

A: Oh, absolutely.

Part 5 - Reading with John Fogarty / Bluey Adam

Q: What was it like in those early years, reading with the late Justice John Fogarty?

A: He wasn't just a Family Court judge. He was a leading voice in family law for thirty or more years.

Q: He did have a criminal law practice too, didn't he?

A: When I was reading with him, he defended Bluey Adam who was one of four policeman charged with the abortion conspiracy: the one involving Peggy Berman as the witness and Ford and Mathews were the main police defendants. Bluey Adam had a fondness for hanging people by their feet out the window of the old Prahran Police Station , or so it was alleged. He was an infamous police officer, Bluey. He was the only one acquitted. The other three were convicted.

Q: That says a lot for John's skills.

A: John lived that case. It went for three months. I was in his room the whole time. You'd see Bluey trotting up and down the stairs.

Q: What was John like as an advocate? That's something I've never seen.

A: He had a wide range. I saw your interview with (barrister) Peter O'Callaghan who doesn't believe in specialisation. I'm afraid that I tend, with respect to Peter, to disagree about that. John Fogarty, like John Winneke who became president of the Court of Appeal, was a wonderful all-rounder in crime and common law, just about anything, and I dips my lid to anyone who can do that, but there aren't too many. With respect to what O'Callaghan said and with all the charm that he can muster (which is a lot), I reckon that today's requirements of being a barrister are such that you virtually need to be a specialist, unless you're an extraordinary person.

Q: Could it be more a reflection of how much more complex things are now?

A: Yes, the criminal law is far more complex than it was when I was a kid at the Bar. The trouble is that parliaments pass laws and what seems like a good idea at the time gradually, piecemeal, you get this enormous body of legislation about the evidence and the substantive law. In the old days, the evidentiary laws didn't change much at all. If you read Gobbo on evidence in the 70s and 80s, you knew the law of evidence. Now, it's forever changing and they're even coming up with new names for whole sections of the law. Rape, as an example, has become an impossible area (to argue) – it's ridiculous.

Q: I read, not long ago, a critique by Justice Mark Weinberg that blames parliaments for making cases longer and more complex.

A: I couldn't agree more.

Q: Why did the Bluey Adam case take longer than usual for its day? What was the problem there?

A: It was an unusual case – I wasn't *au fait* with all the legal details. If you looked at the background, it was allegations of doctors performing abortions bribing the police to turn a blind eye. They used as a go-between one of the secretaries, Peggy Berman, to hand over their money, as it were, in brown paper bags. But it wasn't anywhere near as as simple as all that. There was a lot of murky evidence and people from all over the place were called in. There were four accused, which will always double the length of the trial.

Q: What did you learn from John Fogarty? Was there anything particular that you took away from John Fogarty's approach that had an impact on your own approach to advocacy?

A: Patience, which some say I didn't learn. He was a very patient advocate, he was always very controlled. It's like watching someone who's not just on top of their brief, but virtually knows what's going to happen next. That's the way it appeared. He was a very skilful advocate.

Part 6 - Advocacy – Oral vs Written Testimony

A: Leading evidence in chief, some say is harder than cross-examination - it can be acquired by listening and watching and feeling the subject. If you've got innate skills you'll be a good advocate. If I call a witness, getting that witness's evidence out in its entirety, and the way I want it to get out, is a real skill. It's something I've

tried to concentrate on, over the years. Everyone talks about cross-examination and addressing a jury. But the best skill about being an advocate is reading a brief and deciding what a case is about – the issues are this, this and this, our strengths and weakensses are these, their strengths and weaknesses are such and such. You do that without really stating those topics to yourself, but that's what you're doing. The cross examination: my description of it is whittling away at the credibility of the account. That doesn't mean the witness is a liar, but he or she may be inaccurate. For example, people are always convinced that they're right about identification.

Q: People can persuade themselves that they've seen something when they haven't.

A: Quite often, they're vastly wrong. I was in a case once where about a dozen people saw the two miscreants who'd very heavily assaulted a couple of butchers, and one of them had been shot. All the eye witnesses who described the men running away from the butcher shop - the descriptions of the assailants varied wildly – they were in everything from shorts to boiler suits, from wigs to glasses, wearing hats to no hats... These were the same people watching a dramatic incident that happens suddenly and in a few seconds it's all over, and they don't know the men. Various people react in different ways, including their ability to record things calmly and dispassionately.

Q: I'm digressing for a moment, but in civil law countries like France, they have a preference for written documentation as compared to oral testimony and oral recollections. What do you think of that? How would you feel practising in a different jurisdiction like that? Would you be comfortable?

A: I'd be a bit lost, I think! (Laugh)

Q: I did wonder!

A: I won't surprise you when I say I'm more used to the spoken word. A number of colleagues always rile me – "perhaps your Honour would like written submissions?" I much prefer to do it orally. These days it's more the norm to provide written submissions. I'm a bit of dinosaur now.

Q: Dinosaurs may still have their day. Colin, they're finding that more and more time spent looking at screens is reducing our ability to read people's physical cues.

A: Couldn't agree more.

Q: In a sense, you've relied on reading people over the years.

A: I've found with judges, telling jurors that they're welcome to make notes is <u>inviting</u> them to make notes. The trouble with all of that is that once you're taking notes, you're not watching the bloody witness. A magistrate I remember used to write with his tongue sticking out of his mouth – the whole time - he never looked at the witness. One of the things we talk about is the witness' body language and facial expressions. If you're busily writing down everything they say, trying to write in longhand, you're not exactly serving the purpose that you're put there to do.

Part 7 - Great criminal barristers and the singular Chopper Read

Q: It's said that once you've done 10,000 hours in anything, you're an expert. You were saying before about your ability to look at a brief and know the salient points in a defence.

A: That's not something you acquire overnight. It's an acquired skill and all the lessons in the world - anyone can achieve it to an extent, but as you say,work is required. You've got to do it over and over again.

Q: So when did you start to hit your stride?

A: I don't know!

Q: So, during those years, were there any particular counsel who were tough adversaries, who were some of the more memorable people you've appeared with and against?

Q: Lots of them – it's hard to single out. Well, in my opinion, Robert Richter is a fabulous criminal barrister – I've always said he's the best criminal barrister in Australia. For colour, Phil Dunn is remarkable – you could listen to him talk about anything. Con Heliotis is a very able advocate. The late Steve Shireffs was a very good advocate. There's several who've gone now – Graeme Morrish who was a superb barrister – he prosecuted and I defended in the Chopper Read murder trial. He was a very tenacious fellow, Graeme – the jury asked a question late on a Friday night seeking redirection about murder, manslaughter and self-defence and after the judge had answered and redirected them, he (Graeme) asked me what did I think that was all about . I said I thought one of the jury didn't want to convict of murder, but on manslaughter. Graeme agreed. An hour they came back and acquitted him of murder and manslaughter! (Graeme wrote me a note next day saying let that be a lesson to us, not to try to guess what is in a jury's mind).

Q: Was it you that planted that doubt?

A: It might have been the video-taped interview that Chopper made. Chopper made two videos (one was the false alibi), and the second was the story he told – well, if you want to know more about that story, it's all in the film "Chopper".

Q: What did you think of the "Chopper" film?

A: It was fantastic. I went along thinking it would be a disaster, absolute nonsense, they wouldn't do justice to the facts and the nature of this very unusual human being. Well, Eric Bana – I couldn't get over it. I sat in the back of the theatre and kept shaking my head, because at times it was like you were with Chopper Read. Read said that Eric played Chopper Read better than he did. I wouldn't let him speak to in front of a jury because I knew that if he made even an unsworn statement, he'd simply …..

Q: Sink himself?

A: He'd start talking about what a standover man he was and how many times he'd be charged with murder. [He was only ever charged with murder once.] The only time he spoke in the courtroom was when asked how he pleaded. He said "Not

guilty". For his account, we relied on that second interview when he told the homicide squad what he claimed happened.

Part 8 – Murder He Wrote

Q: Have you counted up the number of cases you've done? About ten years ago it was 170 murder trials.

A: About 200 murder trials. I used to keep a list. I went through my fee book and by that stage, I put the names of the cases for each year. Frank Vincent did an enormous number of murder trials – he was a specialist at running a defence in provocation – he was a wonderful advocate in emotional defences.

Q: Why - what was his secret weapon?

A: He had the wonderful ability to get into the jury's emotions. He never let it overwhelm him, he was detached. He had a gift. He was a wonderful speaker, Frank. There was a colleague of ours who died. Frank spoke at his funeral. Without a note, he spoke brilliantly about this guy – I would have broken down. I can't do that.

Q: John Silvester, the veteran Age reporter -

A: Sly?

Q: You and he are friends – have you and he thought of collaborating on a book?

A: First he wrote for Chopper and then for his lawyer? (Laughs) I don't think so. We're talking at the moment – because he wants to do something on the occasion of my retirement, but that'll just be an article in the paper. Many, many times people have said "Why don't you write a book? Journalists have said "I'll ghost it for you". The idea of my sitting with a tape recorder and some of the journalists I know and have had a drink with over the years, expecting them to do justice to what I waffle is a bit offputting….and remember that while you're practising, you can't do that in cases you've been in – because it's the clients' privilege, not mine. I won't have to get Chopper's consent anymore - he can't waive privilege. I suppose because of the case being the subject matter of a film, it's not a case in point. Lots of cases have been very, very interesting - to my mind, more forensically interesting than the Jaidyn Leskie case for example, but you can't talk about them because they involve people who are still alive – not just your clients, but all the witnesses – things like that. And the client has the privilege - it's their entitlement - to remain private.

Part 9 - Difficult cases

Q: Over the years, you've developed, I would think, a very sharp instinct for knowing how far to go when working on a case in terms of the people that you're representing. With your brethren in criminal law, you all get to know each other's tactics - would that be correct?

A: That list of good barristers wasn't supposed to be exhaustive – there's others, I didn't think of - Michael Tovey, and several others, but anyway.

Q: You do get to know each other pretty well. What happens if you're appearing with or against someone whose style is antipathetic to yours?

A: You do. I know when I get a brief, they say "Well, the client's a difficult client, so we thought of you". I think I have a reputation of handling – maybe because I deserve it – handling the difficult clients.

Q: It sounds almost an unflattering thing to say – the person who's good with the hopeless or difficult case.

A: I wasn't necessarily briefed in the hopeless cases – we've all been briefed in hopeless causes. When you win 'em, the media and the police act as though you'd interfered in them. That's how they acted in the Domaszewicz case and how they acted in Perth when a former head of the Perth CIB died from a bomb planted in the passenger seat of the car he was travelling in. The gut reaction of some was to say the jury must have been tampered with.

Q: You've written about this -

A: I haven't looked at it from my own point of view: you're fair game if you're a barrister. After a trial in Perth when my client rendered a policeman a paraplegic - he ran at a policeman who was tasering his father, and the poor policeman crashed into the pavement. The media, public and government couldn't accept that he'd "got away" with it. But anyone who was there at the trial saw that he would be acquitted.

Q: Can you tell us more about the mitigating factors in that case?

A: There was a brawl at the hotel – my client and his father weren't involved in it, but they were there. Led by the father, they shepherded out a group of drunks without a blow. One of the punters took off his shirt and wanted to go on with it. Some police came running up and saw that my client was grappling with this punter with his shirt off. The sergeant who should have known better just ran at my client and started hitting at him with his truncheon. My client's father saw that and intervened and another policeman, the one who was badly injured, came at him and tasered him. The whole thing turned out to be filmed by three different people using mobile phones. This policeman came at my client like a bull in a china shop and just attacked - and his father was being assaulted by the other policeman. My client's father had a history of heart attacks, and my client pitched himself at the policeman from behind – he'd played soccer for Western Australia in junior ranks - and the policeman cannoned over and smashed his head on the pavement. The son was acting in defence of his father. The video showed it all – the father was perfectly entitled to go to the aid of his son who was being assaulted by that person. The trouble was that these police went to their station and made vastly different statements, none of which had any remote resemblance to what was depicted on the mobile phone footage. The police credibility was nought, but no-one who attacked the verdict afterwards wanted to know <u>that</u>. They just wanted to say this policeman had been badly injured, this fellow head-butted him – QED – why was the accused acquitted? They had a demonstration about this in the streets of Perth after the acquittal, about four days later.

<u>Part 10 - Founding the Criminal Bar Association</u>

Q: Colin, the Criminal Bar Association was founded in 1978 –

A: Yes.

Q: You were one of its prime movers. There had been a criminal bar association in England before, but this was a first in Australia.

A: It started off with a meeting in my room. There were a number of problems in crime at that time – '78. For a start, the Bar Council was comprised almost entirely of non-criminal practitioners, and to be honest, we were the poor relations - the criminal bar practitioners - in those days. We had a Crime Practice Committee, with a heap of people but they never met. There was no voice for criminal practitioners and the Bar wasn't particularly interested in being a voice for anybody. In those days, the Bar Council wouldn't speak to the media. If you asked them about what they thought of a proposed change in law in relation to rape, the Bar would simply say "We've got no comment". They said "no comment" to everything and as a result they got the press they deserved. People like The Age law writer Gary Sturgess used to take great delight at poking fun at the Bar, and they deserved it in those days, because they simply wouldn't deal with the media. We, the criminal barristers that the Bar wasn't interested in representing, were the meat in the sandwich Meanwhile, there were two big issues confronting the Criminal Bar: FIRST, all the various legal aid bodies were about to amalgamate into one body called the Legal Aid Commission. So the Australian legal aid, state legal aid, aboriginal legal aid, free legal aid, the Public Solicitor who handled criminal trials - they were all going to be under the one umbrella. The original Section 32 (2) of the Legal Aid Commission Act said that the new Commission will pay 80% of the "normal non-legally aided fee". What was that? There was no fee scale – there were merely bits of legal scales. We wanted to have a say – if there was going to have to be a scale formed. what was going to be paid to us for our work? The SECOND thing was the County Court trial – the delays were so bad for cases to get on. You'd spend years waiting to get on - you might have put aside a month, a week, whatever to do a trial only to find a day before the listing date that it wasn't going ahead because there was no judge to hear it. You weren't entitled to charge a fee for it. As a result, barristers were losing a lot of money. The other thing was that the backlog of criminal trials was enormous, particularly in the County Court. So, we wanted to do something about that.

What we did was form a Criminal Bar Association. Just jumping ahead, we commissioned a report on the delays, the Fagan Report - the late Warren Fagan – it was a brilliant analysis – he spent hundreds and hundreds of hours. He was assisted by us, but the buck stopped with him and they should have erected a statue in his honour, frankly. The two blokes that did the fees were John Hassett and myself. We drew up an 80 page report, a draft scale of proposed fees. In order to get it accepted then, the hardest people were the Bar Council, and then the various **existing** legal aid bodies and the **putative** Legal Aid Commission – it took another year for all of that to happen, but finally it happened. It was reviewed every six months and for a number of years, the system worked beautifully but of course, sooner or later, the wheels were going to fall off and did, when gradually the Legal Aid Commission realised that it was a buyers' market. Originally, they wanted to brief two counsel in a murder trial, but gradually they realised they could save money. Why pay a junior two-thirds? Why have a junior at all? Why brief a silk at a higher fee scale? So gradually the various rules that existed since time immemorial fell away – were abandoned by a Legal Aid Commission as it gradually realised it could control the situation to a large extent.

Part 11 - Criminal Bar Association (2)

A: Getting back to the formation of the Criminal Bar Association, to do something, we had a meeting in my room: there was Vincent, Coldrey, Hassett, I think Rozenes who was a baby barrister then – he might have been there. There were only about five of us. We then decided to have another meeting. The steering committee was 15 or more barristers: Kelly, Hassett, Vincent, Coldrey, myself, Rozenes, Langslow, Fred James, Bob Kent, Maitland Lincoln, Robert Richter, Zia Bey, Brind Woinarski, Boris Kayser, Michael Hugh-Jones, Schwartz, Lewis, Lopes and Van de Wiel. A lot of well-known names in crime there and a lot of them were very young at that stage. I was a bit cheeky – here I was, only eight years at the Bar, and I chaired the inaugural meeting, and sent the notices out. We got about 80 people at that inaugural meeting. (Michael) Kelly became the chairman and was fantastic. We jokingly said he'd just be a "figurehead" - in other words, not have to do any work - but that was nonsense - he worked his bum off. The second chairman after Kelly went to the bench - we originally didn't want someone from the Bar Council but looking around for the next chairman, we decided that John Phillips was the man. He was on the Bar Council and it wasn't a bad idea – because it meant that we had someone who was not only a respected chairman, but a conduit to the Bar Council.

Q: It also says here that another member of the Bar Council, George (later Justice) Hampel QC and then chairman of its Crime Practice Committee significantly spoke out in favour of the immediate formation of such an organisation.

A: Yes, he was very much in favour of it, George. He was at a lot of our functions and meetings and was a great supporter of the Criminal Bar Association.

Q: Your ranks swelled quickly as a result?

A: They did – I became the membership secretary for quite some years later on. We put the roll on computer and so forth - in the end, there were about 400 members. Anybody, who was a financial member, who became a judge or magistrate would be invited to take up an honorary membership. Nobody ever refused to take up honorary membership. When we had that second meeting with all those people there, Michael Hugh-Jones was from the English Bar and he talked to us about the English Criminal Bar Association and I immediately thought "That's what we bloody well want", and I wrote to them. I got a very prompt, wonderful reply - they told us what their constitution was, to keep it simple– they had four office bearers (chairman, vice-chairman, secretary and treasurer), eight committee (members) who were appointed by the executive, rather than elected, which I thought was a great idea – because people who just wanted it on their CV and wanted to stand for election - popular people who didn't want to do anything - got short shrift. The executive would invite on people who they knew were <u>workers</u>. As advised by the English CBA, we always had at least one permanent prosecutor on it because it was for both sides of the Bar table – and not just for the defence. Very important - I've always thought that.

Q: And thanks to your setting up the Criminal Bar Association, eventually some of the other states followed suit, although it took a little while in NSW.

A: NSW might have been the first to try. They wrote to me and I went up there and addressed them; there was a lot of them – about a hundred people in one of their revered sets of chambers. Their chambers are spread over the city. It was a Who's

Who – any name that I'd heard of from the Sydney Criminal Bar was there. They wanted to know how we'd done it and what we did; I showed them my draft constitution, which was handwritten over my dinner table, drafted by the putative executive at my place. That was the draft constitution that was then moved and passed at the inaugural general meeting, which occurred on 29 November 1978.

Part 12 - Reforms in homicide laws and drug-related crime

Q: You were talking about the English Bar. Was it any kind of follow-on from this that some years later, you delivered a paper titled *Reforming The Law of Murder* at Lincoln's Inn in 1987?

A: No, it wasn't. There was no connection between the two. The first Reform of the Criminal Law convention was in London at the various Inns of Court and I did give a paper on the reforming of the law of murder at Lincoln's Inn.

Q: What was the gist of that paper?

A: It was to talk about what areas were most in need of reform and what people said were the areas most in need of reform. One of the issues I talked about in some detail was the law of provocation which has now been legislated out of existence in this state. Incidentally, the paper that I gave was published in the Bar News.

Q: Have you written lots of papers?

A: Not a lot. When I'm asked to. I'm not one of these academics that runs around getting it on their CV – far from it. As a barrister, I always found you had enough to do, preparing trials. The amount of paper in a criminal trial – this is another matter I think I should talk about - has increased exponentially. Let's just concentrate on homicide. Going back to my first years at the Bar and the first murders I did, the pathologist's report would take a page and a half. Clerks would paraphrase depositions. There'd never be more than 15-20 pages, tops. The police interview would be two pages of "I said, he said, I said, he said" and generally no initials or signatures to prove there was an independent adoption of the document. As soon as compulsory recordings were introduced by the law, police interviews – the length of them – increased from 2-3 pages overnight to 70-80 pages. Yet police had always sworn that everything that was said was written down! That turned out to be nonsense. They'd had this long conversation over an hour or two Once Compulsory taping came int, it was obvious to them as well as everyone else that they should have been doing it for years! It reduced overnight a lot of false allegations about police inventing things! But it did help to make briefs much larger and trials much longer.

Q: You mention this exponential increase in paperwork. One of the things I noticed was that the aims of the Criminal Bar Association when it started, wanted to reduce red tape. But now, 40 years later?

A: Famous last words. The blame for that is largely with the legislature, and to some extent, the courts. Some judges haven't exactly done their brethren a favour when it comes to making pronouncements on what the law should be. When the High Court all give separate judgements on something and people want to work out the ratio of the decision - what the case stands for, it's a bit hard to work that out when every judge is saying something different.

Q: On that basis, have you had much involvement with the Law Reform Commission?

A: I was on it for two or three years at one stage – the Homicide Reference Panel.

Q: Did you put forward recommendations about areas you wanted to see changed?

A: When I was on it, one of the major battles was that the academics were trying to get the offence of dangerous intoxication introduced as a separate offence. It was feared that with the advent of - what was it - Morgan's case in England, and I'll think of the name of the case in Australia in a moment (*O' Connor*). They're cases that dealt with the "defence" of drunkenness and in theory, you were not legally to blame for murder if you weren't capable of possessing the necessary intent. If I'm that drunk, I don't have the necessary capacity to form an intent to kill. That sounds like there'd be a lot of injustices (the so-called "Drunks Charter"). But I can't think of anyone who's ever been acquitted of a serious crime in Australia because they were drunk, since that law came in. Generally, raising intoxication (in court) is a negative thing: juries think "It's your own bloody fault – you went out and got pissed. Don't come here crying about it now, saying I drank myself to a point where I couldn't think straight and didn't intend to hurt him at all". So there was no need for a new offence of "dangerous intoxication" and the idea went away.

Q: How is that going to apply now with other types of drugs, for example with things like ice?

A: Same thing. Juries will be totally unsympathetic. They have been, since drugs reared their ugly head. When I was a young barrister in the early 70s, I was at the Moonee Ponds Magistrates' Court in the first division of the main court. I heard there was in the second division a bloke who was a drug addict. I'd never seen a drug addict and I actually went around to the second division to see what a drug addict looked like. It sounds stupid, but we were all that naive then. Within a few years, more than 50% of serious crime was drug-related in some way. Armed robbery ceased to be a crime motivated by that most noble of motives, greed, and became motivated to obtain money to buy drugs – plus robberies of chemist shops and so forth. Drug-related crimes against the person as well as property – none of that existed when I first came to the Bar.

Part 13 - Changing community attitudes

Q: The more things change, the more they stay the same in some ways when it comes to defence work?

A: I've never thought that. Obviously, if you mount that as a thesis, you could probably mount a pretty good argument. I've always thought that change is happening inexorably all the time. Take the criminal law. Four areas that I've said have changed enormously regarding the attitude of juries since I came to the Bar. First of all - culpable driving. In the early days when I defended people in culpable driving, the jury's attitude was "there, but for the grace of God, go I – the drunk in the dock. What's this bloody doctor doing saying 2-3 beers and I'm incapable of having proper control of a motor vehicle? What nonsense - I've been driving home from the pub for

years." People had that attitude for a long time and it took a long time for the worm to turn. But now, they think "there but for the grace of God go I - the body on the slab in the morgue".

Q: That's been the result in part of community campaigns.

A: The Herald Sun did a great job with that Ten/Thirty-Four campaign when the death toll was 1034 people – nowadays it's less than 300 a year. It was three and a half times what it is now. A lot of it was people's preparedess to tolerate drunk driving then, whereas there's no such preparedness now. Now if you're drunk and behind the wheel and you cause an accident -

Q: "You're a bloody idiot."

A: Yeah, and "you're guilty". Now, the second one is the area of commercial crime. This is where we get to the bottom of the harbour schemes and so forth. The High Court attitude to tax avoidance prior to the Costigan Commission was "Well, it's Australian to arrange your affairs so as to minimise your tax", encouraged by judgements of no less than the Chief Justice Sir Garfield Barwick. But after the Costigan Commission and the publicity it generated, the attitude changed enormously – now people weren't as tolerant of anyone milking the system. We're currently going through that issue again.

The third one is sex cases. When I was a young fellow at the Bar, you were allowed to ask a woman who'd been allegedly raped in her own home, you were allowed to ask how often she'd had sex, who with – even if it was with her husband. Totally irrelevant issues, but calculated to embarrass her and blacken her name with a view to allowing an accused person to say "She must have wanted it - look at how she's been behaving". You can't believe that those attitudes existed but they were laws when I was a boy at the Bar. We don't cop that sexism now. Juries are more prepared to convict now on less evidence than they once were. In the old days, with the all-male juries, they acquitted more easily. Today with all the television about what crooks the defence lawyers are and what heroes the police, investigators and prosecutors are, the defence have quite a bit of ground to make up. The laws have changed a lot; BUT there's still sexism, because old habits die hard.

The fourth one is drugs, and I've just told you that story about my naivety in the second divison of the Moonee Ponds Magistrates Court.

Part 14 - "I've never invented a defence"

Q: You've been called a lot of names over the years – "The Embarrister" is one.

A: Oh, it's just a nickname. Back in 1972, I'd just met a group of sporting fellows and we were all having a drink and somebody said "You're not a barrister – you're an Embarrister". Footy clubs love nicknames. Then I became just "The Barrister" and the name stuck for a while. There are still people at Carlton (Football Club) who just call me "Barrister", eg. John Elliott.

Q: He owes a lot to barristers, though, doesn't he?!

A: I tell you what: he was lucky that a jury wasn't empanelled. This has got nothing to do with what the facts were – I don't know what the facts were. But he

would have been a marked man if a jury got its hooks into him. Forty years ago, they would have let a tall poppy off. But today, because he's a tall poppy, he'd be convicted – on account of his reputation.

Q: You were saying, though, that defence barristers are on the backfoot…

A: They start off on the backfoot. The instinct of the jury is that the goodies are prosecutors and the baddies are the defence lawyers - they invent defences and do all these terrible things. I've never invented a defence in my life. I've been asked to, but I've had to explain the facts of life to a client when that happens.

Q: The thing is, though – the cab rank rule has been around for centuries. You must have wondered about that. You said early in the interview that you always liked the idea of teaching . Have you thought about doing a series of your own, explaining the importance of the cab rank rule? People during the last few hundred years have died for the cab rank rule – for example, the regicide judges and the like.

A: You mean people who by dint of defending an unpopular cause finished up in the dock or who were simply dealt with physically, themselves?

Q: It is a cornerstone of democracy but it's not very apparent to people, sometimes – yet if you took it away, where might we be – even for those regarded as lowly, or evil or sinners?

A: I agree that most people don't seem to have a grasp of the fact that a barrister in this state, this country, has no option but to defend in a case where he's available, not embarrassed by knowing a witness, an accused. It's an ethical offence to refuse a brief. If I'm available and it's a murder trial and I don't know the witnesses, then I'm bound to take the brief. I can't say "it's an unpopular cause, it's a sure loser and I won't do it." My mother once said "are you in such-and-such a case?" I said "yes," and she said "I hope you lose" – she knew the mother of the victim. People get so cross - they always ask, how can you defend someone if you know they're guilty? I got asked that all the time when I was a younger barrister. There's three answers. One answer is: you've got to - you don't have any choice legally and it's an ethical offence to refuse a brief. I was briefed in a case once, speaking of Carlton, where a man was punched and died of a brain aneurism, right in front of the Robert Heatley stand in Carlton - with his little boy next to him, like that. I was in the Robert Heatley stand at the time but I didn't see the fight. A colleague of mine saw (it) – I won't say who he is but he has a lot to do with poker machines - and he was in the Carltonians, and he was going to be a principal witness in the identification of the assailant. When I read the brief, there was no reason why I couldn't do it and then I saw this colleague was one of the two main identifying witnesses. Identification was the defence, so of course I had to hand the brief back. Because I'm really just saying what's bleedingly obvious to lawyers. People would say that justice hasn't been done – if he gets off, they'd say that the witness lay down and if he gets convicted, they'd say that I didn't go in hard enough for my mate who was in the witness box. Because justice has to be seen to be done - you have to hand the brief back and let someone who's anonymous to the witnesses do the case.

Part 15 – Justice denied?

Q: "Justice must be seen to be done" – you had to grapple with that in the Jaidyn Leskie case – some people may never be satisfied with the result.

A: I suggested to Robin Bowles the title of her book should be *Justice Denied*. It was my suggestion that she call it that.

Q: Really – why?

A: Because I knew in most people's eyes, it was justice denied. I don't believe that for a moment, myself.

Q: I remember when he was acquitted, reading in the paper at the time, your saying you knew Greg Domaszewicz wouldn't be found guilty on the basis of the evidence. I thought that was a very interesting remark to make.

A: What – you're reading into that I thought perhaps he was guilty but the evidence wouldn't get him convicted?

Q: I thought a lot of people might think that.

A: No, I didn't mean that at all. I did that case for nothing. The reason I did it for nothing was that Legal Aid were giving him a bad time. It was unconscionable. They weren't prepared to spend money – they wouldn't pay a QC to appear for him, and they wanted me to appear for a junior fee, and I said no. So they rang around a number of silks who would do it for a junior rate. – they were very wrong to do that One, who was only available for the first three days of the six days the committal was booked in for - he then had another commitment - did accept the brief, did a good job while he was there but then he left, leaving the junior who wouldn't get paid and would have to sit for three days, not being paid a penny. In the end, the silk was embarrassed by what he'd done, and was spoken to by the then Chair of the Criminal Bar Association, Michael Rozenes. The silk then very publicly crossed out the brief fee on the Legal Aid brief and wrote on the brief "Fee declined" so the junior could get paid and come into it. The Crown spent a lot of money on the prosecution. The bean counters who were making these decisions at Legal Aid seemed to think that this case was hopeless and therefore there was no point wasting money on it. They hadn't read the brief. I'd got the papers and read them and thought the case was pretty weak. I didn't have a view on whether he was guilty or not. Then I met Greg (Domaszewicz) and as I got to know him , I gradually saw he wasn't capable of committing this crime – he'd have left a trail a mile wide.

Q: You said he was an idiot, not a murderer.

A: I said in my opening that I was "here to defend him for murder, not for being an idiot" – I said it off the top of my head. I did live to regret it! But it was because he told the mother of the child on the phone that the child had burnt his bum on the heater and was in the hospital and he was making this all up – he was just teasing her. The hospital was only partially built –it wasn't open (at that time) – and he said (when he picked her up) "Jaidyn's in there". He's a very strange, eccentric fellow. Mentally, he's suffered an enormous amount since he was acquitted – he's a pariah.

Part 16 – "People need to take a deep breath"

Q: You and a legal academic have debated this sort of thing: you were saying that juries are presented with the evidence and seeing the witnesses close at hand, and that the wider public need to be content with this.

A: The public will always feel entitled to expressing their opinion, and the media encourage them to speak on things they know nothing about. Derryn Hinch, for one.

Q: So what do you advocate - we have social media now – given that we have, if anything, more scrutiny – where do you see all this heading, with people always having an opinion?

A: We used to say at the Bar that there ought to be a blanket ban on publicity at committal proceedings - until the trial. People form too many views based on what they read. But that was then and this is now. With the various forms of publicity that can come into existence now from social media (let alone normal media), you're just not going to be able to stop the material from getting out there. What do you do? I don't know if you can stop people from publicising their opinions – but what people need to be told – it's idealistic and never going to happen, but people need to take a few deep breaths. When the bombing occurred at the Boston Marathon, there were innocent people blamed, named and vilified in the social media who had nothing to do with it whatsoever, and their homes were being attacked. Face-bookers thought they were doing a better job than the police who actually did a very good job in that case. It happens a lot these days. People have forgotten this. When that lady was raped and murdered in Sydney Road –

Q: Oh yes, Jill Meagher.

A: Her husband was at home (at the time). For a number of hours, you could tell by the way the police were being quoted (in the media), there was a buildup of a suggestion that her husband might have done it I knew nothing about it and because I didn't know about it, I didn't have an opinion about it. Had it not been for that footage in Sydney Road of that man [Adrian Bayley] following Jill, I wonder what might have happened (to her husband).

Part 17 – A great performance / Essoign Club

Q: The fact that you're a bit of a thespian – you've appeared in a few plays – a long time ago, you were in "Court in the Act" with the late Douglas Salek QC.

A: I miss Doug. Lovely man. A great actor, fantastic mimic.

Q: He played Pol Pot in a two hander play, "The Cab Rank Rule".

A: John Harber Phillips wrote that little sketch.

Q: Doug was a very good Pol Pot, I thought. So, a bit about your acting because that's not very far from being a barrister….

A: He'd never forgive me if I didn't mention Paul Elliott –

Q: Paul Elliott played the lawyer experiencing a crisis of conscience.

A: (Paul) wrote most of the 1984 Centenary Bar Revue – a bloody genius in my opinion.

Q: So, what about your acting?

A: It was very much part-time, but I loved it. Right from school I put my hand up to do things. I loved Shakespeare and I'm happy to say the kids acquired that love. I saw a recent production last week of "Twelfth Night", with men playing all the roles. Men playing women dressed as men and it was a hoot.

Q: Do you think you'd like to have been an actor? Did it ever enter your mind?

A: No, not good enough. I'm more a frustrated singer than an actor.

Q: Yes, I hear you're a fine singer. Are you tenor or baritone?

A: Baritone.

Q: Do you sing much? Are you with choirs?

A: I started off learning to sing for many years when I was a kid – choirs, we used to do the rounds. I learned the words of every song, you know – community singing, a bunch of us littlies at the front supposedly propping up the quality of the sound.

Q: You could have been in the Vienna Boys Choir.

A: Yeah, well I didn't go to Vienna. But I got to learn the words of every old song that was ever written.

Q: You were the chairman of the Essoign Club, a Victorian Bar institution, for many years.

A: One of the things that's a real feather in the cap of the Bar is the Essoign Club. There was not a little opposition to the introduction of a licensed club. I went along to those meetings and there were people who thought the building would be full of rolling drunks and so forth. It's been a wonderful innovation. People from other states come and you take them into the Essoign Club and you can see the look of envy – and it makes money. I chaired it for nine years until a year ago. It has a fantastic manager, terrific staff, and the Bar Council's always been solidly behind it - and so they should - it's been a great adjunct to life at the Bar and the workings of the Bar Council itself, with its surrounding areas outside the Club – the conference and meeting rooms, and so on. It's perfect, really. The smokers are always complaining that they don't have a balcony – and they're still trying to get a balcony. Good luck, I've always thought, but maybe they'll get it, one day.

Part 18 – Concluding Words

Q: In many ways, Colin, you've been in no small sense a huge contributor to the collegiate atmosphere here at the Bar.

A: Some say I've probably spent enough money doing it. Well, I love the Bar. I'm retiring now, and I've probably just about had enough, frankly. I'm 70 and always vowed I'd retire at 70. I'm on the cusp of leaving. The first forty years, I was

addicted to this place – I'd come in on the weekends even when I wasn't working on a case – it was just something that -

Q: It gets in your blood, doesn't it?

A: That's right. I loved the collegiate atmosphere. I loved the friendship and there's always a challenge. Because of the nature of your work; you finish a case and then there's always a next one. That's why barristers have got it all over solicitors. We finish a case, write it up in our fee book, send the brief back back and the poor bloody solicitor - they have the same clients – maybe dozens, maybe hundreds - ringing them day and night, whereas a barrister can say "you don't contact me, you contact the solicitor". We're very lucky. The buck stops with us when it comes to the presentation of a case – you'll get the blame, more or less, if the result doesn't go the client's way, more than a solicitor – but I think being a barrister is one of the luckiest jobs you can have. No matter how much you feel, you can't take it home. I know barristers who wear their clients to such an extent – they live and breathe their case – if they win, it's a great day, but if they lose, it's the most devastating day in their lives. People say to me "if you win a case what do you do?" "I take my wife out to dinner." "What do you do if you lose a case?" "I take my wife out to dinner." Because life goes on – even if you're bleeding inside. There's been a few cases where I've been genuinely very disappointed – I believed I easily did enough for the juries to have at least a reasonable doubt. The cynics can say there was some kind of clever nonsense that would have justified an acquittal. I don't mean that. The evidence didn't come up, but the jury's convicted us anyway.

Q: In conclusion, I can see your chambers being slowly dismantled. You say you're feeling ready to move on. What are your thoughts about finishing here? Will you miss most about being here? The collegiate aspect? The challenge?

A: I loved a good bloody fight, to be honest. I don't mean a nasty fight. I've got a reputation of arguing with judges. There were a few judges I'd had arguments with; quite often I overreacted and it was my fault. Sometimes, in my opinion, the judge wasn't giving us a fair trial, and I complained about it, sometimes a little incautiously. Most of the really good judges I've never had a problem with. Frank Vincent was the judge on the Domaszewicz trial for eight weeks and we didn't argue. We weren't going to – he's too good a judge. But I don't want to go without saying: people shouldn't do what I did. It's fair to say a lawyer's place is on his feet and not on his knees, but there were times when I was a little cheeky. It's in the nature of the beast, I'm afraid, and I wouldn't recommend it to my colleagues.

Q: But that can sometimes be useful and timely.

A: I never deliberately tried to get into an argument and I always felt terrible about it. Judges would say to me that I would start arguments to distract the jury, but it was the last thing I was thinking of. To me, it was an embarrassment, being involved in an argument. But it's in the nature of the beast – I don't for a moment think that what I did was right, but it was me thinking I was doing my best at the time.

Q: Well, Colin Lovitt QC, it's been a pleasure talking to you.

A: Thank you.

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