cover story

The finale: the Karpal Singh trial

A report from Mark Trowell QC

In January this year *Balance* featured an article by Mark Trowell QC on the trial of Karpal Singh. We thought it fitting to end the year with this final report by Mark, who observed the trial for LAWASIA and represented the Law Council of Australia, Australian Bar Association and Criminal Lawyers Association of WA. This report was filed in mid September. *Balance* would like to thank LAWASIA and Mark Trowell.

Readers are asked to note this article has been edited. In some cases, notes bracketed and in italics explain the absent material.

Background

On the morning of 14 January 2002 Karpal Singh appeared in the High Court at Kuala Lumpur before Justice Datuk Augustine Paul to resume his trial on a charge of sedition.

Mr Singh had been charged with uttering seditious words during the sodomy trial of former Deputy Prime Minister Datuk Seri Anwar Ibrahim. He was alleged to have committed the offence while making a submission to the presiding Judge that the accused was being poisoned while in custody.

The trial had been listed to start on 6 October 2001, but had been adjourned because it clashed with a murder trial that had not been completed before the trial Judge. Given that the accused was in custody, it was agreed Mr Singh's trial be adjourned.[1]

At the time, a large number of local and international observers were obviously disappointed that the trial had been adjourned. It seemed to many that the delay had been contrived in circumstances where the prosecution of Karpal Singh had increasingly become an embarrassment to the Government. There was considerable debate concerning the question of whether the matter would ever proceed to trial.

However, yet again the court had convened to hear the charge.

Counsel at Trial

The Prosecution was represented this time by the newly appointed Attorney General, Datuk Abdul Gani Patail. Karpal Singh again appeared for himself from the dock assisted by his sons Jagdeep Singh Deo, and Ram Karpal Singh. Also appearing at the bar table on a "watching brief" for the Malaysian Bar Council was Bar Council Vice President Roy Rajasingham.

Observers

After counsel had announced themselves to Justice Augustine Paul, Karpal Singh informed his Lordship there were a number of observers who were also present in court including Richard Gibbs QC for the *Law Society of British Columbia*; Ms Gail Davidson for *Lawyers' Rights Watch Canada;* Gerald Gomez for the *Commonwealth Law Association;* Dato' Param Cumaraswamy, the *UN Special Rapporteur on the Independence of Judges and Lawyers* and myself representing *LAWASIA,* the *Law Council of Australia,* the *Australian Bar Association* and the *Criminal Lawyers Association of Western Australia.*

Other interested persons in court included representatives of the various Embassies, opposition political parties and many friends and supporters .

The Trial - Preliminary Issues

Before the trial started, there was an animated and sometimes heated exchange between Karpal Singh and the trial Judge concerning various issues of procedure. Essentially, the Judge believed three issues needed to be resolved before the trial could proceed. They were:

- whether any official status should be granted to the foreign observers assembled at court;
- whether the Malaysian Bar Council should be entitled to attend the proceedings on a "watching brief"; and
- whether Karpal Singh should be entitled to defend himself in circumstances where his sons were present as counsel assisting him.

Domestic and Foreign Observers

The discussion concerning the status of observers became particularly acrimonious.

Karpal Singh submitted legal observers should be officially recognised given the serious nature of the charge brought against him and given it had allegedly been committed where a lawyer had been carrying out his duties in court for and on behalf of a client. He submitted that not only was it in the interest of the legal profession to monitor proceedings, but that it was also in the public interest that the proceedings be seen to be transparent.

Justice Paul responded the proceedings were open to be observed by anyone and would be reported by the press. Karpal Singh replied observers should be there to ensure that "nothing went amiss" and that he be accorded his rights.

(He quoted a recent Appeal Court decision where the Court had observed that Justice Paul in another case had seemed to 'act more as a prosecutor than a judge' in dealing with a contempt proceeding'.)

The Attorney submitted it was a matter for the Judge's discretion and he observed the proceedings were open to any member of the public, including foreign visitors who may have an interest in the matter.

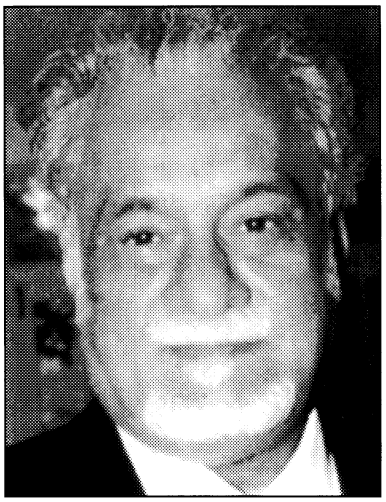
Having heard this submission, Justice Paul refused the application and said the observers would not be accorded any special status at the trial.

Watching brief for Bar Council of Malaysia

Although the watching brief procedure is not common to all legal systems, for some years it has been the convention that the Bar Council of Malaysia appears at cases thought important to its members. The right to appear has not always been granted, but is a matter of judicial discretion. Counsel appearing on behalf of the Council, usually the President or his nominee, will robe and appear at the bar table and if asked by the presiding judge may make submissions on matters of law.

The Bar Council relies on the *Legal Profession Act 1976 (Act 166)* to provide a basis for allowing it to appear in this capacity.

The Attorney General advised Justice Paul that he had no objection to the Bar Council taking a "watching brief", although it was his personal opinion that generally it was unnecessary.



Above: Karpal Singh, photo courtesy Bar Council Malaysia

Justice Paul stated that he did not substantially oppose the application so long as the representative of the Bar Council came to court with an "independent mind." He went on to observe wryly that he thought that might not be possible given the terms of the recent resolution of the Council, which had been highly critical of him. *(After some verbal tussling Justice Paul agreed to the Bar Council's attendance at the bar table).*

Representation of the Accused

Justice Paul then asked whether it was appropriate for Karpal Singh to represent himself and still have counsel assisting him?

The point probably had some merit, for it will be recalled that **his sons were appearing for him** at the bar table.

Attorney withdraws the charge

Before this matter could be argued, the Attorney General rose to his feet and asked if he could make a statement. At the same time copies of the prepared statement to be read were given to Karpal Singh and the Judge. The courtroom fell silent as he proceeded to read from the one-page statement as follows:

> *The office of the Public Prosecutor has received numerous representations from domestic and international legal bodies soon after En Karpal Singh was charged for the present offence seeking a reconsideration of the pending charge against En Karpal Singh. Various legal considerations have been, raised in support of the representations. The Public Prosecutor, apart from those representations, have (sic) reflected upon the tense atmosphere and circumstances at the time En Karpal Singh uttered those words (the subject matter of the charge) which was made in open court. It was very tense indeed and the then Public Prosecutor immediately stood up to express his grave concern and undertook to instruct the police to commence a thorough and swift investigation.*
>
> *Reports from experts of international standing revealed that the arsenic content was within the permissible level and was caused by the food consumed by Dato' Seri Anwar bin Ibrahim whilst in prison. The tests and investigation showed that there was no impropriety attributed to the prison authority or anybody. The food was the same as provided to all people under detention. Thus the allegations made by En Karpal Singh were clearly baseless. The Public Prosecutor viewed that the allegations made by En Karpal Singh went beyond the limit of defending his client for the case in the trial. The complaint was entirely a different matter separate from the matter on trial.*
>
> *Today, having reconsidered the circumstances and the representations, and taking into consideration the public interest, the Public Prosecutor is of the view that it is appropriate to exercise his discretion under Article 145 of the Federal Constitution to discontinue and withdraw the charge against En Karpal Singh under section 4(1)(b) of the Sedition Act 1948.*
>
> *Dated 14 January 2002*
> *Dato' Abdul Gani Patail*
> *Public Prosecutor Malaysia*

Mostly everyone in the Court seemed to be taken by surprise. As he resumed his seat, one could not fail to sense the Attorney's obvious mischievous delight in extracting all the necessary drama from the occasion.

An acquittal order should have come swiftly after that, however, Justice Paul would not be denied some retribution upon the person who had so defiantly challenged his authority. Karpal Singh stood up and tried to address the Court in response to the Attorney's statement, but the Judge would not listen to him.

The impasse was only broken when at the urging of the Attorney General, Justice Paul agreed to do what had been asked of him, but again his Lordship would not be denied.

In dismissing the charge, Justice Paul also directed that the Registrar of the Court refer Karpal Singh's earlier conduct to the Bar Council's *Advocates and Solicitors Disciplinary Board* for disciplinary action to be taken against him. His Lordship said:

> *...(these remarks were) an open and blatant attack on the judiciary. I find that statement to be contemptuous. It's an attack on my impartiality and the biggest insult to the judiciary. I cannot tolerate that.*

The Aftermath

To the considerable excitement and relief of the many friends and supporters in the Court, Karpal Singh was released. He told the assembled media waiting outside the Court:

> *...(the withdrawal of the charge) is a credit to the new Attorney General...it's a relief after having this hanging over me for so long. This is a step in the right direction for Malaysia's legal system, but I am surprised that they decided to wait for such a long time before dropping the case.*[2]

(DAP national chair Lim Kit Siang welcomed the decision as did the Bar Council's Vice President Roy Rajasingham).

The Tactical Game?

The adjournment of the trial in October 2001, gave no indication of the Government's resolve to prosecute the charge of sedition against Karpal Singh. The parties had no choice other than to agree to a delay, given the murder trial before the Judge was part-heard and the accused man was in custody.

However, there were factors some optimists relied on to suggest the Government was in fact looking for an excuse to withdraw from the proceedings without losing face.

First, it had been more than two years since Karpal Singh had been charged.

continued next page

Karpal Singh from previous page

His comments had been made at a time when former Deputy Prime Minister Datuk Seri Anwar Ibrahim was standing trial. On any assessment, that was a politically volatile period. Anwar had since been convicted, imprisoned and was no longer a real political force. For all that time, Karpal Singh had been under substantial personal and professional pressure. In all probability, that was something that had undoubtedly curtailed his customary political outbursts against the Prime Minister and the Government. Given the change of circumstance, perhaps his prosecution now seemed less important.

Secondly, a large number of foreign observers had travelled to Kuala Lumpur to observe the first proceedings in October 2001. The number of observers attending must have caused the Government some concern, but an adjournment also meant that the prospect of returning again in January 2002 would impose a substantial financial burden on some organisations. There was every chance that some would not able to afford to send observers back a second time. Some believed the Government was content to employ a tactic to shake off foreign observers by finding reasons to adjourn the trial at the last moment. Undoubtedly, that would mean less international scrutiny if the prosecution finally abandoned the proceedings in January.

Finally, there had been some optimism that the charge would be withdrawn because of the appointment of a new Attorney General, Ainum Mohd Saaid. She was not the person who had brought the charge in 1999 and was said not to favour it.

However, these hopes seemed dashed when Ainum Mohd Saaid resigned supposedly on grounds of ill health on 31 December 2001. She was replaced by senior deputy public prosecutor Abdul Gani Patail. Gani's appointment was considered controversial due to his involvement as chief public prosecutor in ex-deputy prime minister Anwar Ibrahim's sodomy and corruption trials. The political opposition to Gani's appointment was substantial with claims that it had been unconstitutional. There was every expectation that he would be hostile to Karpal Singh.

In any event, speculation continued as to whether the Government would proceed with the prosecution. The Attorney General's Office gave no indication of any intention other than to proceed with the trial. Nothing was said by Attorney General Ganil until his shock announcement in Court on the morning of the trial.

It is difficult to say what caused the Attorney General to withdraw the charge on that morning. Many suggest that he would not have made that decision without obtaining the consent of the Prime Minister. Perhaps, as some had earlier suggested, the need to prosecute was less important given that Dr Mahathir had won his battle against Anwar and his supporters. Karpal Singh may not have been convicted, but certainly he had in a very public way been punished.

The Government had also come under considerable attack over the appointment of the Attorney General. Allowing Gani to withdraw the charge enabled the Government to enhance his image by portraying him as a moderate and independent Attorney General.

The resulting publicity suggested that if this was intended, it worked with newspaper headlines such as *"Abdul Gani Now Seen in New Light"* (*The Star*, 16 January 2002).

The Prosecution of Justice Augustine Paul

Four days after his acquittal, Karpal Singh appeared in the High Court in an entirely different capacity. This time he appeared to prosecute Justice Paul for contempt of court.

This was an unusual and controversial prosecution. Many suggested that it was not appropriate for Karpal Singh to prosecute Justice Paul in these circumstances.

Others suggested that given Karpal Singh's representation of the complainant, the Judge should have disqualified himself from hearing the sedition charge against Karpal.

The fact is both men had become snared in the political squabble between the most senior members of the Government. It was a squabble that almost destroyed a principle fundamental to the effective operation of Malaysia's legal system.

Lawyer Christopher Fernando had brought a private prosecution against the presiding Judge for contempt for remarks made against him during the corruption trial of former deputy Prime Minister Anwar. After a particularly heated exchange with Fernando, Justice Paul was reported as later in the proceedings remarking:

> *"...if his (Fernando) way of speaking is like an animal, we can't tolerate it. We should shoot him. He should change".*

The last hearing of the application had been on 13 December 2001. That was less than a month before Karpal Singh was to appear at his own trial to answer the charge of sedition. No wonder there was open hostility between the two men when they met that time in court.

Justice Paul had not appeared at the earlier hearing in December, nor had he come to court this time. There had been some earlier indication that the Attorney General might intervene, but now counsel from his Chambers had appeared and sought leave to appear on the Judge's behalf.

Karpal Singh immediately made application to the presiding Judge, Justice Datuk Hashim Mohd Yusof, that he issue a bench warrant to arrest Justice Paul for failing to appear. Then followed a lengthy submission in which lawyers for the complainant argued that the Attorney could not intervene to act for Justice Paul for he did not have the standing to do so. In reply, Abdul Aziz maintained that Article 145 of the *Federal Constitution* allowed the Attorney to represent any public officer or anybody who was performing functions under the Constitution.

Justice Yusof reserved his decision concerning the standing of the Attorney General to intervene to act of behalf of a judge. As for the application to issue a warrant for the arrest of Justice Paul, his Lordship said it was up to Paul whether to come to court pending his decision on the matter.

On 1 March 2002, Justice Yusof delivered his decision finding that the Attorney General could appear for Justice Paul. Christopher Fernando immediately appealed against that decision and applied for a stay. The Court of Appeal granted the stay. At the time of writing this paper, this matter is still pending.

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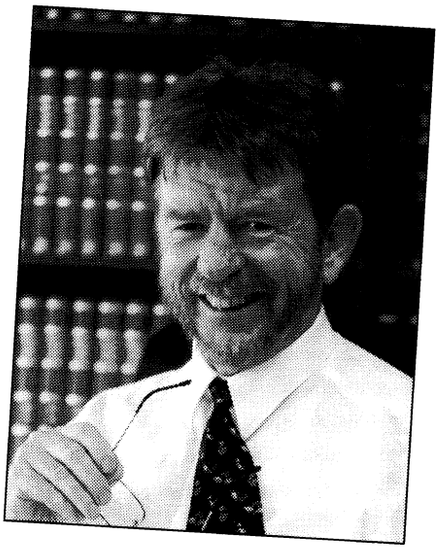
The Application for Bail



Hon Justice Riley

It sometimes appears that the application for bail is something of an afterthought on the part of counsel. That should never be the case. The importance of the application to your client is obvious. An unsuccessful application means further time in custody and that is likely to be an unhappy experience for your client and provide a poor start to your professional relationship. It follows that careful thought must be given to the question of bail prior to the first appearance before the court.

Of course in many cases the position regarding bail will be clear. The obtaining of a grant of bail, in some cases, will be little more than a formality. However in such cases you should prepare on the basis that the court will need to be convinced that a grant of bail is appropriate. In other cases it will be clear that a grant of bail is not an option. In many cases a thoroughly prepared application is likely to be required.

As with most appearances before a court appropriate preparation is vital to the presentation of an application for bail. It is necessary that a case strategy appropriate to the circumstances be developed and followed.

The starting point for your preparation will be obtaining a thorough knowledge of the workings of the *Bail Act*. That Act provides for "the granting of bail to accused persons in or in connection with criminal proceedings." I do not propose to review the Act in detail. It provides for circumstances where there is a presumption in favour of bail, a presumption against bail and where there is no presumption either way ie the situation is neutral.

You will need to bear in mind where the onus lays as a consequence of those provisions. Of particular relevance to your preparation for the application will be the operation of s 24 of the Act which identifies the criteria that a court must take into consideration in reaching its decision on a bail application.

The level of your preparation will obviously depend upon the time available to you. In many cases that time will be limited and you will have to do your best in the circumstances.

Where you have adequate time for preparation of the bail application there are many things to consider. Some of those are spelled out in s 24 of the Act and you will give consideration to each matter there identified.

What is important for the application will vary according to the nature of the offence and the nature of the offender. The fact that the offender has a criminal history does not necessarily mean that bail will not be granted. Such a history may indicate that the client has previously honoured undertakings made to the court and can call upon his or her history as support for the making of a grant of bail on this occasion. The fact that the offence is serious does not necessarily mean that bail will not be granted. Bail is regularly granted in matters as serious as murder.

It will be necessary to obtain clear and detailed instructions from your client on the issues likely to arise.

In many cases these will include an effort to identify an acceptable surety and the development of a plan for what will occur in the event that your client is released. For example you will need to know where he or she intends to live and work and what assurances can be provided to the court as to the attendance by your client at the hearing and that there will be no interference with witnesses.

The prospect that your client may reoffend whilst on bail is another issue to be addressed. If bail is likely to be granted subject to conditions then it will be necessary for you to explain to the client the impact of those conditions and ensure that the client fully understands that a breach of such a condition is likely to result in further time in custody.

When obtaining instructions from your client as to conditions that may be imposed it is necessary to ensure that he or she appreciates the importance of the undertaking to be given.

If the client is unlikely to be able to comply with a condition (eg a reporting condition, residential condition or curfew) you should be in a position to inform the judicial authority of that problem.

Agreeing to conditions which a client is unable or unlikely to meet is to set the client up for failure leading to arrest and a period in custody whilst the matter is revisited.

If acceptable sureties are identified you will need to speak with those persons to confirm their willingness and ability to accept the responsibility. The surety needs to be made aware of the likely consequences for the surety if the bail conditions are breached.

It is prudent to have frank discussions with the prosecutor before the application proceeds. It may be possible to negotiate an agreed basis for the grant of bail which can then be put to the court as, effectively, a joint submission.

Alternatively it may be possible to reduce the area of conflict between prosecution and defence so only the matters that are in dispute need be addressed.

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Justice O'Loughlin, Barristers' Rules

John Reeves QC, President of the NT Bar Association

Farewell to Justice O'Loughlin

As the year 2002 draws to a close, the Bar notes the imminent retirement of Justice O'Loughlin from the Federal Court of Australia. His Honour's departure from the bench in January next year will be a loss to the NT profession.

Before he was appointed to the South Australian Supreme Court bench in 1984 his Honour was a senior partner in one of the leading Adelaide law firms; O'Loughlin Robertson & Co, where he had a busy practice in taxation law. In those days he had frequent contact with the NT through many clients here who sought out his services.

In 1989 Justice O'Loughlin was appointed to the Federal Court bench. He was subsequently given responsibility for the Northern Territory Federal Court list and in that capacity he was able to continue his active involvement with the Territory.

He has been involved in some momentous decisions in NT legal history, including, for example, the Stolen Generation case of *Gunner and Cubillo V The Commonwealth*.

During his time on the Federal Court bench, his Honour has been a strong supporter of the local Bar and of having Northern Territory cases heard in the NT, where ever possible. He will be remembered for his courteous and quiet manner in court, for his quick legal mind and for the efficient way in which he dispatched the business of the court.

Away from the law, Justice O'Loughlin has a keen interest in horse racing. He boasts of having attended the Darwin Cup on several occasions without ever having picked a winner.

In his pre-judicial days, he was a part owner of several race horses but, as is the lot of most owners, without ever gracing the winner's circle.

He also has a keen interest in the history of World War II. He has an extensive collection of books about the role of the Australian forces during World War II. In retirement he plans to take a tour of significant places where Australians fought during World War II.

However, his first travel plan is to take a tour around Australia, which will include visiting and re-visiting a number of places in the Northern Territory. So, we may be seeing more of him in the NT in the not too distant future. On behalf of the NT Bar I wish Justice O'Loughlin a long and happy retirement.

The new Barristers' Rules - binding on most barristers

Earlier this year I mentioned in this column that the Northern Territory Bar Association had adopted a new set of Barristers' Rules.

At present, the Barristers' Rules only apply to those barristers who are members of the NTBA. However, since about 95 percent of barristers in the Northern Territory are members of the NTBA, the new rules therefore apply to the vast majority of barristers.

In due course it is intended that the Barristers' Rules will be adopted by the Law Society as professional conduct rules under section 45A of the Legal Practitioners Act.

When that happens it is intended that the rules will apply to all legal practitioners who practice exclusively as barristers, so the rules will then apply to the other five percent of barristers who are not presently covered.

Highlighting particular rules

The Barristers' Rules are quite lengthy and detailed.

It is therefore not always possible to be familiar with every little aspect of them.

In the interests of promoting knowledge of the effect of the new Rules, I propose in this and future columns to devote a part of the column to highlighting particular aspects of the new Rules that may not be well known or fully appreciated.

Be wary of making comments about current cases in the media

Let me begin by focusing on rule 59 which is commonly referred to as the 'media rule'.

The gist of this rule is that a barrister must not publish his or her opinion about the merits of current court proceedings.

The actual heading to the rule gives a clear indication of its purpose: "Integrity of hearings".

The rule is intended to ensure that court cases are decided in court hearings based upon the relevant facts and law, not in the media based upon the opinions, usually slanted, of one side's barrister.

Such expressions of opinion are often the exact opposite of the court's assessment of the relevant facts and law expressed in the final judgment.

Just as a judge is not permitted to go to the media and explain why he decided a particular case a particular way, neither should the barristers representing the parties in a case do so.

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Wooing the "Court of Public Opinion"

Winning a court case won't necessarily win back your client's reputation – unless the media too are on your side. **Kevin Childs** looks at the role of the journalist as judge. This article was first published by *Lawyers Weekly*.

Within the ranks of the media watchers and the legal scrutinisers, there's a powerful argument that, more than ever, the media is the court of public opinion.

As Stephen Parker, professor of law at Monash University, notes, "The prevalence, immediacy and pervasiveness of the media risk supplanting the courts in people's consciousness as a relevant body deciding truth or falsity, guilt or innocence."

When a deputy chief magistrate in Victoria, Jelena Popovic, sued the *Herald Sun* newspaper for libel, the case had not finally ended when Ms Popovic featured in a glowing profile on page three of the rival group's *Sunday Age*. Beyond what happened in the Supreme Court, Ms Popovic was recovering her reputation where it had first been under attack – in the media.

With the incessant outpouring of news and opinions on four media fronts – newspapers and magazines, television, radio and, increasingly, the internet – the actions of people in and out of public life are under scrutiny as never before. In what is often an unseemly and careless rush to judgment, reputations are damaged, mistakes are made and sticky mud is thrown.

Lawyers concede that submitting oneself to the long, exhausting and expensive process of a trial to try to gain an apology or financial recompense of libel or slander is a lottery. Juries are notoriously unpredictable. In the Popovic matter, the judge had to make a finding that seemed left open by the jury and award her considerable damages.

There seems little doubt that the days when a public reputation could be regained by a court action – if they ever existed – are long since gone.

These days any such action must be undertaken on more than one front. The court of public opinion must be used for people either to regain some lost standing or to establish themselves in the view of their peers and the people.

There have been many just criticisms of the legal system of the United States, but it is open, accountable and offers enormous protections. Certainly Australian lawyers have been rocked when they have heard of American conferences that a prominent lawyer beginning an action includes a call to a media reputation specialist in the early stages of the matter. There can be do doubt of the awareness there of the need for public opinion to be well on-side during litigation.

In Australia, we have seen a leading media expert put a tremendous amount of work into sculpting a glowing sympathetic view of a Mexican banker Carlos Cabal, who escaped to Australia with his family after being wanted on fraud charges in his home country. Through photos and interviews, much sympathy was generated for Cabal, his wife and his children.

In Sydney, the wealth investment adviser, Rene Rivkin, generated support for his action against a newspaper through media reportage.

By contrast, the ignorance in some areas of the media became clear when lawyers were on the receiving end of a public scolding when there was a revelation of the seemingly vast fees for a royal commission into the building industry. Some of this criticism centred on the apparently high level of payments to what are termed "junior barristers". To the uninformed, this may conjure up a picture of lawyers not long out of law school being paid unfair amounts. But the "juniors" are only known thus because they assist Queen's Counsel, Senior Counsel and the like and may have had up to two decades of experience.

Here, again, the public "court" brings in a verdict because it does not have complete information. The failure to use relevant language that can be clearly understood damages lawyers and inhibits their standing as public communicators.

There is little doubt that few people with resources would undertake serious and expensive legal action without ensuring that they have the best available legal advice. The time is fast approaching, if it has not yet arrived, when it would be similarly unthinkable to consider such an action without a well-considered media strategy. Magistrate Popovic was able to tell reporters, through her solicitor, that all she had ever sought was an apology from the *Herald Sun*. It is not always the case that an issue is seen so clearly by someone who has gone to the nerve-wracking, stressful and potentially financially disastrous lengths of suing. But, with professional advice of a high order, the outcome and best result that is sought at court can be translated into a "message" for the media.

And any fears that traditionalists may still harbour, to the effect that the media is so far-reaching that its power may eclipse that of the courts, can be put to rest.

Significantly, the High Court of Australia recently sought the appointment of a media adviser. *(Editor's note: Prior to publication the High Court announced the appointment of its inaugural Public Information Officer).*

Our highest court has been disappointed in the reception of some of its judgments. It wants to make sure the correct message gets out, in a similar fashion to the many other courts that employ these professionals. There is, however, no guarantee that no matter how skilled and dedicated the media officers at these courts are, that argument of a person taking an action may be heard and understood.

That is where decent media advice enters the picture. Without it, there is a danger that a case may be but half-argued. One acute observer of the influence of the media puts it this way: "If judges and juries are not swayed, then it (the media) is a form of infotainment, background noise."

He explains that the courts have always been centres of drama, the powerful events played out becoming the stuff of folksongs and penny dreadfuls. The abiding public interest is in the conflicts played out in the courts.

He has a note of caution for defence lawyers in criminal actions: "There is real concern in the police using the media. There must, for example, be a suspicion about the number of arrests that are caught on camera. There is no justification for the police using the media for their own purposes to get a conviction."

In another issue, while the attack in Federal Parliament on Mr Justice Kirby of the High Court was outside the courts, it could be that people started to become confused about what actually comprises a court, and on the views of guilt or innocence obtained by the media.

As an aside, the authority quoted above points out that there was an increasing scepticism of the media. "We don't know just what the public makes of it all. They may treat it with the same seriousness as advertising, as bits of puffery."

The key questions, naturally, are whether the media affects juries and the judicial system. Judges certainly seem unaffected. Increasingly there is a healthy public debate about non-criminal matters before the courts. We say ABC TV's *Lateline* examining a High Court case involving judges' superannuation.

And for the shock jocks of radio and tabloid newspapers constantly demanding harsher sentencing by the courts, Professor Parker has an interesting final word. When a hypothetical court case involving judges and journalists has been staged, invariably the journalists impose more lenient sentences than those in wigs and gowns. But who ever hears of bleeding heart journos? ①

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Duck for cover!!

The Northern Territory Women's Lawyers are funny birds. An item that created a great deal of interest at its recent meeting was the matter concerning the Argentinian Lake Duck. The supporting documentation – apparently stolen from the office of a "well known" twitcher in legal circles – was an article in the Australian Museum's nature publication on the said duck.

The article stated that the Argentinian Lake Duck has a penis a massive 42 inches in length. The penis is also equipped with a brush to sweep out the remains of any other drake that may have been there first. The meeting resolved to explore the feasibility of importing the duck from South America. Goes to show there is no such thing as a bad duck.

Above: one helluva duck!

Go-go-Federal-Magistrate!

Apparently our reisdent Federal Magistrate Stewart "The Undead" Brown had a very full Tuesday last month.

He started his day at 7am with a video link conference, sat all day with minimal breaks and delivered his last judgement around 7.50pm–8.10pm. He was THEN seen on a jog that apparently took him through to the start of work the next day!

Congratulations

To James Brohier (Commonwealth A-Gs) and Tracey on the birth of their baby girl, Georgia Grace.

To Penny Johnston and hubby Angus Duguid on the birth of their baby boy, Rueben Darcy Johnston Duguid.

Movers and Shakers

Lyn Bennett has moved to Hunt & Hunt from Ward Keller.

Tanya Ling has moved to Cridlands from Hunt & Hunt.

John Newman has moved to Cridlands' Commercial and Corporate Services Section from the NLC.

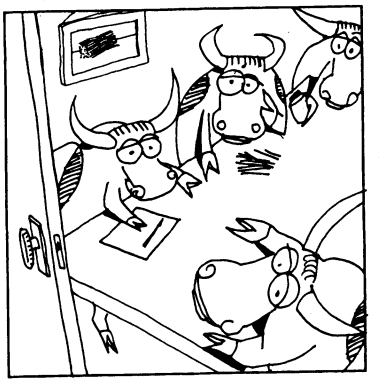
Peter Ward and **Jan Whitbread** are leaving Darwin for Canberra. Peter will work for Blake Dawson while Jan is going to the ACT DPP's office.

Bill Parish is leaving Ward Keller. **Cassandra Goldie** has left DCLS and Darwin.

Peter Tiffin has established a practice in the rural area in the fields of criminal law, civil litigation and administrative law. He is also prepared to accept briefs in family law matters. His contact details are ph 89881765, fax 89881713, mobile 0408841150, email ptiffin@ozemail.com.au and a court box at the Supreme Court.

Tom Walker, formerly of Noonans, is now in Adelaide at DMAW Lawyers. His details are: 3rd Floor, 80 King William St, Adelaide SA 5000, ph 82102222, fax 82102233, email twalker@dmawlawyers.com.au

The Muster Room



Admissions and Mutual Recognitions

Admitted on 5 November was Andrew Marcus Schatz (Clayton Utz).

Mutual recognition admissions are: Jared Nathaniel Sharp (NAALAS), Gregory Francis Smith (NAALAS), Elisabeth Helen Armitage (DPP), Ruth Ellen Brebner (DPP).

Bar jottings, from page 15

There are some exceptions to the media rule. They include:

- The 'academic exception' - a barrister expressing an opinion about current or potential proceedings in the course of genuine, educational or academic discussion on a matter of law.
- The 'non contentious information exception' - a barrister answering unsolicited questions concerning current proceedings provided that the answers are limited to information as to the identity of parties or witnesses already called to give evidence, the nature of the issues in the case, the evidence admitted in the case, the nature of any orders made or judgment given including any reasons given by the court and the clients intentions as to any further steps in the case.

For most barristers, the 'non contentious information exception' is the only circumstance where they may find themselves speaking to journalists.

Even within that exception, barristers can run a number of risks if they speak to the media.

The risks include:

- Becoming identified with the client's cause and thereby compromising the barrister's independence.
- Allowing the media to unwittingly distort what the barrister says about complex legal or factual issues by editing out significant parts of the comments in the interests of brevity or simplicity.

  In other words, the 30 second grab does not work well in this situation.

As is usually the case, this rule can sometimes work to the disadvantage of a party when that party's opponent is freely and inaccurately commenting on the case in the media.

The consolation is the court will always decide the case on the relevant evidence and law, not on the opponent's bleatings in the media.

Karpal Singh, from page 12

The point of describing these proceedings is to illustrate the suspicion and hostility that exists between the legal profession, the judiciary and the executive in Malaysia.

History of Conflict

The political squabble between the Prime Minister and his deputy had been intensely bitter and ruthless. The strain on the Malaysian justice system was considerable involving lawyers and the judiciary equally.

There is no doubt relations between the Malaysian Bar and the Government started to significantly deteriorate after 1986.

During that year, the Bar Council had been extremely critical of various statutory reforms introduced by the Government.

When Vice President of the Bar Council, Dato Param Cumaraswamy, issued a press release criticising the Pardons Board for failing to commute the death sentence imposed on a poor worker who had been convicted of possessing a firearm contrary to the *Internal Security Act* 1960, he was arrested and charged with an act of sedition.[3]

In commenting on the case, he contrasted it with a similar conviction of a former Government Minister whose death sentence had been commuted. He drew attention to what may be seen as discrimination between rich and poor. Dato' Param said:

> *The people should not be made to feel that in out society today the severity of the law is meant only for the poor, the meek and the unfortunate whereas the rich, the powerful and the influential can somehow seek to avoid the same severity.*

The prosecution of Dato' Param Cumaraswamy obviously caused considerable concern within the legal profession that the executive had targeted the Bar in an attempt to silence it. Dato' Param was ultimately acquitted, but the message was clear.[4]

The judiciary was next to come under attack. In 1988, the Government had been rebuffed by the higher courts in a series of decisions unfavourable to it. The Prime Minister reacted savagely, making strong and continuing public attacks on the judiciary coupled with threats that the government would ensure that the judiciary would comply in one way or another with his wishes.

Prime Minister Mahathir also initiated a series of constitutional and legislative amendments that severely circumscribed the role of the judiciary, including restricting the powers of judicial review.

These legislative amendments effectively removed from the Malaysian Constitution the separation of powers, conferring significant authority on the Attorney General and making the judiciary subject to the executive.

The increasing tension between the judiciary and the government culminated in the unprecedented suspension of six Supreme Court judges and the subsequent removal of three of them, including the Chief Justice (then known as the Lord President of the Supreme Court).

The Bar Council's relationship with the remodelled judiciary became extremely strained after these events. In fact, the Council passed a vote of no confidence in the judiciary and socially ostracised the new Lord President.

Communications were gradually restored after 1994, but below the surface were strong feelings of distrust and hostility. The legal profession generally regarded the judiciary as acting politically and more often than not in favour of the government. It also believed that on occasions some judges would use their judicial power against lawyers oppressively and unjustly. The government view was that the Bar Council had become a 'political' opposition whose activities must be curtailed, while the judges felt that lawyers were all too ready to attack the judiciary in the media and lower its prestige.[5]

What Was It All About?

This paper is not meant to be a detailed study of the recent history of the Malaysian justice system. Others have written exhaustively on that topic.[6] However, some explanation was necessary to explain what occurred in the Karpal Singh case, for it was by no means an isolated or uncharacteristic incident. It is a case that illustrates the curious blend of politics and law that constantly threatens the integrity of the justice system in Malaysia.

Without doubt Karpal Singh had been provocative in suggesting that he suspected that "people in high places" were responsible for poisoning his client while in custody. Of course, there was a legitimate basis to complain about a possible poisoning of Anwar based on the test results of the blood samples taken from him. He also had a basis to blame the police or prison authorities, given that the accused was at the time within their custody and supposedly under their care.

However, in the context of Anwar's trial, there could be little doubt he was talking about Prime Minister Mahathir. Even if he had not meant Dr Mahathir, most people would think he had. Whatever the suspicion might have been, no evidence was ever presented that could have proved such an allegation.

There was also more "fall-out" for other counsel appearing for Anwar.

During the corruption trial, one of Anwar's legal team, Zainur Zakaria, had made an application to the presiding judge to exclude two of the prosecutors (one of whom was the current Attorney General Abdul Gani Patail) on the ground they had attempted to fabricate evidence against the accused. Justice Augustine Paul refused to hear the application ruling that it was not only misconceived, but also an abuse of process amounting to a serious contempt of court. He sentenced Zakaria to three months imprisonment to be served immediately. Refusing an application to stay the sentence pending appeal, it was only some days later that such an order was obtained from the Court of Appeal.

Justice Paul also issued a bench warrant for the arrest of the lawyer acting for a colleague of Anwar, who had written the letter on which the application was based. He too was charged with contempt, but the prosecution was not proceeded with after he explained that his permission had not been obtained to use the document. He was also forced to apologise to the court for disrupting the trial. The Judge and the Attorney General accepted the apology.

Another of the defence legal team, Christopher Fernando, was later to be involved in conflict with the Judge. I have already referred to the heated exchange between them and the subsequent remarks by Justice Paul that ultimately resulted in the contempt prosecution being brought against him.

Finally, members of Anwar's defence team were threatened with contempt when they refused to make final submissions in the case until the Judge had ruled on an earlier application that he *recuse* from continuing to hear the case. That application had been made because of a "grave apprehension" on the part of Anwar that the Judge was neither impartial, nor unprejudiced towards him. On this occasion, the Judge backed-off on the threat of contempt, but refused the application to disqualify himself.

Again this paper is not the appropriate vehicle to consider all the complaints about the Judge's behaviour and his rulings at the trial of former Deputy Prime Minister Datuk Seri Anwar Ibrahim. Concerns raised in Malaysia and by the international community seem fully justified, but the appeal brought on behalf of Anwar has since failed. It should be mentioned if only as a postscript.

Anwar Appeal Rejected: Where Now?

On 10 July, 2002, Chief Justice Mohamed Dzaiddin Abdullah, Chief Judge of Sabah and Sarawak Steve Shim and Federal Court judge Haidar Mohd Noor unanimously dismissed Anwar's appeal against his six years' jail sentence for four counts of corrupt practices for tampering with the police investigation into allegations of sexual misconduct. The Chief Justice reflected the view of the Appeal Court stating that:

> *...We have considered all complaints made by the appellant, in particular the question of unfairness of the trial judge throughout the proceeding. Suffice for me to say here after reading, and studying the grounds of judgement of the court below, we are satisfied that the errors complained of have not occasioned a substantial miscarriage of justice and we have to plainly say so and to uphold the conviction. The appeal against the conviction is accordingly dismissed.*

The Chief Justice also said that the court saw no reason to interfere with Justice Paul's decision to sentence Anwar to six years jail which he said "was not excessively excessive".

Anwar responded to the judgement with an impromptu speech from the dock condemning the Chief Justice for his "charade of impartiality" and dashing the hopes of the *rakyat* to see the judiciary rise again. According to observers, the Chief Justice sat stony faced as Anwar described the judgment as "a self-indictment by the highest court of the nation", "a blatant betrayal of the people's trust" and "a perversion of the rule of law".

One of lawyers appearing for Anwar on that morning was Karpal Singh. He told the media that the decision had contradicted the one made in the Zainur Zakaria appeal (against his conviction for contempt of court) in which Justice Paul's conduct as a judge was questioned by the Federal Court. He said the court should have at least found Justice Paul's order, that is to have the sentence start from the date of judgment, as irregular.

He went on to say that:

> *In that judgement, a federal court judgement had even said that he had acted like a prosecutor. His conduct as the trial judge was questioned. That fact alone should have at least warranted a re-trial if not an acquittal.*

Other lawyers and observers had plenty of adverse comments to make about the refusal of the appeal. It prompted widespread responses from various national and international entities including the European Union.

Certainly, the reformasi (or reform) movement Mr Anwar inspired has dissipated, with several of its leaders detained without trial under the draconian *Internal Security Act* 1960 *(ISA)* for allegedly promoting insurrections against the state. The once-dynamic alliance of opposition parties known as the *Barisan Alternatif (BA)* is in disarray.

The party forged in the heat of the reformasi movement, *Keadilan*, or the *National Justice Party,* is still led by Mr Anwar's wife, Dr Wan Azizah Ismail, but senior defections have severely dented its impact and morale. The momentum for political reform has also been unexpectedly reset by the 11 September attacks on New York and Washington in 2001.

Some observers cynically take the view that despite the Prime Minister's theatrical announcement at a recent *Umno Party* conference, he has no intention of retiring and relinquishing the power he so firmly keeps as his own and uses so often to get his way.

Postscript

There is one matter I should deal with. In this paper, some of the persons who provided information or opinion are described as "observers".

This is not a literary device to present my own views as that of others. These people asked that they not be named in any report that I might publish.

Perhaps this might be seen as being overly dramatic, but they gave as a reason the current political situation in Malaysia.

In other cases, the "observers" are named in the footnotes.

Members should also be aware that Karpal Singh was extremely appreciative for the support and assistance that had been given to him by the various international organisations that appeared as observers at the various proceedings. He has since written to me in the following terms:

> *5 March 2002*
> *Dear Mr Trowell,*
> *I write to place on record my appreciation and gratitude for your assistance in my sedition trial. It was a privilege to have met you.*
> *Please convey my thanks and appreciation to the Law Council of Australia, the Australian Bar Association and the Criminal Lawyers Association of Western Australia whom you represented and, of course, LAWASIA.*
> *With kind and warm regards.*
> *Yours sincerely,*
> *Karpal Singh*

Finally, may I take this opportunity of extending my deepest appreciation to the persons responsible for sending me to attend as an observer in Malaysia.

Firstly, to the Executive Committee of LAWASIA for appointing me to represent it on this important mission.

In particular, may I make special mention of the Hon. David K. Malcolm AC CitWA, Chairman, Judicial Section of LAWASIA and Chief Justice of Western Australia for his faith and support in proposing that I represent the organisation.

Special thanks also to Janet Neville, Secretary-General LAWASIA (Acting), for her invaluable support and assistance.

continued next page

Karpal Singh, from previous page

Additionally, I should express my appreciation to those organisations that also asked that I represent their interests in Malaysia and that also provided financial assistance.

These included Tony Abbott, President of the Law Council of Australia; Ruth McColl SC, Past-President Australian Bar Association (and her successor David Curtain QC) and Richard Bayley, President of the Criminal Lawyers Association of Western Australia. All of whom, together with LAWASIA, I was proud to represent.

There were also many persons who helped me on the ground in Kuala Lumpur. Special mention should be made of Dato' Param Cumaraswamy, *United Nations Special Rapporteur on the Independence of Judges and Lawyers,* Mah Weng Kwai, President of the Malaysian Bar Council, and his Vice President Roy Rajasingham.

Finally, I should also make mention of the assistance of the Federal Minister for Justice and Customs, Senator Christopher Ellison for providing me with diplomatic support in Malaysia and to the staff of the Australian High Commission, including Damien Miller (Third Secretary Political) who assisted with valuable information and advice.

This report should not end without at least some mention of the person at the centre of this drama. Karpal Singh is a larger than life character. He is part rascal, part fearless advocate.

For decades he has been a thorn in the side of the Malaysian Government. He has been an outspoken advocate of human rights and for over 28 years was an opposition member of parliament highly critical of the ruling party. Sometimes, the lawyer and the politician merge. In most other legal systems that would not be appropriate, but in Malaysia it is unavoidable. The political and legal systems constantly collide in Malaysia.

Some persons were critical of Karpal Singh for making what they believe was a political statement in court, even though he was appearing as an advocate. Obviously, he stretched the limits of political tolerance in Malaysia with his comments, but there was every basis to complain and it would have been wrong not to do so. However, in the context of that trial, once having made the remark about "people in high places" he immediately became a political target.

The advisability of making those comments may be debated endlessly, however, we should rather focus on the nature of the response. Some Malaysian lawyers have in the past been charged with sedition, but not for things said in court. As far as is known, the charging of Karpal Singh is the first instance anywhere in the world where a lawyer has been accused of sedition for words spoken in the defence of his client.

It has always been accepted that in various circumstances advocates may be dealt with for acts of contempt or professional misconduct, which have occurred in court.

However, as I said in my earlier Report, to bring a criminal charge against an advocate for words spoken in the course of legal proceedings is an act capable of destroying the immunity of counsel, which public policy has determined should exist to ensure fairness within a justice system.

As I also mentioned in my first report, the provisions of the *Sedition Act 1948* have been used in the past by the Government not only to restrict freedom of speech within the Malaysian community, but also at times parliamentary privilege. In this case, it was used to restrict the freedom of a lawyer to speak openly in court on behalf of his client.

For these (and other reasons) the trial of Karpal Singh had significant legal importance.

Karpal Singh remains an important member of that small band of Malaysian lawyers that is prepared to assert the principle of the rule of law and take on the executive and the judiciary to defend it.

That does not mean as lawyers they always get it right or that their conduct is always appropriate in the traditional sense. It does mean that more often that not, they find themselves in conflict with a system that often fails the essential tests of independence and impartiality expected within a democratic nation.

1 Refer to my first Report of 6 December 2001 for details of the adjourned proceedings.
2 The Star, *Wednesday, January 16, 2002*
3 Public Prosecutor v Param Cumaraswamy *[1986] 1 MLJ 512*
4 Distinguished Malaysain lawyer, Dato' Param Cumaraswamy has for some years now been the United Nations Special Rapporteur on Independence of Lawyers and Judges.
5 "Justice in Jeopardy: Malaysia 2000", *Report of the International Bar Association Joint Mission to Malaysia (in conjunction with the Centre for the Independence of Judges and Lawyers of the International Commission of Jurists (CIJL), the Commonwealth Lawyers' Association (CLA) and the Union of Internationale de Advocats (UIA), Journal of the Malasian Bar, page 6*
6 "Justice in Jeopardy: Malaysia 2000" Report

Advocacy, from page 13

In your discussions with the prosecutor you should obtain information as to your client's criminal history, the history of compliance with bail undertakings, the submissions to be made by the prosecutor in relation to the strength of the Crown case and the general attitude of the Crown to the whole of the application.

Wherever possible, before making an application for bail, you should give the prosecution notice of your intention so that there is no application from the prosecutor for an adjournment to obtain instructions or to prepare to meet the application.

A matter of interest to the court will be the length of time your client is likely to remain in custody prior to trial in the event that bail is not granted. You should therefore make enquiry of the Court Registry as to when the matter is likely to be able to be given a hearing date and you will be able to provide that information to the court.

Any court appearance that involves the liberty of your client is clearly a serious occasion. You should ensure that your preparation permits you to effectively present the strongest case for the relief your client seeks.