of those chambers in the Bar as a whole of which they are such an important part, the Bar and the community served by us would be better off.

Finally, I had pupils reading with me from 1985 – 1993. They and their colleagues and my juniors since then have persuaded me of two things. First, that I was lucky to come to the Bar before they did because they are so good. Second, there is more reason to believe that the golden age of the Bar is ahead of us, not behind us, although of course one thing I've learnt from being involved with the Bar Association is that there never was a true golden age.

Readers will note that this issue contains a series of articles with a focus on regional and security issues.

Michael Kirby writes on how our legal system should respond to the events of September 11. Nicholas Cowdrey writes on the role of an international criminal court (as opposed to war) in dealing with terrorists. James Renwick writes on the legal rules, in existence and being introduced, governing the intelligence services in Australia. Justin Young writes on the new East Timor Constitution being drafted. Sarah Pritchard writes on the issues raised by the recent Tampa decisions.

Australia's recent treatment of asylum seekers is a matter which has raised great concern among members of the community. It is far from obvious to many that the policy of the previous government (which largely had bipartisan support) provides a solution that is humane, sustainable or consistent with Australia's international obligations and long term interests. This is an issue which has not, to date, greatly activated the NSW Bar Association, although individual members may have made contributions to public debate on the topic. It cries out for more attention. Contributions from members on this or any other topics are as always greatly welcomed.

We are also fortunate to be able to reproduce the Sir Maurice Byers lecture given, this year by McHugh J.

Finally, there is the welcome return of Bullfry Q.C.. Our thanks as always to Poulos Q.C. for his drawings of Bullfry Q.C.

Justin Gleeson S.C.

Reality training

Dear Sir,

Special thanks to Bryan Pape, Rena Sofroniou and Paul Daley for their contributions to the Winter *Bar News* 2001.

There used to be a form of reality training for budding lawyers. It was called 'Articles of Clerkship'. Even 'bad' articles could, and it was not really a paradox, provide very pertinent reality training.

There has been for many years a great shortage of junior assistants. This seems to have made ordinary practice so tight that the availability of pro bono services have been curtailed at the level where people need them most - the solicitor's office.

Articles of Clerkship may not suit these times but a form of internship for law students might. The first 500 hours might be unpaid but the next, say, 1500 might be paid at reasonable junior rates. The maximum number of hours per week might be limited to 15 during any semester. UTS seems well set up to introduce such a system. Detailed safeguards would be necessary. However, it seems likely that such a system would strongly reinforce problem based learning techniques used in the Law Schools.

The fact that only a few hundred might benefit does not seem to be reason to refuse them the benefits of such a system. The reasons originally given for abolishing Articles did not seem to many of us very appealing. Is it time for another look at a modern system of workplace legal training?

David Nelson

South African Judiciary

Dear Sir,

The Hon. Justice Ipp's otherwise erudite, well structured, and commendable address entitled 'Enduring values and change' reproduced in the *Bar News* Winter 2001 edition, requires qualification and response to his observations about the behaviour, in trials of a political nature, of the South African Supreme Court judiciary in the worst periods of the apartheid regime.

His Honour's statement that appearances before judges by barristers for the defence in political trials involving terrorism and sabotage and related offences was 'really unpleasant,' and that the judges who presided over these trials, having been hand picked, 'would be extraordinarily hostile in every respect throughout the trial to counsel for the defendants'(p.40), does not accord with my experience when I appeared during the 1970s and again in the late 1980s for the accused in political trials, and for litigants in civil proceedings against cabinet ministers or organs of state.

His Honour's observation that 'practise at the Bar breeds independence of mind and attitude' and that 'subconsciously, barristers are trained to think for themselves, to be sceptical and critical, not to owe overriding allegiance to an institution or political party, and to resent and combat injustice' (p.39), although trite, deserves emphasis. All the judicial appointments to the Supreme Court Bench during the apartheid era were nominated by the minister of justice with the approval of the Cabinet and were chosen, with one exception in the case of an appointment of a particular chief justice with an academic legal background, from practising members of the various Bars. Judges were, in the main, from Afrikaans, and to lesser extent, English and Jewish backgrounds.

Supreme Court judges Boshoff, Irvine Steyn, de Wet, Henning, Auret van Heerden and Thirion, provided the best evidence and argument for appointing judges from senior and experienced barristers practising as individuals at an independent Bar. All these judges were from conservative Afrikaans backgrounds. They were members of the Bar at the time of their appointments. They were Nationalist Party (government) supporters. Notwithstanding this, and because they had come from the Bar to the Bench, they tried the cases of the kind in question in which I appeared before them without fear, favour or bias in accordance with their oaths of office and without any 'allegiance to an institution or political party'. The same was true of justices John Milne, Raymond Leon and Andrew Wilson who, from time to time, tried cases of a political nature. They were English speaking and doubtless voted for the Progressive (anti-Government) Party.

The 18 month long '*SASO*' trial early in the 1970s is a good illustration of the point I am making. Instigated by the minister of justice to eradicate and silence the South African Students Organisation (SASO) and

the Black Consciousness movement, seventeen or more young students at Black, Indian and Coloured universities were indicted on charges under prevention of terrorism legislation with conspiracy to overthrow the South African Government by violent or forceable means and other lesser altemative charges. Conviction could carry the death penalty. It was a 'showcase' political trial. The accused were a highly intelligent, articulate and vocal group of young black activists. A cheerful lot who rather enjoyed the fact that they had been charged. They were treated as arch enemies of the state. They suffered the hardships of detention by the security police with great fortitude. They were taken from gaol to and from court each day handcuffed, accompanied by a siren-wailing police escort. To suggest that they had plotted to overthrow the government of the day by violent or forceable means was sheer nonsense. Nevertheless, the attorney-general and the security police earnestly set out to prove this.

'The purpose of this letter is to demonstrate from the South African apartheid experience the case for the appointment of judges from an independent Bar.'

Justice Boshoff might have been 'hand picked' to try the case. If he was, he turned out to be a bitter disappointment to those who chose him. He was reported to be a friend of, and golf-playing partner of, the then prime minister, John Vorster. The judge made short shrift of the attorney-general's attempt to salvage his hundred or more page defective indictment on a defence motion to quash it, with the result that several of the accused were released. He allowed a defence application for the discharge of some accused at the close of the prosecution case. His decision was discretionary and the application was vehemently opposed by the attorney-general.

It seemed to me that the judge had seen through the minister's political objectives in indicting the accused on capital charges. In the result, he acquitted all the accused on the main conspiracy charge. On their convictions for making public statements likely to further feelings of hostility between race groups at public rallies and in publications, no accused was sentenced to more than the mandatory five year gaol term.

As an attempt by the minister of justice to eradicate and silence SASO and the Black Consciousness movement, the support for which had been languishing before the trial, it was a total failure. The trial was attended daily by foreign observers; it got wide national and international publicity. The organisations went from strength to strength. Several of the accused now, deservedly, hold high office in the ANC and the democratic government institutions set up in the post-apartheid era. One of the accused, a handsome young Indian poet, caught the eye during the trial of the judge's associate, a young, attractive, Afrikaans lass and the daughter of another judge of the same court. During the trial they surreptitiously exchanged notes and love letters in violation of the taboos of the time. I later learnt that the young lovers who had met in such unique circumstances went on to marry each other in the UK. The *Prohibition of Mixed Marriages Act* would have prohibited this in South Africa!

In fairness, it must be said that there were reports of South African judges, two in particular, one English, one Afrikaans speaking, both from the Transvaal Bench, who behaved in political cases in the manner described in His Honour's address. They were, fortunately, the exception not the rule.

The purpose of this letter is to demonstrate from the South African apartheid experience the case for the appointment of judges from an independent Bar at which barristers practise individually. Those who advocate to the contrary should not be listened to. It is up to the politicians to ensure that the remuneration and entitlements of judges are sufficient to elevate to the Bench the Bar's most able and experienced members. Financial sacrifice, as sometimes occurs, should not be a prerequisite to a judicial appointment.

Roy Allaway Q.C.

DPP responds

Dear Sir,

I have read in the Winter 2001 edition of *Bar News* the 'Opinion' piece at pages 20-21 by The Hon. J A Nader RFD Q.C.. In my view the article presents an inaccurate and unfair picture of the exercise by my Office of its prosecutorial discretion.

Mr Nader has never raised concerns of this kind with me; nor was his article provided to me for comment before publication. No judge has raised such issues with me. (My address is not a state secret.) I have since discovered that Acting Judge Nader made some remarks in a similar vein from the Bench in April 2001, but the transcript has only just reached me. It appears that he has not taken the trouble to consider the statistics in my Office's official records or those of the Bureau of Crime Statistics and Research or even to request information from me or my senior officers.

When Mr Nader writes of my Office he writes of me, because pursuant to the *Director of Public Prosecutions Act 1986* the decision to prosecute or to discontinue a prosecution resides with me and I delegate that power to nominated officers in particular circumstances. I am an avid defender of the just rule of law and my officers and I are guided in our decision making by the law, the evidence and my Prosecution Policy and Guidelines (a document that is publicly and freely available). We disregard entirely any clamour in the media and the manoeuvring of politicians, especially 'vocal but uninformed criticism'. We are routinely required to withstand and sometimes to put aside even trenchant criticism.

The facts should be summarised briefly.

For some ten years or more we have been presented with increasing numbers of allegations of child sexual assault. This is not confined to New South Wales – it is a national and international phenomenon. There is reason to believe that the increase is not due to increased offending (which has always been present), but is due to increased reporting. We know that there is substance in these reports – they are not the result of some mass hysteria in a section of the population. We also know that some of the reports are false.

Such offences, by their very nature,

are often committed, reported and prosecuted in the circumstances described by Mr Nader under the heading 'The general circumstances'. Is he suggesting that in all (or even most) such cases I should take the place of the jury and administratively, peremptorily determine the proceedings – despite there having been committals for trial (which, in footnote 2, the author does not criticise: for reasons that, at least to me, are far from 'obvious')?

Many cases in this category are in fact discontinued by me and my delegates in the exercise of judgment in accordance with the Prosecution Policy and Guidelines. The majority of the cases that proceed are resolved by pleas of guilty and never get to juries. Presumably (according to Mr Nader) the finding of bills of indictment in those cases has been an abuse of process as well.

The identification of meaningful statistics about criminal proceedings is a difficult and complex exercise. Each case is unique and there are many variables to be taken into account, making comparisons difficult. It is simplistic and may be misleading to say that 'Most of these trials result in acquittals by juries'. In fact, the conviction rate in child sexual assault (CSA) cases that proceed to verdict in NSW is slightly above the general conviction rate for all trials. By way of example, for the year 1999-2000 the conviction rate in all trials that proceeded to verdict was 43.7 per cent (consistently with other years). The rate of conviction in CSA trials that year was six per cent higher than in non-CSA trials.

'We disregard entirely any clamour in the media and the manoeuvring of politicians, especially 'vocal but uninformed criticism'.

Some appeals from convictions are successful – usually because the judges have been found to have erred in the admission of evidence or in their directions to juries. (The author is included in such statistics, on at least one occasion for not having sufficiently warned the jury of the dangers of convicting. And I am not aware of any case in which Acting Judge Nader has taken it upon himself to stay any such proceedings. In the case in April 2001 in which he made public remarks, the charges were not withdrawn from the jury at the end of the Crown case, nor was a 'Prasad' direction given. The trial proceeded its full length and the jury's verdict was taken.) Judges are required to give warnings to juries about acting upon various categories of evidence in all these cases, but juries still convict.

There are well established procedures in my Office for dealing with victims, in accordance with the Charter of Victims Rights and other instruments and guidelines in place (and too numerous to describe here). Despite our best endeavours, some victims do become emotionally distressed, whether or not there is an acquittal and regardless of their preparation for the trial. That experience is not confined to child sexual assault cases. My officers also suffer in these circumstances. Throughout the proceedings, my officers provide explanation and support in an appropriate fashion and we have specialist Witness Assistance Service officers on hand. (Why does Mr Nader assume that such measures are not taken?)

My Prosecution Policy 5 lays down the tests to be applied when deciding whether or not a prosecution will be commenced or continued. My officers and I follow that Policy. The fundamental question is whether or not there is a reasonable prospect of conviction by a reasonable jury properly instructed as to the law. That question is addressed in every case we prosecute, based on the available admissible evidence and the law. Naturally, in every case the answer requires the making of a judgment on the basis of what is known at the time and that judgment requires, amongst other things, that the admissible evidence available be considered in the light of the probable course of the trial and the warnings that will be given by the judge.

Mr Nader's final attack on my independence cannot pass unchallenged. I am constantly subject to 'vocal but uninformed criticism' from many quarters (now, apparently, also from Mr Nader); but in my nearly seven years in office that has never influenced my decisions one whit. He says that he 'raise[s] for consideration whether there is any connection between' what he suggests may be a policy decision to prosecute almost every case (a 'flood') of child sexual assault, regardless of the prospects of conviction, and the publicity given to unsubstantiated allegations of official protection of paedophiles. I resent and reject that suggestion. There has never been such a policy decision. Prosecution decisions have not been and are not in any way influenced by publicity of any kind.

My senior lawyers, Crown Prosecutors, the Deputy Directors and I (all but the senior lawyers being members of the NSW Bar Association) do not conduct ourselves in the way suggested by Mr Nader and we are offended by what he has written.

Nicholas Cowdery Q.C.
Director of Public Prosecutions