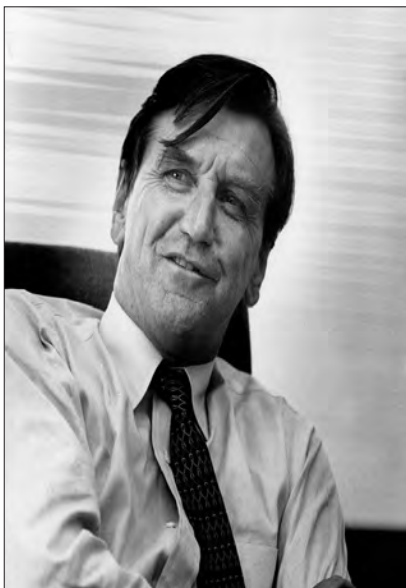


George Gurney Masterman QC (1929–2016)



He knew many people in high places, but would never let fear of displeasing someone with power interfere with his doing what he decided was right.

Allen & Hemsley, under the formidable Sir Norman Cowper. It was there that he became friends with another articled clerk, James Wolfenson, later head of the World Bank.

He was admitted as a solicitor in March 1956, went to the bar in August 1957, and took silk in 1972. At the bar he developed a practice that covered an impressively broad range of fields of law. He had a deep knowledge of the law – not just of one or two areas of the law but of the law as an entire operating system. He had the creative intelligence to identify principles that could bear on a case in a way that was not at first obvious, and use them to test conventional understandings. Just one small example is that at a time when the *Trade Practices Act 1974* was still novel he realised, in the short time available to prepare a defence to an interlocutory injunction application, that even though the Federal Court had been given exclusive jurisdiction to hear actions under Pt IV of the Trade Practices Act, it was possible to raise a defence in an action in the Supreme Court that a contract being sued on was contrary to s 45 of the Act¹. He argued many cases that have been of lasting significance – though, inevitably for any barrister, not always on the winning side. They included *Trade Practices Commission v Tooth & Co Ltd*² (which brought an end to the system of brewers owning pubs and leasing them subject to a tie that required that only the beer of that brewer be sold there), *R v Judges of the Federal Court*³ (which decided that the provision in the Trade Practices Act that says that 'any other person' can bring an action to seek an injunction enforce the

Act means what it says, so that a trader has standing to require its competitor to observe the Act), and *University of New South Wales v Moorhouse*⁴ (which held that universities had been aiding and abetting breaches of copyright by having photocopying machines in their libraries for students to use unsupervised – a decision which led to legislative change to provide for compulsory copyright licensing to educational institutions)⁵. He appeared in many of the cases and tribunal inquiries that tested the limits of the *Trade Practices Act 1974* in the decade or so after its introduction.

His practice at the bar was not just a matter of receiving briefs and appearing. The NSW Government appointed him as an inspector to inquire into the collapse in 1975 of the stockbroking firm Patrick Partners. He acted pro bono in many cases that raised public interest questions, civil liberties or consumer rights – as varied as defending the publisher of *Portnoy's Complaint*, defending nude sunbathers, and seeking leave (unsuccessfully) to appear for the International Commission of Jurists as an intervener or an *amicus curiae* in the Stolen Generations case⁶. They included advising a student filmmaker who had liberated a copy of her exposé of what went on in a chicken-processing factory when her film school decided the film was not suitable for public viewing⁷. His opinion to the International Commission of Jurists, that the NSW Coroner might have jurisdiction to investigate the death of one of the Australian journalists killed by Indonesian troops in East Timor in 1975 was one of the causes of a coronial inquest eventually being held in 2007

George Masterman QC died on 2 October 2016, aged 87. He was an outstandingly individual member of the bar – hugely intelligent, energetic, fearless, always elegantly dressed and fit-looking, patrician in manner but generous and open in spirit. He knew many people in high places, but would never let fear of displeasing someone with power interfere with his doing what he decided was right. He leaves behind a great legacy of contribution not only to his clients but also to the law, to the barristers who were fortunate enough to have crossed his path, and to the Australian public. For nearly all of his time at the bar he was a member of the Eleventh Floor, where he will be particularly missed.

After secondary schooling at The King's School he was awarded the Broughton Scholarship, and studied at Oxford University from 1949 to 1952, receiving an MA. During his time at Oxford he travelled in the Middle East with Rupert Murdoch. Upon returning to Sydney he studied at Sydney University Law School. As was the practice then, he served articles of clerkship concurrently with the last years of his degree, at Allen

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into the death of the Balibo Five.⁸

He was particularly generous and helpful to young barristers, encouraging solicitors to brief promising young juniors, and being very willing to share his knowledge and experience. I remember practical advice like ‘Get an expert involved early – then it becomes his case’. He was the co-author, with Zeke Solomon, of a textbook on the *Trade Practices Act 1965*⁹, described by Ninian Stephen QC as ‘from a practitioner’s viewpoint quite the most useful of the several Australian texts now available which examine and comment upon the Commonwealth Trade Practices Act.’¹⁰ While running his practice he also was a visiting professor at the University of NSW in the 1970s. The courses he taught showed the range of his interests and abilities – he taught the technical and detailed subject of patent law, and also a course advising students on the techniques of representing public interest groups¹¹.

But his interests and energy were not confined to practise as a barrister. He was a director of the Australian Institute of Political Science, its chairman for two years, editor of its magazine *Australian Quarterly*, and editor of books of its proceedings.¹² He was a member of the NSW Writers’ Centre Management Committee in the 1970s, and a member of the Australian Society of Authors. He played hockey for many decades, first with the Legal Eagles (a team started in 1956)¹³. He was an instigator of the re-formation of a Bar hockey team in 1990¹⁴. In 1995, when George was in his mid-60s, *Bar News* referred to his ‘enthusiastic and vigorous play’ for the bar hockey team¹⁵. For a while in 1989 – 1991 he was ‘reader’s editor’ of the *Sydney Morning Herald* – a position intended to allow him to adjudicate independently on readers’ complaints

He reported to parliament that such a system was ‘a dangerous charade likely to deceive the public into believing that there is a public watchdog or guardian when there is not’...

about stories, and possibly expose broader issues about newsgathering or newspaper production. However after producing a number of reports with findings adverse to journalists, journalists blackbanned co-operating with him. The position became untenable, and he terminated his contract¹⁶. He provided practical assistance when his wife Joan established ecotourism ventures in Tasmania.¹⁷

His single greatest contribution was the period he spent as ombudsman of NSW, from April 1981 until he resigned effective in early 1988. The position of ombudsman was created by the *Ombudsman Act 1974*, with some powers to investigate and report on complaints about the conduct of a public authority. Some additional powers of oversight of the police were conferred on the ombudsman by the *Police Regulation (Allegations of Misconduct) Act 1978*. George was the second ombudsman appointed in NSW, and the only silk to have ever filled the office. A front-page story on his appointment in the *Sydney Morning Herald* referred to him as ‘dashing and unconventional’.¹⁸ He certainly proved to be unconventional, as he transformed the office totally – to such an extent that he is sometimes mistakenly referred to as having been the first ombudsman. He applied his energy, intelligence, imagination and courage to turning it into as effective a questioner of the legality and fairness of administrative action as the legislation permitted. Under the Ombudsman Act he used to the full the powers of a royal commissioner to investigate complaints, the power to conduct an investigation of his own motion, and the power to

make special reports to parliament. He was well aware that a complaint that was not particularly significant in itself could be the result of a systemic weakness in administrative procedure, that should be corrected. He developed a procedure for according natural justice to people involved in an investigation, under which if any adverse comment on a person was being considered that person was provided with a draft of the parts of the report that bore upon his or her conduct, and given the opportunity to make submissions.

When he became ombudsman, the powers he had concerning complaints against the police were confined to reviewing a file of papers that emerged from the police’s own internal investigation of the complaint. He reported to parliament that such a system was ‘a dangerous charade likely to deceive the public into believing that there is a public watchdog or guardian when there is not’¹⁹, and ultimately the Court of Appeal upheld his view that he was entitled to decide that he was neither satisfied that a complaint was sustained, nor satisfied that it was not sustained²⁰. This led to a legislative change, which allowed the ombudsman to conduct his own investigation once the police had finished theirs. In consequence police were seconded to the ombudsman’s office to assist in these re-investigations²¹.

He was so effective in investigating and exposing deficiencies in administration that many public servants, police and ministers resented his effectiveness. After his period as ombudsman he was never offered the judicial position for which his intellectual ability and knowledge

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undoubtedly qualified him. But his public contribution both as a barrister and as an involved citizen was enormous.

By the Hon JC Campbell QC

Endnotes

1. *Hollywood Premiere Sales Pty Ltd v Faberge Australia (Pty) Ltd* [1976] 2 NSWLR 144
2. (1979) 142 CLR 397
3. (1978) 142 CLR 113
4. (1975) 133 CLR 1
5. Others – by no means a complete list - were *Interlogo AG v Toltoys Pty Ltd* (1973) 130 CLR 461 (construction of patent specification concerning Lego); *R v Trade Practices Tribunal; ex parte St George County Council* (construction of ‘trading corporation’ in s 51 (xx) constitution); *Pigram v A-G (NSW)* (1975) 132 CLR 216 (whether terms of schoolteacher’s bond constituted a penalty); *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107 (when the Crown is bound by statute – in particular, application of the *Trade Practices Act* to the Queensland Commissioner of Railways); *Minnesota Mining and Manufacturing Co v Biersdorf (Aust) Ltd* (1980) 144 CLR 253 (validity of patent for breathable surgical tape); *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 (what is federal jurisdiction) and *Wacando v The Commonwealth* (1981) 148 CLR 1 (a predecessor of the *Mabo* land rights recognition cases)
6. *Kruger v Commonwealth* (1997) 190 CLR 1
7. *Sydney Morning Herald* 11 October 1977 p 8
8. http://www.nationalprobono.org.au/ssl/CMS/files_cms/BaliboInquestandProBono.pdf
9. Masterman G & Solomon, E *Australian Trade Practices Law* (Butterworths Australia 1967)
10. Stephen, N M ‘Australian Trade Practices Law’ 6 *Melbourne University Law Review* 453
11. *Sydney Morning Herald* 29 April 1981 p 1
12. Eg *Poverty In Australia* (Angus & Robertson 1969), *Big Business in Australia* (Angus & Robertson 1971)
13. *Bar News* Summer 2006/7 p 118
14. *Bar News* Spring 1990 p 40
15. *Bar News*, 1995, p 53
16. Finkelstein, R Report of the *Independent Inquiry into the Media and Media Regulation* (Canberra, Australian Government 2012) p 202 –3 para 7.44; Muller, D ‘Media Accountability in a Liberal Democracy. An examination of the harlot’s perspective’ (Melbourne, Centre for Public Policy Department of Political Science University of Melbourne) <http://www.denismuller.com.au/documents/MullerPhD.pdf> Chapter 9
17. ‘Forget David Walsh: Joan Masterman gave birth to Tasmania’s tourism boom’ *Australian Financial Review* 26 April 2016
18. *Sydney Morning Herald* 29 April 1981 p 1
19. Special report to parliament March 1982
20. *The Ombudsman v Moroney* [1983] 1 NSWLR 317
21. The history is more fully set out in Landa, D & Dillon, H ‘Public Accountability & External Review of Police Conduct’ in *Police Leadership in Australia* (B Etter & M Palmer eds) 122 – 136 and Masterman G 1988 ‘External Review: the New South Wales Experience’ in Freckleton, I & Selby, H (eds) *Police in Our Society*, Butterworths, Sydney 1988

John Barrington Bishop (1937–2016)

Dr John Bishop, barrister at Third Floor Wentworth Chambers, died on Saturday, 3 September 2016. His funeral was held at St Andrews Cathedral in Sydney. The following is an extract from the eulogy delivered by Kanishka Raffel, dean of the Parish of Sydney.

John Bishop was born on 22 April 1937 to Bruce and Lena Bishop. He was the youngest of two boys. John attended Canterbury Boys High School, a selective public school with many prominent alumni, including former prime minister John Howard, who was at the school at the same time as John. John excelled in literary subjects, such as Latin.

From his youth, John was a life-long fan of rugby league and was an avid follower of the St George Dragons. He attended the University of Sydney and attained a Bachelor of Arts degree with first class honours. He majored in Hebrew, as he had a deep love of the Old Testament. He also undertook theological studies and joked that, if ever ordained, he could end up as Bishop Bishop. After undertaking studies in economics he

settled into the study of law. He was awarded a Bachelor of Laws degree with first class honours and then a Master of Laws degree with first class honours, both from the University of Sydney. John also undertook doctoral studies through the London School of Economics and Political Science. This entailed many visits to London to see his supervisor. He was awarded his PhD in law in 1988.

He worked as a lecturer in law at Macquarie University from 1978 to 1984. He lectured in the administration of criminal justice and in evidence and procedure. He enjoyed setting examination questions which entailed hypotheticals featuring the St George Dragons, much to the amusement of students.

He began practising at the New South Wales Bar in February 1978. He practised mainly in common law, criminal law and administrative law. In 2001 he was appointed as counsel assisting the Royal Commission into the Building and Construction Industry in Melbourne. He maintained a thriving practice until his death at the age of 79.

Arguably his major contribution to law was as an author. He wrote *Criminal Procedure*, first published by Butterworths in 1983 and which went to five reprints. A second edition was published in 1998. The book remains a seminal authority on criminal procedure from a national perspective and an important practical resource for judges and practitioners in the field of criminal law.