REMARKS OF THE HON. MARILYN WARREN AC
CHIEF JUSTICE OF VICTORIA
ON THE OCCASION OF

THE BAR READERS UPON SIGNING THE BAR ROLL

20 May 2010

Your Honours, Mr Chairman, Ladies and Gentlemen and, particularly, the newest members of the Victorian Bar.

On these occasions it is accepted that there should be lots of war stories about 'when I was at the Bar'. There is usually advice about 'preparation, preparation and preparation'.

I think those stories and that advice are not much point, mostly irrelevant. You see, whilst we all belong to an ancient profession and a very old Bar, all that is the past. When we look across to the William Street windows of this room we see a glorious example of 19th century architecture, but, the portrayal of justice in an old fashioned way.

While there is no substitute for experience – and you are yet to have that – you, the newest members of the Bar have something none of the judges, mentors and other barristers here tonight possess. You hold the future. You are the future.

You have doubtlessly been told you are coming to the Bar at a tough and challenging time. The fact is that for most of you it will not be all that tough and challenging because of who you are and where you have come from.

Mostly, the group tonight is dominated by Gen Y. There may even be some Gen dot com people. For you, as distinct from all the judges and barristers present, possess a pre disposition to change, innovation, experiment and generally moving on.

As judges we see some barristers come to court presenting their cases in the same old way as if oblivious to law reform, significant change within the legal system and dramatic change within the courts themselves. We live within an age of therapeutic and restorative justice. Concepts such as the Drugs Court, the Koori court, neighbourhood justice centres, alternative dispute resolution (especially mediation) are concepts you have not only studied at law school but also developed skills in.

Significantly, you have IT skills that enable you to steel a march on well-established barristers at the Bar.

Let me give some examples. We are told by the Victoria Police that national and international cyber crime and organised crime through computer fraud, identity theft and other digital means is increasing in prevalence. We have sophisticated and complicated terrorism laws to deal with the challenges that type of activity involves. At the heart of this type of litigation lies the capacity to understand technology. By that I mean much more than the capacity to send emails or check the internet. There needs to be a sophisticated understanding of how technology works. Given that most of you have those skills, you should not be modest about them. You will have skills that far exceed the majority of your colleagues at the Bar.

Last year, at the Supreme Court Judges' Conference, we invited academics to talk to us about cyber crime. We also invited Dr Matt Collins from the Victorian Bar to talk to us about technology and how it might be used in litigation. We now see the phenomenon of modern technology impacting on the courts. Recently the Court of Appeal was called upon to consider a difficult and complex matter relating to suppression orders and their utility in the face of the internet. It cannot be underestimated that in criminal trials the making of a suppression order is dramatically more complex than simply a judge ordering non-publication. The timing of the publication is critical because if material has been put on the internet in one sense it is the end of the story in terms of suppression. There would be many members of the Bar who would not understand the technical analysis contained in the Court of Appeal majority judgment. The name of the case is suppressed, for the moment, but copies of the judgment are available in hard copy from the Supreme Court librarian on request. I recommend you read it.

Moving then from your IT advantage there is your skill at creative and innovative ways of preparing and managing cases. These days intensive judicial management is the way we go. No matter the jurisdiction, civil or criminal or other, rarely does a case go straight to hearing without some form of management especially in the higher courts.

Opportunities exist in the Supreme Court in the Commercial Court for creative barristers to participate in case management conferences and early neutral evaluation. These concepts are new to many barristers still. For most of you with your academic and professional training you will find it easy to adapt to the demands made by those judges. In fact, harking back to what I said about your IT skills, we are moving more and more in commercial litigation to higher levels of management and preparation of litigation. Law firms have an

expectation that the barristers briefed will be able to manage discovered documents that have been prepared digitally, present the documents in commercial trials on screen and have the capacity to guide the judge and witnesses through the documents, on screen. This, again in the context of commercial litigation, is how you will be able to steal a march.

But it does not stop with commercial proceedings. In the Supreme Court we have what are called Section 5 hearings within fourteen days of a person being committed for trial. There are, in effect, twenty questions that judges will ask the prosecution and defence counsel. There may be opportunities for you to gain a brief, a junior brief, helping to prepare for the provision of answers to the judge. The days are gone when the defence remains silent until the prosecution case has finished. The days are gone when the prosecution sorted out the case shortly beforehand.

Which leads me to observe the phenomenon of the growing juniority of criminal briefs within the County Court. This causes rumblings in some quarters and, of course, there are times when lack of experience leads to error leading in due course to judicial error and ultimately to the overturning of a conviction on appeal. All that said the briefing of newer and more junior members of the Bar is to be encouraged, not discouraged. After all, being briefed is a competition. The prosecution and Victoria Legal Aid should brief the best and not the same barristers because they are the people they have always briefed. I have made it plain to both the OPP and VLA that they should be satisfied before they brief that the barrister is fully up-to-date on the new evidence and criminal procedure provisions.

This again is where you as the new members of the Bar are able to steal a march. Most of you will have been trained at university on the new evidence

provisions. You will know the Commonwealth and New South Wales authorities and how to apply them. There will be many members of the Bar yet to come to terms with the new provisions. They have been in operation since 1 January and are having a significant effect in both criminal and civil litigation.

So, to recapitulate you have an advantage with IT skills, your flexibility and innovation and your knowledge of significant changes in the law. There is more to come with law reform. Shortly we will see the rollout of the new Civil Procedure Reforms in both State and Federal courts. There will be pre-action protocols, new rules of discovery and expanded judicial power for the management of cases.

Which leads me to a topic I want to explore, the takeover of the preparation of trials by the profession. Regrettably in the last 10 to 15 years the law firms have stolen a march on the Bar and for the most part control and manage the preparation of cases for trials. We see particularly in commercial litigation the consequences of this phenomenon. These days it is unusual, indeed rare, for counsel to receive a brief on evidence. We have tried a number of measures in the Supreme Court to overcome this but the firms have managed to maintain their stranglehold. Significantly with the establishment of the Commercial Court and the expansion of commercial litigation in the Supreme Court we see counsel involved at a much earlier stage. However, with other civil litigation because of the sheer volume of that litigation, change will take a long time. But this is where the new members of the Bar come into the picture. You are the leaders of the Bar of the future. It will be up to you to reinforce the excellence of the advocacy side of the profession. We have a divided profession in Victoria because there is a clearly identified need or

difference between providing advice and preparing a case for trial and actually running the case for trial.

The same point may be made about appeals. I have raised earlier this week when addressing the Bar the prospect of specialist accreditation to achieve an increase in legal aid fees. It is not something the Bar should be fearful of. Indeed it will be an opportunity for the Bar to demonstrate its expertise and provide a guarantee to the community of competence but moreso excellence. The new members of the Bar would have no difficulty with accreditation, indeed it will be a way for the talented members among you to rise to the top.

Mentioning legal aid leads me to talk about pro bono work. I studied the program or syllabus of your course. Sadly only a limited amount of time was devoted to encouraging pro bono work. However, for new members of the Bar pro bono work is a doorway through to litigation. It enables you to practise and in the early stages that is something you need more than anything. It also enables you to participate in and fulfil the great traditions of the Victorian Bar in helping those in need and ensuring the proper administration of justice. You never know, you might find yourself with a pro bono brief to appear in the Court of Appeal. The judges will be kind, I promise.

So what do you do in the coming weeks. Some of you will be fortunate enough to have a brief already, others will be waiting. It is a time of trepidation. When the moment comes and you are on your feet, it will be a time of exhilaration. Life at the Bar has its ups and its downs. There will be an attrition rate from this group but I urge you to be courageous and ambitious. When you have times waiting for the brief seize the moment to go

and watch, listen and learn. Visit everywhere. Go to VCAT, Commercial Court Directions Days, the Associate Judges' courts, the main court of the Magistrates' Court – do not solely go to the glamorous, exciting trials. Go and observe the areas where you may have a prospect of obtaining a brief. Comfort zone is very important. When Australia won the America's Cup for the first time one of the things they worked on was their comfort zone, that is knowing about the feeling of winning. The idea was when they found themselves leading the Americans, they would not panic and ask the question what am I doing here? The more you know about what is likely to happen the more comfortable you will feel in what you do.

Having said that advocacy is not about copying. It is about self-expression. It is about the expression of personality. You will have acquired many, many skills during the course of the Readers Program. As a graduate from the program I promise you nothing will be as daunting as the moot exercises, or what used to be called, the video exercises.

Be yourself at the Bar. It is not possible to copy Alan Archibald, Julian Burnside. Robert Richter, Fiona McLeod or Debbie Mortimer. Be yourself, confident in the fact that you have the IT skills, the flexibility and innovative capacity together with the intellectual knowledge of the new law to be able to tackle almost anything and if there is something you feel you cannot tackle, you will set about finding out how to do it. Tha is your training after all these years culminating with the Bar Readers' Course and this afternoon the signing of the Bar Roll.

There will be moments when you will be challenged and your courage will be tested. You join one of the great Bars of the English speaking world. It is the Victorian Bar that stands up for legal principle, the proper administration of

justice and the rule of law. Politicians sometimes say things that are regrettable. They suggest that a lawyer promoting or representing the interests of a client is "a leftie greenie lawyer". Other politicians might say when a legal challenge is made it is just resorting to "pulling the wig on". It is none of those things.

We, and I deliberately use the plural we, are a proud and courageous Bar. Recently Chief Justice Keane of the Federal Court described Victorian advocates as "second to none".

I agree wholeheartedly.

I wish you every success and courage in the years that lie ahead – for most of you, most of the time, it will be "the time of your life".