

Brian Bourke Talks About 50 Years in the Law

Interviewed by Patrick Tehan QC

Patrick Tehan QC: *Brian, you have been a lawyer for 50 years. You've still got a very active practice, in court almost every day. Why do you still do it?*

Brian Bourke: I still get a kick out of being able to appear and have the odd success either in the County Court or the Magistrates' Court, or the odd Supreme Court murder that I still do. It just keeps me active and I still associate with others at the Bar. The latter is one of life's great joys.

PT: *You came to the Bar in 1960 but before then you were a solicitor for some years. What sort of work did you do as a solicitor?*

BB: It was primarily liquor work. I did a five-year articulated clerks course. I actually started articles in 1948. I was admitted in 1953 and I worked as a solicitor until 1958. I went overseas for about 18 months and came to the Bar early in 1960. The liquor industry was strictly controlled and there was a great deal of work.

PT: *Well, there used to be a lot of licensing liquor cases before the Magistrates' Courts, Courts of Petty Sessions in those days, sly grog cases, those sorts of cases. Why were there so many?*

BB: Well, if we can deal with the second matter first. So far as sly grog was concerned, there was a limitation on the types and numbers of licenses that could be issued by the Licensing Court. Until 1954 no more licenses of each type could be issued in a particular area than that issued in 1917. That coupled with the fact of 6.00 pm closing and no Sunday trading until 1966 led to a large number of illegal outlets. Courts at South and Port Melbourne, Richmond, Hawthorn dealt with a large number of sly grog cases. I was regularly briefed to appear in prosecutions both for licensed and non-licensed persons until the late sixties.

PT: *You would have had the opportunity as a young solicitor in those days*

to brief some good counsel and see some good judges. Who were they?

BB: Well, the best judge I ever saw in my life was, (and the best judge I ever appeared before) was Tom Smith, but there were some wonderful judges: Sir Henry Winneke who became Chief Justice in 1964; Lush, Gowans, Newton, McInerney, Bill Harris, Starke and Crockett; some on the County Court — Leo Dethridge, one of the most kind, pleasant and affable men I have known; and fellows like Bernie Shillito and Jim Forrest.

So far as advocates, I had a great opportunity to see them when I was doing long articles and after admission — no-one came near Jack Cullity. But the other leading advocates of the day were fellows such as Vic Belsen, Rob Monahan before he went to the Supreme Court Bench, Frank Galbally, and Ray Dunn — the king of the Magistrates' Courts. We used to brief Lou Voumard. He was one of the great lawyers and a charming man — Dick Eggeston, Jack Nimmo, Dr Coppel — could make a case out of nothing — and Ashkanasy. Neil McPhee — I never met a sharper fellow than this wonderful bloke. Jack Winneke, top lawyer, top advocate. Bill Crockett, Jack Starke and of course some of the present day fellows — Bob Richter, could stand tall with any of them. The Bar has always had many great minds and I am sure they are still here today.

PT: *In 1958 you travelled overseas. In the 5th edition of Bourke's Liquor Laws of which you were an author, Mr Justice McInerney said "Brian Bourke at one stage was interested in joining the diplomatic service". What turned you away from the foreign service and towards the Bar?*

BB: I think what turned me away was that I didn't get the job. There were 700 applicants. I was in the final 14 and they wanted 11. I still missed out. At the final meeting in Canberra I was asked "How



well do you know Murray McNerney?" I said extremely well, he's a very close friend of mine. In a reference I got from McNerney he said he couldn't understand why I was applying to join the Foreign Affairs Department because he thought I would be far better suited in the law. That reference fixed me. All I want to say is McNerney was 100 per cent right.

PT: *You signed the Roll of Counsel on ...?*

BB: 1 April 1960. I had actually come to the Bar about the end of January when I came back from overseas. In those days things were a bit more relaxed. There was no such thing as readers courses and you signed the Roll by agreement — I got the date adjourned twice — too busy!

PT: *Who did you read with?*

BB: Jim Gorman.

PT: *What sort of practice did he have?*

BB: Running down, almost exclusively.

Good advocate and a good judge when he was appointed to the County Court.

PT: *What was reading like in those days compared to today?*

BB: Well, you took a brief on your first day. Some mates because of my involvement in debating briefed me as soon as I arrived. I'll never forget my first brief. I appeared before Ben Dunn, in the County Court, who subsequently became a Judge of the Supreme Court, and he locked my

Patrick Tehan QC and Brian Burke in chambers.





BB: *"I think the great advantage I had was I got to know police, judges and magistrates and other barristers and solicitors quickly."*

fellows up. It wasn't a very good start. It was completely different then. You didn't spend all that much time with your Master. You were in Court, you were around the Courts seeing other barristers in action, taking responsibility for making decisions in relation to matters. I don't know which is the better option. It does mean that I never really learnt how to draw pleadings but I don't think I would have been able to do that if I came to the Bar today. I think the great advantage I had was I got to know police, judges and magistrates and other barristers and solicitors quickly.

PT: *You were briefed in more than a couple of murder trials as Junior to Mr Justice Starke, who was appointed to the Supreme Court in 1964. What sort of barrister was Starke?*

BB: He was tops. He was a wonderful man. Fierce advocate. At times he might have been a bit too vigorous but he feared nobody, particularly the Bench. I heard him say once, there's a bit too much of "If Your Honour pleases" about this trade and I think he is right about that. He led me in the Magistrates' Court and Court of General Sessions as well. He did all sorts of work.

PT: *Starke presided over the trial of Ronald Ryan, the last man to hang in the State. You were Junior Counsel to Phil Opas. What sort of fellow was Ryan?*

BB: Well, I think he is the toughest and

most courageous bloke I ever met. I appeared for both him and Walker on my own in committal proceedings that went for about two or three days, in February 1966. I knew Ryan prior and I was in communication with him while he was on the run and I went out to see him as soon as he was returned to Victoria. I can remember the first day after his return saying to him, "You know Ronnie, if you go down for this you're in for the big jump." He said, "You don't have to tell me anything about that, I know." I never saw the bloke concerned about his own fate. He wasn't a big-time crim. He was a thief and a burglar, but I got pretty close to him over his last 12 or 13 months and we became friends.

PT: *The trial got an enormous amount of publicity. No doubt Starke conducted it well?*

BB: He certainly did. Jack Lazarus — a very good barrister — appeared for Walker, who was convicted of manslaughter. It was sort of a sympathy verdict I think, but in all events it was good in the circumstances. Ryan never had any concern about that and so far as the trial was concerned it occupied I think 11 sittings days. It was just a well conducted trial; there was no delay. Starke kept us on the straight and narrow. Included in that time was a view that took place at Pentridge and it was great to observe the jury; they were just excited at the idea of walking around Pentridge. The publicity was abso-

lutely enormous. It had a great influence on my career.

PT: *In what way?*

BB: Well, the publicity. I had known a lot of crims because I coached the Pentridge debating team from about 1954 until I went overseas. We established a debating club there. The principal organiser in the jail was a fellow by the name of John Bryan Kerr, a much publicised murderer. I had done murder trials before Ryan but the publicity of Ryan's trial meant more briefs.

PT: *John Bryan Kerr stood trial for murder I think three times and was prosecuted by Sir Henry Winneke. You got to know Kerr pretty well; what sort of fellow was he?*

BB: Well I got to know him extremely well because I was visiting Pentridge on a regular basis — about every second or third Friday night for a couple of hours. We ultimately got Kerr selected as a member of the Victorian debating team with such fellows as the late Ivor Greenwood, Allan Missen and Barry Beach. I can't think of the names of the others; there were six of us I think in the team. Kerr had three trials during 1950. Henry Winneke prosecuted him twice and Frank Nelson on the third occasion. There were two disagreements. In those days they didn't go much beyond the six hours, and the hope was if there was a disagreement the third time they would nolle the matter and the jury went for right on six hours but then came back with a guilty verdict. Kerr was a radio announcer, an odd fellow. I might say that I was at his funeral at Springvale in the last 12 months. I kept in touch with him and got to know his parents well. After he was released I saw him quite a deal. He got himself a decent job. He was intelligent, arrogant. His conceit was never matched in my view, but all in all he did a great job in Pentridge in relation to debating.

PT: *If I could return to the Ryan case. Were you involved in Ryan's appeals and the process to stay his execution?*

BB: Yes I was. We had appeals to the Full Court as it was in those days, presided over by Sir Henry Winneke. I just forget the other judges on that Court. We were unsuccessful. It was significant in that appeal that John Young was brought in to lead Jack Lazarus for Walker, I was with Opas. Tony Murray had prosecuted the trial with his usual skill and complete fairness. Geoff Byrne was his Junior. It was just a revelation and delight to see Young in the Full Court arguing this criminal matter. I must say I found John Young one

of the very great judges that I appeared before and one of the most humane. Ryan's appeal went to the High Court and Privy Council. We had applications for stay of execution. It was a very interesting year for me.

PT: *And what about Ryan, the case attracted enormous publicity. Who were the key figures involved in the moves to save Ryan from hanging?*

BB: Well we all know Father Brosnan did much. Barry Jones was absolutely tireless in his efforts. Lots of people, but I think the two people that one would have thought would have been most persuasive was the prosecutor Tony Murray and Judge Starke. Neither of them wanted Ryan to hang. They were both heard by cabinet on the matter. The Premier of the day was intent on hanging him and that was all about it. There was a huge organization that developed quickly to try and prevent the execution. The night Ryan was executed there was a meeting held in the Chambers of Dick McGarvie who was also prominent in trying to prevent the execution. I was present. At the meeting we had a couple of professors. We had a crim and two or three other people present. There was a transcript of the meeting. When I get things organised I'll certainly give that transcript to the Bar for it to keep for whatever use they want to make of it.

PT: *The story is famously told of Mr Justice Starke advising Cabinet that he did not doubt Ryan's guilt. Why was Starke called before Cabinet and why did he have that view, do you think?*

BB: Prior to 1975 when the only sentence for murder was death, judges spoke to Cabinet in relation to whether the sentence was to be commuted — almost always it was. I don't think there was anything particularly unusual in Starke being asked to appear before the Cabinet and saying to them what his views were about the case. I think on the evidence Starke didn't have any doubt about his guilt and I think he would have conveyed that to Cabinet, but I suppose Cabinet were just checking to see that the trial judge didn't think there could possibly be some miscarriage. I became very close to Ryan. I knew what Ryan's view and attitude was and I don't think there was a miscarriage relation to the conduct.

PT: *Where were you on the morning of his hanging?*

BB: I can remember coming in. I was living at Hawthorn at the time and I can remember walking down Bourke Street. He was executed at 8.00 am. I was just

passing the post office at 8.00 am. I had an arrangement with a great friend of mine who was a Senior Officer at Pentridge to ring me as soon as he could. By the time I got to Chambers there was a message to ring him. He told me that it had gone very quickly. It was a very tense time because there hadn't been an execution since, I think, 1953. Jack Galbally was the leader of the Labor Party in the Legislative Council for a very long time and every year he used to bring a Bill to change the Crimes Act to abolish capital punishment and fix a term of life for murder. He could not get Parliament to support the Bill. The Liberals abolished capital punishment in 1975.

PT: *How did you cope with the tension and the anxiety of those sorts of trials over such a long period of time?*

BB: It was difficult. But you knew in most cases that the sentence wouldn't be carried out. You couldn't get a worse result for a client could you, than get him convicted of murder and to trot up those stairs beside the 4th Court and try to talk to a client who had just been convicted of murder was one of the most arduous tasks you could ever engage in. I was helped in any decision to not do many murder trials by the late Woods Lloyd, one of the best barristers that was ever at this Bar who himself had done several murder trials. He told me of the dangers of getting too involved. I accepted his warning but I did about 50 murder trials.

PT: *"Jack Cullity is almost regarded as the doyen of the Criminal Bar. Why?"*



PT: *And who were the barristers doing murder trials in the 1960s with you? People like Bob Vernon, Michael Kelly? Tell us a bit about them.*

BB: Vernon was one of the best barristers I was ever with. When he was hot there was no-one to match him. His addresses, his cross-examination — everything was short, direct and telling. A wonderful barrister. Michael Kelly, well just look at him now. He could make a silk purse out of a sow's ear. He was and is a wonderful compassionate man. Lacked the vigour of Vernon, but that was Kelly's style. He was very good. George Hampel was doing a lot of murders. Crockett, Starke, Belson, Lazarus and those fellas were all doing them. Strangely enough Jack Cullity didn't do all that many murder trials.

PT: *Jack Cullity is almost regarded as the doyen of the Criminal Bar. Why?*

BB: He was the most wonderful advocate you could imagine. His presence in court was like no other advocate I have seen here or in England or the US. He was a quiet man. In fact Cullity away from the Court room was a very shy individual. All his presentation was done to plan. His cross-examination was brief but piercing. The police were justifiably scared of Cullity. His addresses to the jury were short, clear and persuasive. He had the respect of every judge and magistrate he appeared before. The crims idolised him.

PT: *There is no secret that you've long been regarded as a Labor man. In the*

1960s was there a Labor Bar?

BB: There were always prominent members at the Bar who were Labor oriented. Greg Gowans was a very prominent Labor fellow and a really gifted, intelligent individual, and many members of the Bar have stood for Parliament. I stood myself once, but I wouldn't have thought there was ever a "Labor Bar". I think one of the great things at this Bar, it is not very political. I never concerned myself to know the politics of anyone else and I don't think many other people at the Bar would be concerned about another's politics. Xavier Connor and Dick McGarvie were prominent in the ALP and of course John Thwaites is a member of the Bar.

PT: *In 1967 you became President of the South Melbourne Football Club and you've been involved with footy for most of your life. You were a VFL Director and a member of the Tribunal and now on the Appeal Board. Tell us of your involvement with football.*

BB: Well I played junior football but I was nothing much at it. I joined the committee of the South Melbourne Football Club in 1960. They said they wanted a lawyer on it. I was the Club's delegate to the VFL within a couple of months. I served for 10 years which gave me a life membership of the league which has been the most rewarding and satisfactory connection I have had with footy. I became President of South by default. During my 10 years as a league delegate and now over 30 years as a life member I've kept myself in touch with football, and some of the greatest friends I have know are footballers and people who administered football. Sir Kenneth Luke became a great friend of mine and was a really wonderful bloke. He led the league.

PT: *You sat on the Tribunal for many years. Tell us of some of the more interesting cases you sat on.*

BB: Well after I finished at South in 1971, sat on the Tribunal and I now sit on the Appeals Board. I sat on the Tribunal with Jack Winneke as Chairman at one stage and Jack Gaffney at another and the late Alf Foley — a magistrate for a short time. All those charged are innocent or so some sections of the public says. I think Brian Collis gets far more publicity for his work than Murray Gleeson does. The Tribunal preserves the mystique of the game. It is good for football. I sat on Carmen's case. Carl Dietrich of St Kilda was the most interesting bloke.

PT: *Who are some of the best footballers you have seen?*

BB: Really this is answered by a litany of names. Without saying much: Whitten,

Coleman, Farmer, Ablett, Rose, Skilton and Bedford and Clegg. Graeme Arthur from Hawthorn and Leigh Matthews, perhaps the best player I ever saw. Carey. Bill Hutchison from Essendon. Anybody who plays league football is a good player. Anybody who is a top player in his own club is excellent and every club has a few of those.

PT: *Now it is not a secret that you entertained judges down at South Melbourne when you were President, and Sir Henry Winneke was one. Who were some of the others?*

BB: Well, Sir Henry Winneke, he was one of the great blokes. We used to have Ester Barber, Murray McInerney who had the great wisdom to be a South supporter. Trevor Rapke and Joe O'Shea. To have

The attitude to accused must change. I believe if pleas were made less formal and the judge had some direct verbal contact the judge would get a more complete assessment of the accused. The accused would have a better regard for the process. An understanding attitude by a judge directly to the accused is the spark for rehabilitation.

those people there was great for South, for football and to see Henry Winneke having a drink — or two or more with Bob Pratt and Laurie Nash was terrific.

PT: *I heard you kept him waiting one afternoon, that is Sir Henry Winneke on the Full Court, is that true?*

BB: Yes it is actually. I made an enquiry over there about 4.10 pm one afternoon as I had a rape committal at Coburg the next morning. JPs conducted committals in those days. I don't know what happened in the Full Court. I got a message about 10.30 am to say that I was wanted in the Full Court. Reg Smithers, a great character at this Bar, told me once, if you are going to do anything at the Bar as long as you are completely honest about it you will get away with murder. Winneke said to me "What's your explanation?" I said "sheer greed", and he said "Oh get on with it". Of course it was another example of

the CJ's generosity.

PT: *What sort of judge was Sir Henry Winneke?*

BB: I think he was just matchless. His ability to deliver judgments off the cuff. I don't just mean in appeals against sentence but he would just give deliver the judgment in an appeal against conviction without leaving the Bench. The judgments then are great. At all times Henry Winneke treated the accused as though he was a person entitled to fairness, consideration and courtesy. He was regarded with real affection in Pentridge, which is saying something for a Chief Justice. But it was his ability just to run the Court with no fuss, little pomp and where everyone present felt relaxed. I mean this is what ought to happen now. I think one of the problems with the present system is that judges are not strong enough in the way they determine things. The easiest order to make is to adjourn a matter. It is also easy to reserve all sort of matters for a later ruling or sentence. That wasn't Winneke's way. Yet he did it with such finesse the system was better. I have a letter written to me by Tom Smith which praises Sir Henry Winneke — for changing the attitude in criminal appeals.

PT: *Can I return to your practice in the law. Criminal trials and pleas now seem to take longer than they did years ago. Why do you think that is the case and are the accused ultimately better off?*

BB: Both take longer now. I don't think the accused are advantaged. I don't think all the pre-trial appearances achieve much and the cost is prohibitive. Judges should be more assertive in the trial process and less concerned with worrying about the Court of Appeal. Rulings should be given on the spot. When sentencing an accused now there are two appearances — nearly all sentences are "thought about". I believe 90 per cent of the sentences should be delivered at the end of the plea. Barristers in my view address juries for too long, and charges become too complicated because of the length of them and the repetition of facts. Judges do one or two pleas a day — Leo Dethridge would do eight of a morning and the accused was sentenced immediately. The attitude to accused must change. I believe if pleas were made less formal and the judge had some direct verbal contact the judge would get a more complete assessment of the accused. The accused would have a better regard for the process. An understanding attitude by a judge directly to the accused is the spark for rehabilitation. We proceed with an

insular narrow approach to reformation. The fact is that we have a highly efficient system of crime management directed at protecting victims instead of coping with its causes.

PT: *Brian, you never took silk, why?*

BB: I don't really believe in silk. I don't regret I didn't take it for one minute. I've had a number of readers and several of them have taken silk but I didn't ever want to.

PT: *When will you retire?*

BB: I don't know, I'll keep going for a little while yet. I still feel that I can keep up with the young bloods at the Bar for a year or two. I've got plenty of good mates around this Bar who will tell me when I ought to give up.

PT: *Tell us about the old style crim.*

BB: Crims that I used to deal with when I first came to the Bar in 1960 were mainly charged with dishonesty offences. It was rare they carried a gun, they weren't involved in drugs.

Whilst they didn't like police they had some innate respect for the law. They would never inform on anyone. You never did a trial where one crim gave evidence against another and when you think about the old prosecutors such as Jack Maloney, Stan Mornane and Bob Bitstrup it was a different scene. I don't think those fellas were interested in calling people to inform on other crims and what's more other crims didn't. Nowadays you can hardly do a trial where there is not some informer. The Court sanctioned reductions for assisting the police has led to a change in the attitude of some crims, particularly drug operators. I still see crims that I acted for 40 years ago. They are little different to other people.

PT: *Who was your most dangerous client?*

BB: The only time I was ever threatened was by letter from a fellow convicted of a murder. It is a reported case: *R v Baron* and I led Frank Vincent. Baron was convicted of two counts of murder of two Salvation Army people who befriended him. He got them to take him to St Kilda and wait while he went inside and got a gun, shot the two of them and left their bodies out past Narre Warren. I subsequently got a letter from Baron after all the appeals had been exhausted. He told me that he didn't know how I slept at night. He didn't know how the judge could keep on going and furthermore that Harry Morrison from the homicide squad was on his list. He was going to fix us. Nothing ever really happened about it. I spoke to the prosecutor and I spoke to the judge. The letter was sent down to the homicide squad. Frank Vincent told me later on that Baron was certified. I've never heard any more about it. I was not unduly upset about it but it was a bit of a jolt to get the letter.

PT: *Still I suppose most threats by criminals come to nothing.*

We were speaking earlier about some barristers that you had appeared with in the sixties and seventies. What about some of the solicitors who were around in the fifties, sixties, and early seventies?

BB: Well, the solicitors in those days were very different. I mean you used to get briefed a lot by Frank Galbally. Frank Galbally was a complete advocate. Quick, short and to the point. Avoided the facts. Knew how to play on emotion and had very great success. Ray Dunn, who was the best Magistrates' Court solicitor you could hear. Ron Window, who had a practice Lynch and Window in Richmond. He was a fine solicitor.

PT: *Who was the solicitor who appeared in the Kerr cases?*

BB: Jack Jones. He's got a daughter now at the Bar and he ran a practice in partnership for many years with Noel Purcell, who is a magistrate. Jack Jones was a wonderful solicitor. Didn't do all that much appearing, he used to brief extensively but he was devoted to the cause, very hard working and certainly did a great job on the Kerr case because Kerr went within a brink of being acquitted. Every client got good service from Jack Jones.

PT: *What about recidivist sexual offenders, how would you deal with them in terms of sentencing?*

BB: The Parliamentarians know. Ask the Court of Appeal.

I believe most of the people charged with those offences are sick. One can only hope in the fullness of time there will be proper places for these people to be looked after, treated and helped. Of course there will be failures, there are failures in everything in life.

PT: *Well in your 50 years in the law you have certainly seen some dramatic changes in the courts. In the lower courts, the Magistrates' Courts, what have been the changes and have they been for the better?*

BB: Generally I don't think the changes have been for the better. Most changes have been politically inspired. There is too much bureaucracy, too many mentions, pre-trial conferences and I do not like the distraction created by computers in court.

PT: *You spoke about the need for more judges. Would the appointment or the proposed appointment of temporary judges solve the problem?*

BB: No, I don't think the appointment of temporary judges would solve anything.

discover **byron bay** relax in australian perfection



Come and discover the peace and harmony Byron has to offer Relax at **Bayvilla** in this Balinese style two storey villa within a bushland setting near Belongil, or surf at Main Beach opposite your ground floor apartment at **Surfside** in Lawson Street. Both luxury holiday apartments are located 100m from the beach and an easy walk to town.

contact ed silk real estate now for more information: (02) 6685 7000 or www.edsilk.com.au. Property ID: 13.1 & 32
design by www.hiley.biz