



THE  
VICTORIAN  
BAR

## SUBMISSIONS TO THE STANDING COMMITTEE OF ATTORNEYS- GENERAL

### ADVOCATES' IMMUNITY

27 May 2005

1. It has been reported that the Standing Committee of Attorneys-General ("SCAG") is to consider the abolition or limitation of the common law rule of advocates' immunity at its meeting in July 2005, and that an options paper is being prepared. This submission argues against any abolition or limitation of that rule.

#### Executive Summary

2. For the following reasons, advocates' immunity should not be abolished or limited:
  - (a) The central justification for the advocates' immunity is the principle that controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances. This is a fundamental and pervading tenet of the judicial system, reflecting the role played by the judicial process in the government of society. See below paragraphs [3]-[9].
  - (b) The re-opening of controversies in subsequent litigation against the advocate would carry the real risk of inconsistent outcomes from different courts and thereby undermine confidence in the proper administration of justice and the standing and authority of the courts. [21]-[35]
  - (c) It would also carry a real risk of injustice to a party in the original litigation who may not be involved in the subsequent litigation. [31]-[34]

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- (d) The immunity is part of a wider immunity for all participants in the court process - judges, jury, witnesses and advocates; it exists in the public interest and arises in the administration of justice, not because professional advocacy itself is distinguishable from the work of other professionals. [10]-[16]
- (e) The forensic task of establishing the necessary causation between the alleged negligence of the advocate and the adverse result at trial is fraught with difficulty when the judge, jury and witnesses themselves enjoy immunity from suit and the judge and jury cannot be called as witnesses or joined for contribution – the litigation would be skewed, limited, inefficient and anomalous. [17]-[20]
- (f) No sound basis exists for limiting the immunity to in-court negligence. Preparation of a case out of court cannot be divorced from presentation in court. The two are inextricably interwoven so that the immunity must extend to work done out of court which leads to a decision affecting the conduct of the case in court. [83]-[84]
- (g) Abolition or limitation of the immunity could well have practical consequences in the legal system that would not serve the public interest – longer trials, a reluctance of counsel to take some cases and increased cost of litigation. [69]-[79]
- (h) The principle underlying abolition of advocates' immunity that actions for compensation arising out of the trial process should be allowed, and that compensation should be payable, for imprisonment where the conviction is later quashed and the accused is subsequently acquitted (the situation in *D'Orta-Ekenaike*) has significant consequences for government liability for compensation when the error is that of the judge, jury or prosecution. Moreover, the principle is equally applicable to harm suffered in civil trials.[36]-[42] and [79]
- (i) The overseas authorities on close examination are not persuasive of the need for abolition or limitation of the immunity.[43]
- In the United States [44]-[46] and Canada [59], the conduct of litigation and the role of the courts are not comparable to Australia. The authorities there are of no assistance.
  - The position in New Zealand is yet to be settled by the Supreme Court of New Zealand. [47]-[49]
  - The authority of the decision of the House of Lords in England in *Hall v Simon* is unpersuasive and distinguishable. It is not the law in Scotland. [50]-[58]

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## Submissions

3. The issue is not whether the profession of the advocate (whether a barrister or solicitor-advocate) is uniquely different from other skilled professions so as to justify the special status of being immune from suit for negligence.<sup>1</sup> The immunity is not to protect the advocate, but to protect the finality of judicial determinations.<sup>2</sup>
4. The judicial system is part of the structure of government, and advocates' immunity is part of a series of rules designed to achieve finality in the exercise of judicial power.<sup>3</sup> The appropriate comparison is not with other professions but with the other branches of government.
5. The High Court as the head of the judicial arm of government is responsible for the judicial system. The Court justifies the need for advocates' immunity to protect finality, which it holds to be "fundamental" to the judicial system<sup>4</sup>. Its views must be accorded great weight.

### **In *D'Orta-Ekenaike*, the High Court established the finality of judgments as the one central justification for immunity.**

6. Prior to the High Court decision in *D'Orta-Ekenaike*, every modern decision upholding the immunity had done so on the basis of public policy in the administration of justice, and each decision had identified finality in judicial determinations as an element. However, until *D'Orta-Ekenaike*, finality had been only one of several public policy justifications for the immunity.
7. Other justifications had included matters involving claims of unique differences in the profession of being a barrister, such as the conflicting duties to the court and the client, the cab-rank rule requiring a barrister to represent even the most unpopular and difficult cause and client, and the barrister's in-court decisions being finely balanced and instantaneous.
8. In *D'Orta-Ekenaike*, the High Court dismissed all other justifications as insufficient to justify the existence of the immunity.
9. Key passages in the joint majority judgment of Chief Justice Gleeson and Justices Gummow, Hayne and Heydon bear direct quotation:

[T]he decision in *Giannarelli* must be understood having principal regard to two matters: (a) the place of the judicial system as a part of the governmental structure; and (b) the place that an immunity from

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<sup>1</sup> *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12 (10 March 2005) at para 44 (per Gleeson CJ, Gummow, Hayne & Heydon JJ).

<sup>2</sup> *Id* at para 45 (per Gleeson CJ, Gummow, Hayne & Heydon JJ).

<sup>3</sup> *Id* at para 25 (per Gleeson CJ, Gummow, Hayne & Heydon JJ).

<sup>4</sup> [2005] HCA 12 at para 45 (per Gleeson CJ, Gummow, Hayne & Heydon JJ).

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suit has in a series of rules, all of which are designed to achieve finality in the quelling of disputes by the exercise of judicial power.<sup>5</sup>

The question is not . . . whether some special status should be accorded to advocates above that presently occupied by members of other professions. . . . Nor does the question depend upon characterising the role which the advocate (a private practitioner) plays in the administration of justice as the performance of a public or governmental function.<sup>6</sup>

Rather, the central justification for the advocate's immunity is the principle that controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances. This is a fundamental and pervading tenet of the judicial system, reflecting the role played by the judicial process in the government of society.<sup>7</sup>

A justification based on finality has as much force today as it did when *Giannarelli* was decided.<sup>8</sup>

**Most significantly, the Court rejected the justification that advocates are uniquely distinguishable from other professions.**

10. For over a century, courts have recognised a public policy interest in the administration of justice as a basis for the immunity.<sup>9</sup> However, the immunity has also in the past been based on the proposition that professional advocacy in court is uniquely distinguishable from other professions. The latter basis has attracted particular criticism from surgeons who have no equivalent immunity from suit for instantaneous, finely balanced and often intuitive decisions under pressure in the operating room. The criticism reflects a widely held misconception as to the true basis of advocates' immunity.
11. The High Court (with the exception of Justice Callinan<sup>10</sup>) has clearly and unequivocally rejected this latter justification as "distracting and irrelevant".<sup>11</sup>

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<sup>5</sup> [2005] HCA 12 at para 25 (per Gleeson CJ Gummow, Hayne & Heydon JJ).

<sup>6</sup> *Id* at para 44 (per Gleeson CJ Gummow, Hayne & Heydon JJ).

<sup>7</sup> *Id* at para 45 (per Gleeson CJ Gummow, Hayne & Heydon JJ).

<sup>8</sup> *Id* at para 46.

<sup>9</sup> Clearly articulated in *Rondel v Worsley* [1969] 1 AC 191; see also *Giannarelli* (1988) 165 CLR 543, 569 (per Wilson J) ("[E]ven in the nineteenth century, the seeds of the barrister's immunity were sown not only in the absence of a contract between barrister and client and the related inability of the barrister to sue the client to recover fees, but also in public policy grounds.").

<sup>10</sup> In this respect, Justice Callinan is out of step with the other five Justices in the majority in his focus on instantaneous and intuitive decisions by advocates; on persuasive advocacy being unique and distinguishable from, for example, surgery as an art, not a science; on there being radical changes, and few absolute truths, in law; and on all these matters justifying the existence of advocates' immunity. See [2005] HCA 12 at paras 366-370 (per Callinan J).

<sup>11</sup> *Id* at para 28 (per Gleeson CJ Gummow, Hayne & Heydon JJ); see also at paras 188-189 (per McHugh J).

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This is why the list of professions Justice Kirby describes as having been held to account in negligence<sup>12</sup> is irrelevant.

12. This is also the first basis of distinction the High Court majority judgment makes with the House of Lords decision in *Hall & Co*. The High Court refers to the speech of Lord Steyn, one of the two leading speeches in that case, in which it is clear that Lord Steyn still saw the issue in terms of the special status of barristers:

In 1967 [when *Rondel v Worsley* was decided, establishing the modern basis for barristers' immunity], the House considered that, for reasons of public policy, barristers must be accorded a special status. Nowadays a comparison with other professions is important. [Decisions made by doctors] may easily be as difficult as those facing barristers. And no-one argues that doctors should have an immunity from suits for negligence.

13. That is not the basis of the High Court decision in *D'Orta-Ekenaike*. Nor should the decision of SCAG as to whether the High Court decision ought to be overturned by legislation be based on this misconception.

#### **Administration of Justice immunities parallel Parliamentary privilege.**

14. The judicial system is part of the structure of government, and advocates' immunity is part of a series of rules designed to achieve finality in the exercise of judicial power.<sup>13</sup>
15. The proper comparison is with the other branches of government. Just as the public interest in the administration of law affords immunity to those involved in the judicial process, so the executive arm of government has crown privilege and immunity, and the legislative arm of government has parliamentary privilege and absolute immunity.<sup>14</sup>
16. The other appropriate comparison is not between professions generally but between the various actors in the judicial trial process. It is between barristers (or barristers and solicitor-advocates) and judicial officers (judges and magistrates), jurors and witnesses<sup>15</sup>, all of whom do have immunity. The

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<sup>12</sup> *Id* at para 210 (per Kirby J) (“architects, civil engineers, dental surgeons, specialist physicians and surgeons, anaesthetists, electrical contractors, persons providing financial advice, police officers, builders, pilots, solicitors (in respect of out-of-court advice) and teachers”).

<sup>13</sup> *Id* at para 25 (per Gleeson CJ Gummow, Hayne & Heydon JJ).

<sup>14</sup> Justice Brennan, in *Giannarelli*, drew the parallel with parliamentary privilege (“A similar immunity, granted for similar reasons, attaches to members of Parliament taking part in the proceedings of Parliament.”), (1988) 165 CLR 543, 579. The comparison is appropriate because advocates' immunity is part of the series of rules and immunities within the judicial branch of government. However, the immunity is not based on the advocate's role being a governmental one, and takes into account that the advocate is a private practitioner. The joint majority judgment expressly says that the decision “does not depend upon characterising the role which the advocate (a private practitioner) plays in the administration of justice as the performance of a public or governmental function”. *Id* at para 44 (per Gleeson CJ Gummow, Hayne & Heydon JJ).

<sup>15</sup> See *id* at paras 37-42 (per Gleeson CJ Gummow, Hayne & Heydon JJ).

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specialist physician or surgeon (to take an example from Justice Kirby's list) who gives evidence in court as an expert witness is, in that role, absolutely immune from suit.

**Importantly, the Court included in its reasoning concerning the central justification of finality that re-litigation in negligence claims against advocates would be unfairly skewed and limited.**

17. Distortion, inconsistency and inequity would be caused by the abolition of advocates' immunity without abolition of the parallel immunities in favour of the other actors in the judicial trial process – the judicial officers (judges and magistrates), jurors and witnesses. The advocate would not be able to join as parties who caused or contributed to the plaintiff's claimed loss, the judicial officer, jurors or witnesses.<sup>16</sup> The judicial officer and jurors could not be called to testify<sup>17</sup> Yet the abolition of the immunity of judges, jurors and witnesses is plainly unthinkable.
18. In a jury trial, the proof of causation would be pure guesswork without hearing from the jurors. It is they who make the decision. The obvious way anyone can know what influenced the jury is to ask them. It may be that the jury in *D'Orta-Ekenaike* gave no weight at all to the plea of guilty at the committal – that, as between the complainant and Mr D'Orta-Ekenaike, the only people able to give evidence about the immediate incident, they found the complainant and not Mr D'Orta-Ekenaike credible as a witness. Without evidence from the jury, evidence of causation – that the claimed negligent conduct of the advocate caused the harm – “is simply impossible of proof”<sup>18</sup> and becomes an exercise that piles “speculation upon speculation”.<sup>19</sup> Juries are properly protected by statute from investigation by media or other parties after verdict.
19. Neither judges, nor magistrates nor jurors should be called to give evidence, or be cross-examined, or judged, in relation to their actions in the judicial process. The same strong public policy supports the collective immunity of all involved in the process, including the advocates, from suit.<sup>20</sup>
20. Importantly, the majority decision includes this gross inequity in the re-opening and re-litigation of a judicially decided case as an inevitable and central element of any negligence action against the advocate in its “central justification” of finality in the judicial process – namely that, limited to the advocate, and with the judicial officer, jurors and witnesses all excluded by immunity, the re-litigation would be “of a skewed and limited kind” and “inefficient and anomalous”.<sup>21</sup>

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<sup>16</sup> See *id* at para 45 (per Gleeson CJ Gummow, Hayne & Heydon JJ).

<sup>17</sup> *Id* at para 193 (per McHugh J).

<sup>18</sup> *Id* at para 162 (per McHugh J).

<sup>19</sup> *Giannarelli v Wraith* (1988) 165 CLR 543, 574 (per Wilson J, quoting from Lord Morris in *Rondel v Worsley* [1969] 1 AC 191,250).

<sup>20</sup> See *D'Orta-Ekenaike* at para 162 (per McHugh J).

<sup>21</sup> *Id* at para 45 (per Gleeson CJ, Gummow, Hayne & Heydon JJ).

**Re-litigation would have unacceptable consequences.**

21. The High Court described finality of judgments as “a fundamental and pervading tenet of the judicial system”. The re-opening of controversies in subsequent litigation against the advocate would produce unacceptable consequences and is against the public interest.
22. We offer the following hypothetical case studies by way of illustration and explanation.

**Case study - Negligence in a criminal trial**

23. The accused is convicted and sentenced to a term of imprisonment. The accused does not appeal, but sues his barrister for damages claiming that he was negligent in his cross examination of a prosecution witness. At the civil trial, the plaintiff (the prisoner) calls evidence of the conduct of the trial by the barrister. The latter denies negligence but says that even if he was negligent, it was not the cause of the conviction and subsequent imprisonment. The barrister calls evidence that reflects the prosecution evidence at the trial.
24. The trial judge in the civil action must determine not only the question of negligence but also whether any negligence was causative of the conviction and subsequent imprisonment of the plaintiff. These questions inevitably raise the very issues that were before the judge and jury at the criminal trial.
25. A verdict in the civil negligence suit for the plaintiff (the prisoner) for substantial damages on account of his imprisonment necessarily involves a conclusion by that court that if the barrister had not been negligent, the plaintiff would not have been convicted and imprisoned. On the one hand, the successful plaintiff has been convicted and sentenced to a term of imprisonment. On the other hand, the plaintiff receives a substantial sum by way of damages for having suffered that fate. The inconsistency in these outcomes would have a strong tendency to undermine confidence in the proper administration of justice; it would call into question the authority and standing of both the court that conducted the criminal trial and the conviction and sentence that it handed down to the prisoner and the court hearing the civil negligence claim and its judgment. The public would justifiably ask why a person should remain convicted and in prison if the Court has in a subsequent civil proceeding hearing his or her negligence claim held that if the person's barrister had acted with due care and skill, the person would not have been convicted and sent to prison.
26. There is a strong public interest in certainty and finality in judicial determinations and in upholding confidence in the administration of justice. This is not to deny persons who claim to have been wrongly convicted a remedy. It is to limit their remedy to an appeal in which the conviction can be set aside, with the fail-safe further provision of a petition for mercy to the executive. The abolition of advocates' immunity would promote the re-opening of controversies already determined by a court.

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**Case study - Negligence in a civil debt trial**

27. A client is being sued for a money amount. The client's barrister advises the client a fortnight before the trial that the evidence of a particular proposed witness is unnecessary and that the barrister does not intend to call the witness. The trial proceeds and the barrister does not call the witness. The defendant client loses the case and suffers a judgment for a money amount. The client later sues the barrister for negligence in not calling the witness.
28. The same principles as noted above apply to the suit in which this former client alleges negligence by their barrister in the conduct of the civil trial. If the barrister is held to have been negligent in the conduct of the trial and that omission was the cause of the unfavourable judgment, the defendant client would recover against the barrister a judgment for damages. The court would have made a finding that if there had not been negligence, the outcome of the first trial would have been favourable to the defendant client.
29. The judgment in the first civil trial would not have quelled the substantive controversy over the liability of the defendant. The second civil trial would re-open that controversy and the court, differently constituted, could reach a different conclusion to the court in the first trial. If the barrister for the client in the second civil trial was negligent, that client could in the absence of the immunity, launch a further civil suit again raising the controversy albeit against a new defendant, the second barrister. These outcomes transgress the "central and pervading tenet of the judicial system ... that controversies, once resolved, are not to be re-opened except in a few, narrowly defined, circumstances."<sup>22</sup>
30. In the above case study, the barrister's negligence arises both in the conduct of the case in court and in the decision, the fortnight before, which is intimately connected with the conduct of the case in court. The public policy interest in finality holds good for both.

**Case study - Negligence in a civil trial against a surgeon**

31. A surgeon who is cleared of negligence at the suit of his or her patient would not have standing to be heard or represented in a negligence suit by the patient against his or her barrister. In that suit, one issue would be whether, if the advocate had not been negligent at the trial of the suit against the surgeon, the latter would have been exculpated. If the patient can sue his or her barrister for negligence at the first trial, the controversy over the conduct of the surgeon would be re-opened and the surgeon would not be present or represented to defend his or her conduct.
32. The re-opening of the controversy would invite the undesirable prospect of two inconsistent outcomes – one in the first trial exculpating the surgeon and the other in the second trial inculpating him or her.

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<sup>22</sup> *Id* at para 34 (per Gleeson CJ, Gummow, Hayne & Heydon JJ).

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### Case study - Negligence in a civil trial for defamation

33. Similarly, a plaintiff in a defamation suit may successfully refute the defendant's defence that the defamatory statement was true, and may be awarded damages. If the unsuccessful defendant sued his or her barrister for negligence in the course of the first trial, the successful plaintiff at the first trial would not have standing to be heard or represented at the second trial, against the barrister.
34. The reputation of the plaintiff in the defamation proceeding would again be in issue at the trial of the second suit against the barrister, and subject to being reported in the press. The second suit again raises the real prospect of an outcome inconsistent with the outcome at the first trial and the undesirability of different courts coming to different results on the same controversy.
35. Similar considerations would apply to family law cases. In the New Zealand High Court decision in *Lai v Chamberlains*<sup>23</sup>, Justice Laurenson identified family law as an area in which the public policy considerations supporting advocates' immunity are at their strongest, linking it with criminal law.<sup>24</sup> Justice Laurenson saw criminal and family litigation as tending to be prolonged or re-litigated<sup>25</sup> – a similar basis to the finality justification adopted by the High Court in *D'Orta-Ekenaike*.

#### **It does not make any difference that the conviction has been quashed.**

36. In *D'Orta-Ekenaike*, not only was the rape conviction quashed, but Mr D'Orta-Ekenaike was acquitted on re-trial. The High Court records that Mr D'Orta-Ekenaike argued exactly this – that for him to succeed against his barrister and solicitor, he would not have to impugn the final result of the litigation.<sup>26</sup> He was, after all, in the end, acquitted on the rape charge.
37. On the particular facts of *D'Orta-Ekenaike*, the Court noted that basis for judgment in the Court of Appeal was that “the conviction at the first trial was quashed for want of a proper direction about how the plea of guilty at committal might be used, not because the plea of guilty was improvidently entered”.<sup>27</sup> In other words, the risk that there had been a miscarriage of justice<sup>28</sup> was in the judge's directions to the jury, not in the fact of the guilty

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<sup>23</sup> *Sun Poi Lai v Chamberlains* and *Hilda Lorraine Lai v Chamberlains* unreported decision of the Full Court of the High Court of New Zealand (Salmon and Laurenson JJ) 19 December 2002.

<sup>24</sup> *Sun Poi Lai v Chamberlains* and *Hilda Lorraine Lai v Chamberlains* unreported Court of Appeal of New Zealand, 8 March 2005, CA17/03 and CA15/03 at para 6 (per Anderson P, describing the unreported High Court judgment of Laurenson J).

<sup>25</sup> *Ibid.*

<sup>26</sup> *Id* at para 73.

<sup>27</sup> [2005] HCA 12 at para 81 (per Gleeson CJ Gummow, Hayne & Heydon JJ).

<sup>28</sup> The general ground of appeal in section 561(1) of the *Crimes Act* (1958) is “that on any ground there was a miscarriage of justice”. That a risk is sufficient flows from the proviso to section 561(1) that the appeal may be dismissed if the Court of Appeal “considers that no substantial miscarriage of justice has *actually* occurred”, s. 561(1) (emphasis added).

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plea at the committal, claimed by Mr D’Orta-Ekenaike to have resulted from the allegedly negligent advice and pressure by his advocates.

38. The Court went on to say that the incompetence of counsel is not a separate ground of appeal<sup>29</sup>, and that accordingly “in general . . . if an intermediate result is set aside, it will be for reasons unconnected or, at best, only indirectly connected” with the claimed negligence of the advocate<sup>30</sup>.
39. The Court rejected any suggestion of an exception for intermediate results where a negligence claim against an advocate does not involve challenging the final judicial result – in *D’Orta-Ekenaike*, ultimate acquittal – because “the proposition that for every wrong there should be a remedy has become too attenuated to have any application” given that “the very existence of the relevant exceptional case depends for the most part on considerations that are irrelevant to the wrong that is to be remedied [ie, the claimed negligence of the advocate]”<sup>31</sup>.

**A quashed conviction does not retrospectively render imprisonment unlawful or give rise to any right to compensation, nor are money damages appropriate for a conviction or criminal sanction claimed to be wrong.**

40. Although the High Court did not advert to this in *D’Orta-Ekenaike*, it is axiomatic that the quashing of a conviction on appeal does not render the imprisonment of the accused person from the time of conviction to that of quashing unlawful retrospectively. This underlies the practice that ordinarily no compensation is payable by the State in respect of that imprisonment where the conviction is set aside on the ground of some error on the part of the judge or prosecution.
41. Money damages are, as a matter of public policy, not an appropriate remedy for a conviction or criminal sanction claimed to be wrong. The only appropriate remedy is that the wrong conviction or criminal sanction be set aside or varied, and that can only be done within the framework of appeal and petition for mercy. This is so whether the cause of the wrongful conviction is error on the part of the judge, as found by the Court of Appeal and noted by the High Court in *D’Orta-Ekenaike*, or the claimed negligence of the advocate.
42. In the most extreme cases involving a serious miscarriage of justice, such as the Chamberlain case<sup>32</sup>, there remains the capacity for an aggrieved party to

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<sup>29</sup> *Id* at para 82 (per Gleeson CJ Gummow, Hayne & Heydon JJ) (referring to *TKWJ v The Queen* (2002) 212 CLR 124 at 132-133 [23]-[25] (per Gaudron J) and 157 [102]-[103] (per Hayne J)). However, although the incompetence is not a separate ground of appeal, it is well established that it can be the basis for allowing an appeal against conviction that “on any ground there was a miscarriage of justice”, *Crimes Act* 1958 (Vic) s. 568(1). This is recognised in the very passage to which the *D’Orta-Ekenaike* court cites, in the judgment of Gaudron J in *TLWJ v The Queen*. Justice Gaudron refers to the leading NSW Court of Criminal Appeal decision in *R v Birks* (1990) 19 NSWLR 677 (per Gleeson CJ, then Chief Justice of NSW, at 684-85).

<sup>30</sup> *Ibid*.

<sup>31</sup> *Ibid*.

<sup>32</sup> The Chamberlains received ex gratia compensation of \$1.3 million. They also received \$396,000 for legal costs and \$19,000 for their dismembered Torana. Mrs Chamberlain had been in prison from her conviction in

seek an ex gratia payment from the Executive<sup>33</sup>. However, that process correctly remains a matter for the exercise of executive discretion rather than inter party litigation.

**The High Court did not disregard conflicting authorities.**

43. The High Court decision in *D’Orta-Ekenaike* does not “disregard the practice of the United States, Britain and New Zealand”, in the words of one newspaper editorial.<sup>34</sup> On the contrary, the practice in the United States was not seriously argued in *D’Orta-Ekenaike* by the applicant or by Justice Kirby in his dissent. The “practice” in New Zealand referred to is the very recent New Zealand Court of Appeal decision, which is on appeal to the New Zealand Supreme Court, and not settled law. Finally, the six Justices constituting the majority did not “disregard”, but explained their reasons for not following the English House of Lords decision that abolished advocates’ immunity in July 2000.<sup>35</sup>

**United States practice is of little assistance and was not seriously argued.**

44. The absence of advocates’ immunity in the United States was not seriously argued in *D’Orta-Ekenaike*. The only reference to the United States in the appellant’s summary of argument is to a three-sentences aside by Justice Kirby in *Boland v Yates* (1999) 167 ALR 613 at para 138. Similarly, Justice Kirby, in his dissent, does no more than repeat his aside from *Boland*, namely the bare assertions that there is no such *general* immunity there<sup>36</sup>, and there has been no flood of litigation against advocates there<sup>37</sup>. The qualification is significant because the only authority to which His Honour refers in *D’Orta-Ekenaike* is a 1979 United States Supreme Court decision on federal law in which the Court notes the immunity of judges, prosecutors and grand jurors<sup>38</sup> and, in other contexts, of, for example, a Captain in the US Navy and the Postmaster-General<sup>39</sup>. The Court also makes clear that its consideration is limited to federal law, and not whether the particular State involved,

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1982 until her release in 1986, when the Northern Territory government remitted her sentence and announced a Royal Commission – the Commission that subsequently found the conviction unsound.

In New South Wales, Douglas Harry Rendell’s 1980 murder conviction was found to be “unsafe and unsatisfactory”, and he was pardoned in 1989. The same forensic scientist discredited in the Morling Royal Commission into the Chamberlain case was involved. Mr Rendell received \$100,000 ex gratia compensation for his eight years in gaol.

<sup>33</sup> The Victorian guidelines for ex gratia payments do not specifically provide for compensation in cases of wrong convictions. There is, so far as we are aware, no Australian equivalent to the English statutory provision for monetary compensation for convictions that are later reversed – *Criminal Justice Act* 1988 section 133. Even under that Act, payments are in the discretion of the Secretary of State, and there are no payments where the conviction is reversed on first appeal to the Court of Appeal – see *Hall & Co* [2002] 1 AC 615,749B (per Lord Hobhouse).

<sup>34</sup> *Sydney Morning Herald* 14 March 2005 editorial *Justice must come first*.

<sup>35</sup> *Arthur JS Hall & Co v Simons* [2002] 1 AC 615.

<sup>36</sup> *Id* at para 211.

<sup>37</sup> *Id* at para 328.

<sup>38</sup> *Ferri v Ackerman* 444 US 193, 202 (1979).

<sup>39</sup> *Ibid*.

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Pennsylvania, might conclude as a matter of State law, that the court-appointed advocate is absolutely immune.<sup>40</sup>

45. United States writings on the subject of immunities had been relied on by the appellants in *Giannarelli*. Only Justice Wilson refers to them, and he found them to be of no assistance because “the conduct of litigation and the role of the courts and of lawyers in the administration of justice in the United States is not comparable to the practice in Australia”.<sup>41</sup>
46. The highest Lord Steyn was prepared to put United States law, practice and experience in this area in his speech in the House of Lords decision in *Arthur J S Hall & Co v Simon* (“*Hall & Co*”) was his observation that differences in the United States system needed to be taken into account, and that “the United States position cannot be altogether ignored”.<sup>42</sup>

#### **The March 2005 New Zealand decision is not settled law.**

47. The New Zealand decision<sup>43</sup> is not settled law in New Zealand. It is the decision of an intermediate appellate court, the Court of Appeal, not of New Zealand’s highest court, the New Zealand Supreme Court. An application for leave to appeal has been filed with the New Zealand Supreme Court, and leave is expected to be granted. Just as the Australian High Court reviewed the Victorian Court of Appeal decision in *D’Orta-Ekenaike*, so it is very likely that the New Zealand Supreme Court will review the New Zealand Court of Appeal decision in *Lai v Chamberlains*.
48. Also, the challenged Court of Appeal decision did not abolish advocates’ immunity altogether. It did so only in civil matters<sup>44</sup>, leaving immunity in criminal cases to be argued in a case in which the particular policy issues in that context, highlighted in the three minority speeches in *Hall & Co*, have been fully argued.<sup>45</sup> The challenged Court of Appeal decision was despite a long, detailed and carefully reasoned dissent by the President of the Court of Appeal.<sup>46</sup>
49. The New Zealand Court of Appeal decision was delivered only two days before the High Court decision in *D’Orta-Ekenaike*. Understandably, the references to it in the High Court judgments are extremely brief and conclusory.<sup>47</sup> However, every Justice took it into account.

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<sup>40</sup> *Id* at 198.

<sup>41</sup> *Giannarelli* (1988) 165 CLR 543, 577.

<sup>42</sup> *Arthur J S Hall & Co v Simon* [2002] 1 AC 615, 681C (per Lord Steyn).

<sup>43</sup> *Lai v Chamberlains* still unreported Court of Appeal of New Zealand, 8 March 2005 (the consolidation of two appeals: *Sun Poi Lai v Chamberlains* CA17/03 and *Hilda Lorraine Lai v Chamberlains* CA15/03).

<sup>44</sup> *Id* at paras 189-191 (per Hammond J); and at para 124 (per McGrath, Glazebrook & O’Regan JJ).

<sup>45</sup> *Ibid*.

<sup>46</sup> *Id* at paras 1-123 (per Anderson P).

<sup>47</sup> [2005] HCA 12 at para 61 (Gleeson CJ Gummow, Hayne & Heydon JJ); para 205 (McHugh J); para 215 (Kirby J); para 381 (Callinan J).

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**The July 2000 House of Lords decision in *Hall & Co* was held unpersuasive.**

50. The justices forming the majority in the High Court carefully addressed the English decision in *Hall & Co*. In the end, the High Court declined to follow the reasoning of the House of Lords for principled reasons based in the public interest in the administration of justice that are served by maintaining all the immunities supporting the trial process and finality in judicial determinations, and the gross distortion and inequity involved in abolishing only one such immunity, that in relation to advocates.
51. The decision in *Hall & Co* must be evaluated in the context of what the High Court described as the “profound changes in the constitutional and other arrangements to which the United Kingdom is party, such as the various European and other international instruments to which it is, but Australia is not, a party”.<sup>48</sup> It “can be understood as influenced, if not required, by Art 6 of the European Convention . . . then understood . . . as securing the right to have *any* claim relating to civil rights and obligations brought before a court or tribunal”.<sup>49</sup>
52. The House of Lords conclusion that advocates’ immunity is not required to prevent collateral attacks on criminal decisions, because any such actions would be struck out as an abuse of process was, the High Court said, “critical” to the outcome in *Hall & Co*.<sup>50</sup> The three Law Lords who dissented on abolition of the immunity in criminal cases disagreed strongly.<sup>51</sup> Justice McHugh stated that, in his view, the Law Lords “underestimated the importance of maintaining confidence in the administration of justice, even in the civil sphere, and overestimated the court’s capacity to limit the re-litigation or rehearing aspects of a negligence trial”.<sup>52</sup>
53. Australian law, and the law in the various States of Australia, as it stands, does not provide for the striking out of claims against advocates as an abuse of process (described by the High Court majority judgment as “critical” to the outcome in *Hall & Co*), or based on issue estoppel to the extent relied on in the majority speeches in the House of Lords<sup>53</sup> Both the “new flexible Civil Procedure Rules [in England and Wales]” permitting dismissal where “the claimant has no real prospect of succeeding on the claim”, and the abuse of process decision in *Hunter v Chief Constable of the West Midlands Police*<sup>54</sup>, relied on in *Hall & Co* as enabling vexatious actions against advocates to be struck out, are at odds with Australian law.<sup>55</sup> Australian law requires that the

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<sup>48</sup> [2005] HCA 12 at para 59 (per Gleeson CJ Gummow, Hayne & Heydon JJ).

<sup>49</sup> *Id* at para 64 (per Gleeson CJ Gummow, Hayne & Heydon JJ).

<sup>50</sup> *Id* at paras 57-58 (per Gleeson CJ Gummow, Hayne & Heydon JJ).

<sup>51</sup> [2002] 1 AC 615 at 723-724 (per Lord Hope of Craighead); at 735 (per Lord Hutton); and at 752 (per Lord Hobhouse of Woodborough).

<sup>52</sup> [2005] HCA 12 at para 191 (per McHugh J).

<sup>53</sup> *Id* at para 201 (per McHugh J).

<sup>54</sup> [1982] AC 529.

<sup>55</sup> [2005] HCA 12 at para 202 (per McHugh J).

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power to order summary judgment be exercised with “exceptional caution” and “never unless it is clear that there is no real question to be tried”.<sup>56</sup>

54. The legal context of the House of Lords decision in *Hall & Co* was “critical” to the decision, but does not exist in Australia. Nor should Australia introduce the English law claimed by the majority in *Hall & Co* to avoid re-litigation by striking out claims either as abuse of process or as unmeritorious on summary judgment. The sound principles on which the general law in relation to abuse of process, issue estoppel and the threshold for summary judgment in Australian law is based should not be abandoned so as to achieve, by different means affecting all cases, only part of what is now achieved by the sharply focussed immunity limited to advocates’ involvement in the judicial process.
55. Although it described the House of Lords’ conclusion that collateral challenges and abuse of process will ordinarily result in the striking out of actions against advocates as “critical” to the decision in *Hall & Co*,<sup>57</sup> nevertheless the High Court majority judgment did not see the different Australian position as determinative<sup>58</sup>. However, this needs to be understood in the context of the fine distinctions in the High Court majority judgment between matters seen to be “determinative” and those not determinative, but nevertheless, like the chilling effect of advocates being open to suit, “do not detract from the importance of the immunity”<sup>59</sup>, and in respect of which “the significance, or magnitude, of such effects should [not] be underestimated”<sup>60</sup> – see also paragraphs 60-63 of this submission, below.

### **The House of Lords decision in *Hall & Co* is of limited application in the United Kingdom.**

56. *Hall & Co* is of limited application even within the United Kingdom. It does not apply in Scotland.
57. Lord Steyn, delivering the first speech in the House of Lords decision in *Hall & Co*, explicitly limited the questions to be considered by the House to the law of England – in relation to advocates’ immunity, “Ought the current immunity of an advocate in respect of and relating to conduct of legal proceedings as enunciated by the House in *Rondel v Worsley* and explained in *Saif Ali v Sydney Mitchell & Co* to be maintained in England?”<sup>61</sup>, followed by “The position in Scotland was not the subject matter of argument in these appeals.”<sup>62</sup>

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<sup>56</sup> *Id* at para 203 (per McHugh J, quoting *Webster v Lampard* (1993) 177 CLR 598, 602-603 per Mason CJ, Deane & Dawson JJ).

<sup>57</sup> *Id* at paras 57-58 (per Gleeson CJ Gummow, Hayne & Heydon JJ).

<sup>58</sup> *Id* at para 60 (per Gleeson CJ Gummow, Hayne & Heydon JJ).

<sup>59</sup> *Id* at para 29 (per Gleeson CJ Gummow, Hayne & Heydon JJ).

<sup>60</sup> *Ibid*.

<sup>61</sup> *Hall & Co* [2002] 1 AC 615, 675G (per Lord Steyn) (citations omitted and emphasis added).

<sup>62</sup> *Ibid*.

58. The Court of Session, Scotland's supreme civil court, held in August 2002, more than two years after the House of Lords decision in *Hall & Co*, that "The decision in *Hall*, which was concerned with English civil law and English procedure, is not binding in Scotland".<sup>63</sup>

**The Canadian situation is also different from Australia.**

59. Canada has never had advocates' immunity.<sup>64</sup> However, as noted in *Demarco v Ungaro*<sup>65</sup>, the relationship between an advocate and a client in Ontario is very different. Canada has never had a separate Bar – advocates prepare their own cases and there is no cab-rank rule. It also seems that, in Canada, advocates do not owe the same extensive duties to the court. Further, suits against advocates are limited in a different way in Canada, as advocates are liable only for "egregious negligence in the conduct of cases in court".<sup>66</sup>

**The High Court majority judgment divided bases for advocates' immunity into three categories: central justification; rejected bases; and bases not rejected, but not determinative.**

60. The High Court majority judgment concluded that finality in litigation is the "central justification" for advocates' immunity<sup>67</sup>, and Justices McHugh and Callinan agreed that finality is a "fundamental issue"<sup>68</sup> and "necessary for the orderly functioning of the system of justice in this country".<sup>69</sup>
61. However, of the previous bases for advocates' immunity, only two are wholly rejected: (1) that a barrister advocate may not have a contract with the client and may not be able to sue the client for professional fees<sup>70</sup>; and (2) that the professional skills involved in advocacy are uniquely different from those involved in surgery or other professions or callings, and that advocates are

<sup>63</sup> *Wright v Paton Farrell* [2002] ScotCS 341 at para [23]. This is a decision of, in Australian terms, the trial division of the Court of Session – what the Scots call the Outer House of the Court of Session. There has been an appeal to the appellate division, the Inner House of the Court of Session, but that appeal has not yet been decided. The appeal is part heard and adjourned to 28 June 2005. Also, an additional basis of decision in the Outer House is that the decision in *Hall & Co* was subsequent to the trial at which the allegedly negligent conduct occurred; *Hall & Co* expressly did not overrule *Rondel v Worsley*; and that *Rondel v Worsley* remained good law until the decision in *Hall & Co* was pronounced.

<sup>64</sup> *Demarco v Ungaro* (1979) 95 DLR (3d) 385.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Id* at 405; *Pelky v Hudson Bar Insurance Co* (1981) 35 OR (2d) 97 (HC); *Karpenko v Paroian, Courey, Cohen & Houston* (1980) 30 OR (2d) 776 (HC); *Demarco v Ungaro* (1979) 21 OR (2d) 673 (HC); *Garrant v Moskal* [1985] 2 WWR 80 (Sask QB) *affirmed* [1985] 6 WWR 31 (Sask CA); and *Henderson v Hagblom* [2003] 7 WWR 590 at 569-71 (Sask CA). See also *The Immunity of the Advocate* The Hon Justice Stephen Charles (2003) 23 ABR 220 at fn 42; NSW Legal Profession Advisory Council Report at 26; and *Hall & Co* [2002] 1 AC 615, 772 (per Lord Hope).

<sup>67</sup> *Id* at para 45 (per Gleeson CJ Gummow, Hayne & Heydon JJ).

<sup>68</sup> *Id* at para 165 (per McHugh J).

<sup>69</sup> *Id* at para 380 (per Callinan J).

<sup>70</sup> *Id* at para 25 (per Gleeson CJ Gummow, Hayne & Heydon JJ).

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called upon to make finely balanced tactical decisions involving conflicting duties instantaneously in the heat of the trial<sup>71</sup>

62. The majority judgment identifies a third category of factors held in previous decisions to support advocates' immunity. These are held insufficient to justify the immunity. However, they are not characterised as "not well founded" or "distracting and irrelevant", as are the rejected bases.<sup>72</sup>
63. This third category recognises practical considerations, which the Court characterises variously as "highly desirable . . . in ensuring that the unpopular client or cause is represented in court" (the maintenance of the cab-rank rule)<sup>73</sup> and a matter "the significance or magnitude of [the effect of which] should [not] be underestimated" (the chilling effect that exposure to civil suit would have on advocates' independent judgment in the economical presentation of a case, perhaps contrary to the wishes of the client, in the interest of the efficient administration of justice, with consequent tendency to prolong trials)<sup>74</sup>. The practical considerations and likely consequences of legislation to limit or abolish advocates' immunity within this third category are matters that members of SCAG can and should take into account.

#### **Advocates' duties to the court are an important policy issue.**

64. As stated immediately above, the High Court majority held that "the significance, or magnitude, of [the chilling effect of the threat of civil suit with a consequent tendency to the prolongation of trials]"<sup>75</sup> "should [not] be underestimated"<sup>76</sup>. In the same paragraph, it said that such considerations "do not detract from the importance of the immunity".<sup>77</sup>
65. Moreover, the majority judgment makes very clear, by its footnote references to particular pages in the judgments of Chief Justice Mason and Justices Brennan and Dawson in *Giannarelli*,<sup>78</sup> that the independent judgment that may be "chilled" is that on which Chief Justice Mason says "the administration of justice in our adversarial system depends in very large measure" "for the speedy and efficient administration of justice".<sup>79</sup> The independent judgment is in limiting the number of witnesses called, questions asked, topics and points of law raised "so that the time of the court is not taken up unnecessarily,

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<sup>71</sup> *Id* at para 28 (per Gleeson CJ Gummow, Hayne & Heydon JJ); and at paras 187-189 (per McHugh J).

<sup>72</sup> See *id* at para 25 (per Gleeson CJ Gummow, Hayne & Heydon JJ) (barrister's lack of contract with client "not well founded") and *id* at 28 (per Gleeson CJ Gummow, Hayne & Heydon JJ) (instantaneous in-court decisions not differentiating advocates from other professions "distracting and irrelevant").

<sup>73</sup> *Id* at para 27 (per Gleeson CJ Gummow, Hayne & Heydon JJ).

<sup>74</sup> *Id* at para 29 (per Gleeson CJ Gummow, Hayne & Heydon JJ).

<sup>75</sup> *Id* at para 29 (per Gleeson CJ Gummow, Hayne & Heydon JJ).

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> *Id* at para 29, footnotes 22 & 23 (referring to *Giannarelli* (1988) 165 CLR 543 at 579 (per Brennan J), at 557 (per Mason CJ) and at 594 (per Dawson J).

<sup>79</sup> *Giannarelli* (1988) 165 CLR 543, 557 (per Mason CJ).

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*notwithstanding that the client may wish to chase every rabbit down its burrow*".<sup>80</sup>

66. The dissent by three of the seven Law Lords in *Hall & Co* in relation to criminal cases is based, in part, on the importance of this independent judgment by advocates, and the chilling effect on it of the abolition of advocates' immunity, and the adverse effect that would have on the administration of justice.<sup>81</sup>

67. Lord Hope said this:

I consider that the risk is as real today as it was in 1967 in this country [when *Rondel v Worsley* defined advocates' immunity in England & Wales and Scotland] and it was in 1988 in Australia [when *Giannarelli* defined advocates' immunity in Australia] that, if advocates in criminal cases were to be exposed to the risk of being held liable in negligence, the existence of that risk would influence the exercise by them of their independent judgment in order to avoid the possibility of being sued. The temptation, in order to avoid that possibility, would be to pursue every conceivable point, good or bad, in examination, cross-examination and in argument in meticulous detail to ensure that no argument was left untouched and no stone was left uncovered. The exercise of independent judgment would be subordinated to the instincts of the litigant in person who insists on pursuing every point and putting every question without any regard to the interests of the court and to the interests of the administration of justice generally.<sup>82</sup>

68. Although Lords Hope, Hutton and Hobhouse put this only in relation to advocates in criminal cases, and dissented only in relation to the abolition of the immunity in criminal cases, there is no logical or practical distinction between criminal and civil cases in relation to the exact same risk in civil cases.

### **The adverse practical consequences of the abolition or limitation of the immunity**

69. The contemplated abolition of advocates' immunity in Australia by uniform State legislation would change the framework of the administration of justice. Judges, magistrates and jurors, like members of Parliament, have absolute immunity. Advocates' immunity as sustained by the High Court in *D'Orta-Ekenaike* is part of the framework of the administration of justice, and based

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<sup>80</sup> *Ibid* (emphasis added).

<sup>81</sup> *Hall & Co* [2002] AC 615, 717A-B (per Lord Hope); see also at 731D-G, 733B-F and 733H to 734A (per Lord Hutton) and at 746D-F, 747C-D, 749G and 750B (per Lord Hobhouse).

<sup>82</sup> *Id* at 717A-B (per Lord Hope).

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on the same public policy underlying the immunity of judges, magistrates and jurors and, incidentally, of witnesses.

70. Were advocates' immunity to be abolished by statute, advocates would have no option but to accept the changed framework, and could be expected to adjust their conduct of cases accordingly.
71. Justice McHugh, in *D'Orta-Ekenaike*, referred to statements by Justice Kitto and Chief Justice Dixon on the "unique but indispensable function in the administration of justice" of barristers (this was in the days that the immunity was "barristers' immunity") and the "delicate relationship [of intimate collaboration with the judges] . . . [that] carries exceptional privileges and exceptional obligations".<sup>83</sup>
72. It is not suggested that legislative abolition of advocates' immunity would entirely eliminate advocates' duties to the court. However, abolition of the existing "exceptional privilege" of advocates' immunity – taking advocates out of the immunity extended to all others in the trial process – would surely involve a consequential adjustment in the existing "exceptional obligations", which presently include independent judgment by the barrister – independent from the interests of the client – to exclude from presentation of the client's case matters relevant to that case.
73. As stated in paragraphs 63-64 above, the High Court majority judgment observed, "the significance, or magnitude, of [the chilling effect of the threat of civil suit with a consequent tendency to the prolongation of trials]"<sup>84</sup> "should [not] be underestimated"<sup>85</sup> and such considerations "do not detract from the importance of the immunity"<sup>86</sup>.
74. Similarly, the Bar Council would have to reconsider the traditional cab-rank rule, which requires a barrister to accept a brief in an area in which he or she practises and in relation to which he or she would be competent and available. Abolition of advocates' immunity would certainly require consideration of whether such a rule is appropriate and fair in requiring a barrister to represent a client in circumstances where reasonable prudence might suggest declining the brief.
75. Members of the Bar, solicitor advocates and various legal aid organisations, such as Victoria Legal Aid, Community Legal Centres, and Public Interest Law Clearing House (which administers the Victorian Bar Legal Assistance Scheme) furnish a significant volume of free legal representation. Not uncommonly persons seeking such aid come with a history of aggressive dissatisfaction with previous legal representation which, on investigation, is seen to be unfounded. Abolition of advocates' immunity would surely require

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<sup>83</sup> [2005] HCA 12 at para 106 (per McHugh J, referring to *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 286 (per Dixon CJ) and at 298 (per Kitto J)).

<sup>84</sup> [2005] HCA 12 at para 29 (per Gleeson CJ Gummow, Hayne & Heydon JJ).

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

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them, as a matter of prudence, to consider carefully whether to represent such persons.

76. There are, we consider, serious access-to-justice implications to be considered in the change to the framework of the administration of justice involved in any proposal to abolish or limit advocates' immunity.
77. There may not be many negligence suits against advocates. It is claimed by abolition proponents that there have been very few such suits, and an infinitesimal number of successful suits. If true, that suggests rather that very few claims (and even fewer meritorious claims) are being denied access to a hearing by the immunity, and that the balancing of interests should favour the fundamental public policy basis supporting its retention.
78. As noted, there would be likely to be adverse consequences in access to justice. Advocates, public interest lawyers, legal aid agencies and community legal centres would be forced to look closely at representing difficult clients. There would be consequences in the way advocates present cases, not only criminal cases, but also large commercial cases in which the consequences of a complex and protracted negligence suit like, for example, that in *Yates Property Corporation v Boland*<sup>87</sup>, are potentially devastating.
79. The potential costs to Government include the judicial resources that would be engaged in more protracted trials. If there is to be a remedy and compensation for those claiming to have been convicted and penalised because of the negligence of their advocate, should there also be a remedy and compensation for those similarly prejudiced because of errors on the part of the rest of the judicial system – judges, jurors and witnesses? There is statutory provision in England for limited compensation in the discretion of the Secretary of State.<sup>88</sup> More comprehensive provision for government compensation in both civil and criminal cases is a logical corollary to the abolition of advocates' immunity.

**The High Court also examined and rejected bases for limiting advocates' immunity.**

80. The High Court majority also examined in its judgment the various alternatives that have been advanced for limiting advocates' immunity – limiting it to criminal cases and removing it from civil cases (as was effectively done in the challenged New Zealand Court of Appeal decision in *Lai v Chamberlains*), limiting it to final rather than intermediate outcomes, limiting it to actual in-court conduct and removing the immunity from conduct "intimately connected" with the in-court conduct. The Court examined each, and gave principled explanations as to why none of these alternatives is appropriate in the Australian context.

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<sup>87</sup> Finally resolved after years of litigation in the High Court, (1999) 167 ALR 575.

<sup>88</sup> See para xx and fn xx of this submission (above).

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81. As to the distinctions based on the criminal/civil dichotomy, the majority decision refers to “the difficulties of dividing the litigious world into two classes, one marked ‘civil’ and one marked ‘criminal’ identified in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*” as “reason enough to reject a principle founded in drawing such a distinction”.<sup>89</sup> That case involved the tangle between criminal and civil proceedings in relation to actions under the *Customs Act* 1901 (Cth) and the *Excise Act* 1901 (Cth) possessed of both civil and criminal characteristics.<sup>90</sup>
82. The majority judgment links the distinction between final and intermediate judgments with the point that an intermediate judgment will, by definition, have been set aside on appeal, and that, as in the *D’Orta-Ekenaike* facts, often on the basis of a flaw in the conduct of the trial not directly linked as a matter of causation to the claimed advocate’s negligence.<sup>91</sup>
83. On removing the “intimately connected” extension, the majority adopted the reasoning of Chief Justice Mason in *Giannarelli* that it would be “artificial in the extreme to draw the line at the court door”.<sup>92</sup>
84. Chief Justice Mason observed in *Giannarelli* that:

Preparation of a case out of court cannot be divorced from presentation in court. The two are inextricably interwoven so that the immunity must extend to work done out of court which leads to a decision affecting the conduct of the case in court. But to take the immunity any further would entail a risk of taking the protection of the immunity beyond the boundaries of the public policy considerations which sustain the immunity.<sup>93</sup>

**Neither exception nor compromise is appropriate given the public policy basis in the finality of judicial determinations adopted by the High Court in *D’Orta-Ekenaike*.**

85. It is not appropriate to abolish the immunity in civil cases, but retain it in criminal and family law cases. The three Law Lords who dissented in *Hall & Co* were firmly opposed to abolition of the immunity in criminal cases.<sup>94</sup> Justice Laurenson in the Full Court of the New Zealand Supreme Court would have excepted also family law cases.<sup>95</sup> Justice Hammond, with whom

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<sup>89</sup> *Id* at para 76 (per Gleeson CJ Gummow, Hayne & Heydon JJ, citing to the *Customs* case at (2003) 216 CLR 161).

<sup>90</sup> *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161; [2003] HCA 49 (5 Sept 2003) at para 114 (per Hayne J).

<sup>91</sup> *Id* at paras 81-82 (per Gleeson CJ Gummow, Hayne & Heydon JJ).

<sup>92</sup> *Id* at paras 85-87 (per Gleeson CJ Gummow, Hayne & Heydon JJ).

<sup>93</sup> (1988) 165 CLR 543, 559-560.

<sup>94</sup> [2002] 1 AC 615 at 723-724 (per Lord Hope of Craighead); at 735 (per Lord Hutton); and at 752 (per Lord Hobhouse of Woodborough).

<sup>95</sup> *Lai v Chamberlains* still unreported Court of Appeal of New Zealand, 8 March 2005 (the consolidation of two appeals: *Sun Poi Lai v Chamberlains* CA17/03 and *Hilda Lorraine Lai v Chamberlains* CA15/03) at para 6

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Justices McGrath, Glazebrook and O'Regan, in their joint majority judgment concurred, in the New Zealand Court of Appeal, limited his ruling to civil cases.<sup>96</sup>

86. Retention of advocates' immunity in criminal and family law cases is certainly appropriate. However, the public interest in the finality of judgments adopted by the High Court in *D'Orta-Ekenaike* is equally applicable to civil cases.
87. A number of other compromises and modifications to advocates' immunity have been suggested – all before the landmark High Court decision in *D'Orta-Ekenaike* which limited justification of advocates' immunity to the single public policy interest in finality of judgments, fundamental to the administration of justice. Were SCAG minded to consider any of them, the Victorian Bar would wish to have an opportunity to address them. Overall, we see them as answered by the judgment of the High Court in *D'Orta-Ekenaike*. Legislative intervention on peripheral modifications should not even be considered.

**On this matter involving legal principle described by the all but unanimous High Court as “fundamental” to the judicial system, SCAG should pay close regard to the Court’s judgment.**

88. The Court predicted that there would be those who would seek to characterise the result as a case of lawyers “looking after their own, whether because of personal inclination and sympathy, or for other base motives”<sup>97</sup> – and that has certainly been the case in the editorial columns, notably, for example, that headed “Gentlemen’s club protects its own”.<sup>98</sup> The Court went on to explain:

But the legal principle which underpins the Court’s conclusion is fundamental. Of course, there is always a risk that the determination of a legal controversy is imperfect. And it may be imperfect because of what a party’s advocate does or does not do. The law aims at providing the best and safest system of determination that is compatible with human fallibility. But underpinning the system is the need for certainty and finality of decision. The immunity of advocates is a necessary consequence of that need.<sup>99</sup>

89. On all these matters so intimately connected with, and in the judgment of the Court fundamental to, the administration of justice, which is the responsibility of the judicial branch of government, the executive and legislative branches should pay close regard to the carefully reasoned, principled judgments of the

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per Anderson P (describing the unreported decision of Laurenson J in the Full Court of the Supreme Court of New Zealand).

<sup>96</sup> *Id* at para 191 (per Hammond J) and para 124 (per McGrath, Glazebrook & O'Regan JJ).

<sup>97</sup> [2005]HCA 12 at para 84 (per Gleeson CJ Gummow, Hayne & Heydon JJ).

<sup>98</sup> *The Weekend Australian*, 12 March 2005.

<sup>99</sup> [2005] HCA 12 at para 84 (per Gleeson CJ Gummow, Hayne & Heydon JJ).

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six members of the High Court who are, on this occasion, very nearly unanimous in their reasoning.

90. The Victorian Bar is happy to answer any queries that may arise in connection with these submissions.

A handwritten signature in black ink, appearing to read 'W. Ross Ray', written in a cursive style.

**W. ROSS RAY**  
Chairman

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