Advocacy in Practice

5TH EDITION

J L Clissan

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LexisNexis Butterworths
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2011

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TAIWAN	LexisNexis, Taiwan
UNITED KINGDOM	LexisNexis UK, London, Edinburgh
USA	LexisNexis Group, New York, New York
	LexisNexis, Miamisburg, Ohio

National Library of Australia Cataloguing-in-Publication entry

Author:	Glissan, James Lindsay.
Title:	Advocacy in practice.
Edition:	5th edition.
ISBN:	9780409327984 (hbk).
Notes:	Includes bibliographical references and index.
Subjects:	Trial practice — Australia.
Dewey Number:	347.94075.

First edition, 1985; Second edition, 1991; Third edition, 1998; Fourth edition 2005.

Typeset in Palatino and Frutiger.

Printed in Australia by Ligare Pty Ltd (NSW).

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Advocacy in Practice

5th Edition

This fifth edition of the book is dedicated to Brian Sully QC, late of the Supreme Court of New South Wales; my pupilmaster, mentor and friend throughout nearly 40 years of practice as a barrister; and to my children, Alexander, Christopher, James and Eleanor, who together have taught me more about advocacy than all the judges in the Commonwealth.

JUSTICE
Blind blindfolded and forbidding
Stands erect and difficult to move
LAW
Wide awake and willing
Soft and flexible will ever be my love

(James Glissan, *Lex Caelestis*)

PREFACE

In the 25 years since this book was first published, much has changed in the law and in advocacy, both as practised and as taught. When it was first published, its claim to fame was that it was the first advocacy text written by an Australian, from an Australian perspective.

It was first written at a time when the general belief was that advocates were born and not made. Even then, however, it was always recognised that there were general precepts of universal application that could be used to improve a natural talent. So it came to be believed that advocacy could be learned, but it could not be taught. In those days, there were many more learning opportunities provided to the fledgling advocate — summary hearings, committal proceedings, and a complete absence of alternative dispute resolution meant that many small matters were conducted as contested litigation.

In the intervening 25 years, most, if not all, of those avenues of 'learning by doing' have disappeared, as a result either of increased cost or a governmental determination, often aided and abetted by the courts themselves, to reduce access to, and the importance of, the curial system.

In such an atmosphere, a change of perception became a necessity. In that climate, creatures such as the Australian Advocacy Institute and the Bar Practice Courses came into existence. Using the principle of 'teaching by doing', they sought to fill the void that was developing.

The necessary consequence was a change of philosophy: it became asserted that advocacy could be taught.

As to this, I remain unconvinced.

There can be no question that advocacy can be improved by teaching, and that critical self-analysis is a powerful adjunct to improvement. One of the casualties

of the philosophical change was the abandonment of anecdote; war stories were discouraged. Where those anecdotes were no more than an opportunity for the narrator to assert his or her own excellence, there is no loss. Many, however, were instructive, and many, now in the process of being lost through generational change, provided a valuable link between generations of counsel, and preservation of traditions which, in turn, led to a trust between bar and bench and which rendered both the advocate's and the judge's task easier.

Who could not be both amused and instructed by hearing counsel interrupting a judge during sentencing proceedings in the following way:

Judge: *Smith, you have been convicted after a fair trial.*

Counsel: *I object.*

Judge: *What do you mean?*

Counsel: *It's not for your Honour to say it was a fair trial. That's for the Court of Criminal Appeal.*

Or the following exchange:

Judge: *I've listened to your argument, Mr Smith, for the last two hours, and I am none the wiser.*

Counsel: *Perhaps not, your Honour, but far better informed.*

In many ways, we have become too mealy mouthed, too serious and too governed by precepts of advocacy foisted upon us by 'those who know'.

In this, and in later editions of this book, I hope to do something to redress that balance, while still offering a framework for the proper presentation of cases. I have been privileged by the support that the book has been given — I am informed by *one who knows* that it is the most stolen book in the Supreme Court and Bar libraries. I am happy to accept that as a measure of its success and hope it may continue to enjoy its privileged position.

James Lindsay Glissan QC

Chambers, April 2011

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