

THE BULLETIN

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ACCESS TO JUSTICE & PRO BONO

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KEY LAW SOCIETY CONTACTS

Chief Executive
Stephen Hodder -
stephen.hodder@lawsocietysa.asn.au

Executive Officer
Rosemary Pridmore -
rosemary.pridmore@lawsocietysa.asn.au

Member Services Manager
Michelle King -
michelle.king@lawsocietysa.asn.au

Director (Ethics and Practice)
Rosalind Burke -
rosalind.burke@lawsocietysa.asn.au

Director (Law Claims)
Geoff Thomas -
gthomas@lawguard.com.au

Manager (Education)
Sally Browne -
sally.browne@lawsocietysa.asn.au

Manager (LAF)
Annie MacRae -
annie.macrae@lawsocietysa.asn.au

Manager (Finance and Administration)
Ciro Pipolo -
ciro.pipolo@lawsocietysa.asn.au

THE BULLETIN

Editor
Michael Esposito -
bulletin@lawsocietysa.asn.au

Editorial Committee
D Barnfield E Olsson
S Kljun S Hodder
R Earles P Wilkinson
S Errington E Belperio
A Siow B Grant
A Bradshaw R Hasda
W Jordan E Moran

The Law Society Bulletin is published monthly (except January) by:

The Law Society of South Australia,
Level 10-11, 178 North Tce, Adelaide
Ph: (08) 8229 0200
Fax: (08) 8231 1929
Email: bulletin@lawsocietysa.asn.au
All contributions letters and enquiries should be directed to
The Editor, The Law Society Bulletin,
GPO Box 2066,
Adelaide 5001.

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PUBLISHER / ADVERTISER

Boylen
Level 3, 47 South Terrace, Adelaide SA 5000.
Ph: (08) 8233 9433 Fax: (08) 8212 6484
Email: admin@boylen.com.au
Studio Manager: Cindy Ridgwell
Layout: Henry Rivera

Advertising
Email: sales@boylen.com.au

Printer
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Pro Bono is not a substitute for legal aid

TONY ROSSI, PRESIDENT



Adelaide played host to the National Access to Justice and Pro Bono Conference on 23-24 March. It was the first time the event has been held in Adelaide and it was a wonderful opportunity to showcase our city to national and international guests.

The event was a huge success thanks to the wonderful efforts of staff of the Law Council of Australia, Australian Pro Bono Centre and of course, the Law Society of SA, who worked tirelessly to bring the event together.

In my opening address I discussed the relationship between pro bono legal work and legal aid, arguing that pro bono cannot be seen as a substitute for legal aid. The following is a modified version of my speech:

It is an unfortunate reality that the terms “access to justice” and “pro-bono” are associated.

As a result of not just a failure to maintain but actually reduce the level of funding to legal aid commissions, community legal centres, aboriginal and Torres Strait islander legal services and family violence legal services there has been an increasing dependency upon the provision of free or reduced cost legal services by the private legal sector.

Whilst the legal profession can be expected to continue to provide pro bono services, it can only do so according to its ability. Law firms are not charities and the erosion of traditional areas of work and profitability through legislative changes, is impacting upon the ability of firms to undertake pro bono work.

The Society has noted that it has become increasingly unviable to take on legal aid matters. Overwhelmingly, practitioners who represent legal aid clients do so at significant cost to their firm. This is further exacerbated in small and regional firms.

Our members have noted that legal aid matters are not cost effective to run if you want to provide quality service to a client. For many, it is for “love, rather than money” that they give their time and expertise. Despite the increasing challenges, practitioners remain compelled to continue to provide legal aid and pro-bono services.

The Society has campaigned tirelessly alongside the Law Council and its constituent bodies for the Federal and State Government to prioritise legal aid funding. The underfunding of legal aid will only further erode access to justice for those in our community who need it most. Legal aid allows some of our hardest working lawyers to help some of our most vulnerable people. There will be no saving from cutting legal aid. Instead it will ensure further hardship, a greater dependence on welfare and in some cases increased criminal activity.

The conference theme “innovation and justice” provides an opportunity to explore innovative ways of improving access to justice and, perhaps, the extent to which pro-bono services are required.

At an international level the challenge is more difficult because there are still countries in the developing world which lack proper access to information and communication technologies.

Politics may interfere in the infusion of technological innovation and global justice.

In Australia in 2014 the Australian Government commissioned a report from the Productivity Commission on Access to Justice Arrangements.

The inquiry was confined to the civil justice system and the report noted there are many options for resolving disputes including administrative bodies, Tribunals and civil courts and noted that alternative dispute resolution methods, whilst they can be successful, was not an appropriate mechanism to resolve all disputes.

It had regard to the difference between our present adversarial system and an inquisitorial system. Ultimately, the recommendation was for improvement of the current system rather than a change.

Courts in Australia have demonstrated a preparedness to embrace technology. The take-up however has been relatively slow and that has been primarily due to financial considerations and the priorities of governments.

The challenge is to identify how emerging technologies can not only improve access to justice, but do so in a cost effective manner for the litigants and which may, in turn, encourage lawyers to act on a pro bono basis where that is required; and persuade governments that investment in the emerging technologies is justified.

In South Australia, the State Government has placed a very low priority on funding the justice system. Not only does it contribute much less to funding legal aid than most other State Governments, the budget for the Courts Administration Authority is very constrained and the courts operate in sub-standard buildings with sub-standard facilities.

The Society, in its submission to the State Government budget process will be calling for the Government to increase funding to the Legal Services and community legal centres (read a summary of the State Budget Submission on pages 38-39).

In all, we are seeking a proper focus on access to justice. It is one of the primary factors that underpins the quality of our experience as Australians. We must fight for the funding that is necessary to properly provide it. We must impress on voters the implications for them. To allow Governments to continually push more on to a profession that has at its core the desire to see justice done is no longer sustainable. **B**

Radical thinking needed to fix the access to justice problem

MICHAEL ESPOSITO



With a theme of “innovation and collaboration”, the recent National Access to Justice and Pro Bono Conference in Adelaide focused on new, creative and enterprising strategies to provide quality legal assistance to those who might otherwise be unable to access it.

The legal aid crisis, precipitated by a chronic lack of investment, was referred to time and time again during the conference.

While several speakers propounded exciting innovations within the legal profession to bridge the justice gap, it was the keynote speaker from the United States who proposed the most radical solutions to the access to justice problem.

Professor Sheldon Krantz, a professor of law at Georgetown University and a thought leader in the area of pro bono work, proposed a drastic re-evaluation of how legal services were administered. While speaking from a frame of reference based on the US experience, the professor’s descriptions of the problems facing the American justice system, including a dramatic reduction in Government funding and cost prohibitive services, drew parallels with the situation in Australia.

Prof Krantz has previously said that we have “reached a point in history where we

have to re-focus and become a helping profession, not just for those who can afford to pay the rates we charge.”

Some of the changes he implored chafed against the conventional thinking of the legal profession and would no doubt be controversial if these recommendations were considered in Australia. They included:

- A mandatory pro bono requirement for all lawyers;
- New fee structures which allow lawyers to offer greatly reduced fees to particular sections of the population and to provide “partial” services;
- Eliminate the monopoly that precludes non-lawyers to address legal needs;
- Provide greater support to self-represented litigants.

The Law Society has regularly warned against the dangers of not engaging lawyers to do legal work and has also illustrated the problems with the increasing number of self-represented litigants, so Prof Krantz’s proposals would be hard to fathom for some.

But it doesn’t mean these recommendations should be dismissed. Prof Krantz is an internationally respected leader in access to justice and has also had vast experience in the cut and thrust

of legal practice on both the civil and criminal arena. He is acutely aware of the complexities and pitfalls of the justice system.

What is clear is that we need to think outside the box to fix the legal crisis in Australia. The law firm that Prof Krantz established in 2015 is a prime example of such lateral thinking - it’s a firm that provides legal assistance at a fraction of the going rate and is based on the client’s ability to pay. So far, the firm has shown encouraging signs that it can be a long-term sustainable model.

Aware of the need to address the justice problem, the Law Council of Australia has launched an ambitious initiative to create a fairer justice system.

The Law Council has been conducting consultations with a range of representatives from legal aid commissions, community legal centres and courts to help inform the “Justice Project”.

The survey will shine a light on the experiences of a variety of disadvantaged groups in the community and the barriers they face. The final report, due in November, will hopefully provide a framework for a justice system that is properly resourced and caters to the needs of all Australians. **B**

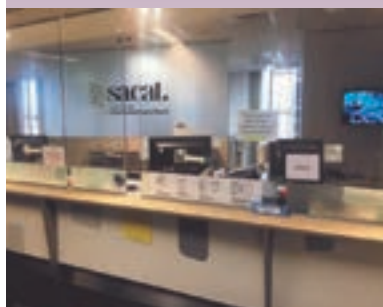
SACAT—SIGNIFICANT DECISIONS

24 MAY 2017

5.30PM—7.00PM

Law Society of South Australia
Level 10, 178 North Terrace, Adelaide

Presenter: His Honour Justice Parker—President SACAT
Commentator: Mike Wait SC—Crown Solicitor’s Office



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* Total CPD Units are accurate at time of printing and should be taken as a guide only.



A round-up of recent Society meetings & conferences

ROSEMARY PRIDMORE, EXECUTIVE OFFICER



2 MARCH 2017

Electronic Systems for Courts

President Tony Rossi and Chair of the Civil Litigation Committee, Nick Anderson, met with the Courts Administration Authority's Executive Director of Strategy and Court Operations, Megan Webster-Bradman, to obtain an update on the Electronic Case Management System being developed by the Courts Administration Authority. The ECMS will operate in a similar manner to the Federal Court's electronic filing system. It is anticipated the vendor will be announced shortly and the ECMS will be implemented within three to five years. The Courts intend to further consult the Society and other key stakeholders in relation to technology aspects of the system and functionality for solicitors and barristers.

9 MARCH 2017

Meeting with Commissioner for Victims' Rights

Tony Rossi and Chief Executive, Stephen Hodder, met with Commissioner for Victims' Rights Michael O'Connell. Matters discussed included prison overcrowding, major indictable reform, transforming justice, civil claims for assault, the Victims of Crime Fund, District Court systems and the Children and Young People (Safety) Bill 2017.

Meeting with David Pisoni MP: Special Drivers' Licences

Philip Westover, Chair of the Country Practitioners Committee, joined Tony Rossi and Stephen Hodder for a meeting with David Pisoni MP, Shadow-Minister for Transport. The Society informed Mr Pisoni of its proposal for the introduction of restricted drivers licences for people in rural and remote areas who have committed a traffic offence and lose their licence. The proposal aims to balance the inequitable punishment experienced by people living in remote areas where there is no public transport or delivery service. As an example, a person could be given a licence that allows them to drive only to take children to school.

Stakeholder Reference Group for the sale of the Land Titles Office

The Chair of the Property Committee, Philip Page, represented the Society at the Stakeholder Reference Group for the sale of the Land Titles Office. Gary Goddard, Deputy Under Treasurer, reported the State Government expects to complete the selection of the preferred bidder for project to sell the services of the Land Titles Office by August-September 2017. Jamie Restas of HWL Ebsworth and Assistant Crown Solicitor Chris Gray gave a presentation on the "legal architecture" of the bidding and sale. The Society maintains its concern with some aspects of the sale; and that such a fundamental asset must be retained by the State.

17-18 MARCH 2017

Meeting of Law Society Presidents, Chief Executives of Constituent Bodies of the Law Council of Australia; the Conference of Law Societies; Constituent Bodies Meeting and Meeting of Directors of the Law Council of Australia

Tony Rossi, as President and as the Society appointed Director of the Law Council, and Stephen Hodder as Chief Executive variously participated in the above quarterly meetings. Topics discussed included the Legal Profession Uniform Law, PEXA, bail review in Victoria, funding cuts to Community Legal Centres and various LCA projects such as the Legal Aid Matters campaign; the Justice Project; national unconscious bias training; privatisation of the Land Titles Office; the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*; and the *Racial Discrimination Act 1975* and freedom of speech.

23 MARCH 2017

CRASH! Compulsory CTP Insurance seminar

Tony Rossi attended the CRASH! Seminar to present the closing remarks, highlighting some of the concerns the Society holds in relation to cuts to compensation to those injured in motor

vehicle accidents. The Society continues to agitate for a system that provides adequate compensation in relation to economic loss and pain and suffering for those injured in motor vehicle accidents.

24 MARCH 2017

Meeting with Chief Magistrate

Matters discussed at a meeting Tony Rossi and Stephen Hodder held with Her Honour Chief Magistrate Hribal included costs in the Magistrates Courts, the Legal Services Commission's Family Law Duty Solicitor, the Magistrates Association's proposal that the Magistrates Court be renamed as the Local Court, the Magistrates Court's workload, the Rule regarding filed offers, the ECMS, transcript delays, funding for the Courts Administration Authority, the Judicial Registrars Bill, Victorian bail juries, the Society's newly established Advocacy Committee, the AVL protocol and suites, professional courtesy issues and the quality of advocacy.

28 MARCH 2017

South Australia: The State of Mental Wellbeing Business Luncheon

The Society was represented by Tony Rossi at this Luncheon, which focussed on the importance of positive mental health and wellbeing in businesses and the community.

3 APRIL 2017

Law Council of Australia

Law Council of Australia President Fiona McLeod SC, CEO Jonathan Smithers and Director of Policy Nick Parmeter attended the Society to discuss the LCA's focus and projects for 2017, in particular the Justice Project. They met with representatives from the Aboriginal Issues, Justice Access, Children and the Law, Country Practitioners, Criminal Law, Family Law, Small Practice and Women Lawyers Committees; and also with the Society's Council.

Please note that the Society's advocacy work is reported to Members via the monthly Advocacy Notes e-newsletter, which commenced on 1 March 2017. B

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Access to Justice through the Courts

THE HON JUSTICE MARTIN HINTON

The following is an edited version of Justice Hinton's speech on "comparative approach to access to justice through the courts", delivered at the National Access to Justice and Pro Bono Conference on 23 March.

Daily the courts of the nation must grapple with the objective of delivering perfect justice in accordance with an inscrutably fair process in a context where the time and resources necessary to doing so are limited. Innovation is inevitable.

That we are compelled to innovate drives the courts and judges to improve their quality, efficiency and effectiveness.

Bearing this in mind, I would be surprised if judicial officers in other courts did not have the same experience as me, namely, that their respective courts have lively and proactive rules committees and that there is amongst them and their colleagues a never ending exchange of views about how things can be done better.

But to state the objective as I have – the delivery of perfect justice in accordance with an inscrutably fair process in a context where time and resources are limited – risks overlooking many aspects of justice delivery. Many of those aspects may be conveniently grouped under the rubric "access to justice".

Chapter 11 of the Productivity Commission's report on Access to Justice Arrangements focuses on court processes and I would be surprised if you did not find in each court, or perhaps across a jurisdiction, rules and practice directions that address many of the Commission's concerns including:

- Fast tracking of certain types of matter;
- Limitations upon discovery;
- The use of information technology to manage the discovery process;

- Rules controlling the obtaining of expert opinion;
- Embracing alternate dispute resolution, and
- The expanded use of information technology.

As a relatively new judge I have observed in my colleagues, without exception, unwavering commitment to the objective. Each in whatever jurisdiction they sit brings that commitment and their individual experience to the conduct and resolution of the matter before them. Each has their own approach, but the rules provide a framework that ensures that idiosyncrasies do not undermine predictability such that legal practitioners cannot meaningfully engage with the court or advise their clients on what is anticipated to occur.

Speaking for myself, it is all well and good to have the tools, but the true effectiveness of their deployment rests in no small part with the parties and their lawyers. The enforcement powers of the Court are a blunt tool for securing compliance with programming and procedural orders made. The Court can easily be frustrated.

I find that I am increasingly looking to counsel, who, with the benefit of their knowledge of broader aspects of the matter and their client, are in the best position to assist me in determining how the flexibility that the rules permit can best be tailored to the individual dispute. My experience to date is that counsel are only too willing to assist, but still very much cling to the traditional way of doing things. That may be appropriate in many matters, but I doubt that it is in all – innovate.

I urge counsel and legal practitioners generally to study the rules of court. I appreciate that is not the most irresistible of invitations. I have found, however, that the rules not only permit great flexibility but allow for innovation. Further, they contain many, many suggestions as to how things may be done, suggestions that are the product of the collective wisdom of the Supreme Court and many other courts throughout the common law world.



The Hon Justice Martin Hinton

True a judge could impose a novel approach, but if it is not embraced it will likely flounder. A cooperative approach is essential.

Within our Court we have a sub-group of judges who form the special classification committee. Matters that are specially classified – those that are sufficiently complex – are allocated to one or other of these judges. If a matter is specially classified and allocated, the rules provide for greater control and management of the matter by a judge who will also be the trial judge. There is great scope here for the judge and counsel to work closely together to achieve an efficient outcome following a tailored process without compromising justice or the judicial method.

I appreciate that our special classification regime, which may be considered a species of docket system operating within a broader general roster system, deals with large and complex civil litigation only. Sight should not be lost, however, of the savings in judicial time and resources that is achieved by excising complex civil litigation from the ordinary list, savings that can then be redirected to other matters thereby improving access to justice.

Access to justice is about more than just rules and procedures.

There are many obstacles less visible

to judges that impact upon people who should have unimpeded access to justice. Out of sight does not necessarily mean out of mind. As an institution, and I use that expression rather than court purposely to include the various officers of the Court, we are conscious of limited funding for legal aid, we are conscious of the difficulties confronting the unrepresented litigant, we are conscious of the level of fees charged for instituting proceedings, the need to embrace electronic filing systems, the complexity of some of our rules and forms, and the need to use plain English. We are conscious of cultural barriers. We are conscious of the cost of transcript, of the costs of expert reports, of an absence of things in some of our buildings like wheelchair access and hearing loops, of the

There is great scope here for the judge and counsel to work closely together to achieve an efficient outcome following a tailored process without compromising justice or the judicial method.

need to provide suitable amenities for court users of all backgrounds and capacities, of the need to ensure the professionalism of translators, and the need to provide a safe environment in which any litigant can be listened to and truly heard.

This list is not exhaustive.

Many of these issues are currently under review and some constantly under review. Many are the product of discussions with government and budget processes. No

doubt in many respects, we can do better than we are. My point, however, is to emphasise that as an institution the Court is committed to dealing with each of these issues.

It is also my experience that the Court is open to suggestions for improvement. It may be, that like the common law, we move slowly, but like the common law approach to judicial method, nothing relevant is rejected without first being scrutinised. **B**



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Pro Bono conference urges action on access to justice

On 23-24 March, the Law Society, in conjunction with the Law Council of Australia and the Australian Pro Bono Centre, hosted the sixth National Access to Justice Pro Bono Conference at Adelaide Convention Centre.

The event featured a range of South Australian, interstate and international speakers, including Shadow Attorney General Mark Dreyfus QC and keynote speaker, Georgetown University's Professor Sheldon Krantz, who spoke on the provocatively titled topic "What's wrong with the legal profession and how to fix it". Focusing on the deficiencies in the US legal system, Prof Krantz outlined a plan to improve the legal system and give millions

of marginalised Americans the ability to access legal representation.

Prof Krantz also delivered a speech at the Conference Dinner at the National Wine Centre on "The Rule of Law in the new America".

Professor Krantz developed New Perimeter, a not-for-profit organisation providing long-term pro bono legal assistance in under-served regions to support access to justice, social and economic development, and sound legal institutions. He is also the Chairman of the DC Affordable Law Firm, a non-profit "low-bono" firm that assists those who do not qualify for legal aid, but cannot afford to pay lawyers' usual rates. DCALF assists

housing, family law, immigration and small business clients. Professor Krantz said the firm, currently in its third year of operation, is showing positive signs that the low-fee model can be sustainable.

This edition of the Bulletin features several illuminating articles based on the presentations of some of speakers at the conference.

The Society is presently collecting data from Members involved in legal aid work with a view to using the findings from the survey to implore the government to provide adequate funding for these matters. Additionally, the Society's submission to the State budget is strongly focused on reversing the budget cuts to legal aid services. **B**





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LINDY MCNAMARA

Never afraid to be outspoken and to campaign when he felt laws needed to be changed, barrister Kevin Borick QC has worked for more than five decades ensuring people have the right to a fair trial.

Looking back over his past 57 years in the legal profession, Kevin Borick QC struggles to pinpoint one aspect that will be seen as his “legacy”.

There have been many achievements of which he should be proud. He’s defended those accused in some of the State’s high-profile ground-breaking cases – Cheatle, Kontinnen, Drummond to name a few – and has also played a role in pushing for changes in legal principles and legislation. He has taken a particular interest in the use of forensic evidence – in Keogh for example – and demanded better practices be implemented when it comes to utilising science in police work.

Major cases aside he hopes that he will be remembered for always fighting for every person’s right to a fair trial, describing it as their “basic human right”.

However, his illustrious legal career may have been nipped in the bud if one of his first cases had ended differently.

Together with esteemed mentor Elliott Johnston QC, he was appearing for Victor Randall Grant, who had been convicted of murder and sentenced to death.

“He was due to be hung on a Monday morning and about 5pm on the Friday preceding that we went before Justice Chamberlain and we got a stay of execution,” recalled Mr Borick.

“Elliott and I then arranged to meet on Monday morning to go to the jail to tell Victor Grant what was happening.

“I picked him up at about 8am just by the Newmarket Hotel and Elliott said to me ‘Did you serve the order on the Sheriff?’ and I said, ‘What order?’. He said, ‘The order for the stay of execution’ and I said, ‘Was I supposed to?’ He said, ‘I think so’.

“And we drove the rest of the way to the jail in silence.”



Kevin Borick (left) and Geoffrey Eames at the inaugural International Criminal Law Congress in Adelaide in 1985, and on the following page - Mr Borick with barrister Angus Redford (left), who together organised the major event's return to Adelaide.

When they arrived there was a big crowd milling outside and Mr Borick admits he was pretty worried that they may have been too late.

“The chief warden came out and said, ‘Hi Elliott, you want to talk to Victor Grant?’ and he said, ‘Yes’. He said, ‘I heard on the wireless on Saturday morning you got a stay of execution so if it’s any use to you, I didn’t hang him!’”

Despite a three-year stint as an assistant crown prosecutor, Mr Borick says he always felt it was in his DNA to defend and he spent most of his career as an independent barrister.

Some of his cases brought about changes to legal principles, such as in the matter of Cheatle which resulted in Federal Court cases requiring the verdict of the jury to be unanimous, rather than a majority verdict.

In the ground-breaking case of Kontinnen, he successfully argued ‘battered women’s syndrome’, explaining that women who are battered can’t leave because they are under some sort of control.

“The interesting aspect of that was I knew Erika Kontinnen well and I knew that Hall, the man who battered her, was a very violent man. I got a call, I was at home, at 3am in the morning and it was from Erika and she said, ‘Mr Borick it’s Erika here’.

“She said, ‘I’ve just shot Hilly’. I said, ‘Is he dead?’. She said, ‘I don’t know’.

“Well, at that point all the conventional bits of advice were irrelevant. My advice was ‘Get an ambulance’.

“That case went on for a long time, but eventually the concept of why women cannot leave men who are battering them came into full force.”

Another landmark in the justice system occurred in the Drummond case. This dealt with the proper collection and analysis of DNA evidence, and assisted in abolishing the principle of finality.

“We won where we showed that the forensic scientists did not properly understand, assess and present the results of contact DNA mixtures which they collected. Drummond was the first case to be appealed under new legislation which allowed for a further appeal, rather than trying to get a case returned to a Court via the petition process.

“This was ground-breaking legislation. What happened was that in 2011 there was a parliamentary committee looking at whether there should be a Criminal Cases Review Commission set up to look at possible miscarriages of justice.

“Together with another lawyer, Philip Scales AM, and Dr Harry Harding, a forensic scientist I have known since the



“...(Dr) Manock should never ever have been allowed to give evidence, because (he) was not properly qualified. He didn't understand the proper ethics and he didn't understand normal practice of a pathologist.”

Van Beelen trials, we put a submission to the committee that an alternative way to go could be to amend the *Criminal Law Consolidation Act* to give people a right of a further appeal if fresh and compelling evidence appears even years after the event. “The committee recommended that the

change be made and the new legislation was introduced in 2013. It dealt with, and got rid of, the principle of finality.

“Drummond was the first case to get it over the road and the second case to get it over the road under the new legislation that got set up was the Henry Keogh case.”

Keogh was convicted of murder in 1995, with his conviction overturned on December 19, 2014. Mr Borick had not been involved in his trials but from 2000 he spent 10 years working through arguments before the Medical Board, exposing pathologist Dr Manock and Dr James who worked with Mannock.

“...(Dr) Manock should never ever have been allowed to give evidence, because (he) was not properly qualified. He didn't understand the proper ethics and he didn't understand normal practice of a pathologist.

“It was extraordinarily frustrating because we had all the evidence about Manock's performance and then what's called 'the third petition' was before the then solicitor general, Mr Kourakis QC as he was then, now the Chief Justice. He spent three years looking at that and then advised the government that it should be rejected.

“Then came the fourth petition before Solicitor General Martin Hinton, now Justice Hinton. That took four years and nothing ever happened.

“The only way we got it back before the Court was under the new legislation.”

In February this year, the High Court granted Frits van Beelen, who is being represented by Mr Borick, special leave to appeal his 1971 murder conviction. The original trial heard evidence from Dr Manock. **B**

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Vulnerable witnesses & defendants in the criminal justice system

ANDREW ENGLISH, CRIMINAL LAW PRACTICE MANAGER, LEGAL SERVICES COMMISSION



Barrister Andrew English manages the Criminal Law Practice at the Legal Services Commission. He has worked in SA criminal courts for almost 30 years, in defence and prosecution roles. He recently spoke on issues facing vulnerable witnesses in the criminal justice system at the National Access to Justice & Pro Bono Conference.

The criminal justice system is essentially designed to cater for people who do not have special needs. It therefore is a sad irony that so many defendants are at a shocking disadvantage because they do have particular requirements arising from their mental or physical disabilities.

These individuals face a double-whammy: dealing with serious disability and with legal processes that often fail to properly recognise the disadvantage stemming from their impairment.

HEARING THE VOICELESS

The law generally expects vulnerable people to adapt to the system, not the other way around. As a result, individuals with disabilities often face reduced access to justice. This is profoundly unfair.

People with mental health problems, intellectual impairment or physical disabilities often find it very difficult to tell their story or assert their rights in a justice system that is not set up with their needs in mind.

It has been my experience that disabled clients caught up in the criminal justice system are not always treated fairly or with respect. The rights and needs of disabled people accused of a crime are just as important as the rights and needs of vulnerable disabled victims. However, there

seems to be a perception that the rights and needs of disabled defendants are not always considered to be important. Their legitimate interests tend to be subsumed because they are alleged offenders. This lack of empathy, in my experience, will sometimes lead to disabled defendants being misunderstood, at best, or actively discriminated against, at worst.

NEW LAWS, NEW APPROACHES

It's not all bad news; some of the problems I mention are being addressed, to a degree, by Parliamentarians and the SA Government.

It has been very pleasing to see the implementation of the SA Attorney-General's *Disability Justice Plan* over the past three years. The plan is the first of its type in Australia and mirrors many of the very positive developments that have occurred in the United Kingdom.

Aspects of SA's *Disability Justice Plan* were expressed in law last year in the *Vulnerable Witnesses (Amendment) Act 2015*. This legislation will make it much easier for people with disabilities to give evidence in court – whether they are victims, witnesses or defendants. It means, for example, that people with complex communication needs are now entitled to a “communication partner” to help them give evidence in court or when speaking to police.

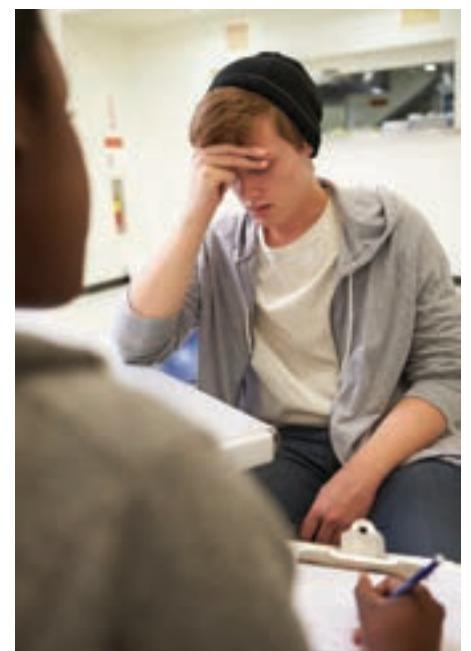
The legislation also insists that vulnerable witnesses, such as children or people with an intellectual disability, are questioned in language which is appropriate to their understanding and cognitive abilities. Far too often, vulnerable people cannot properly comprehend the questions they are asked, or they feel under pressure to give answers they do not wish to provide. To ensure fairness, new communication techniques will have to be adopted by barristers who cross examine vulnerable individuals and the police who interview those individuals. This is a significant step forward because it recognises that the system must adapt to the needs of the witness and not the other way around.

POLICE PROGRESS, POLICE CHALLENGES

SA Police have been taking the *Disability Justice Plan* very seriously and have commenced special training about how to deal appropriately with vulnerable alleged offenders. However, relations between disabled people and police officers often continue to be difficult.

Despite the improved police training and legislative reform, it is concerning that some police officers continue to interview disabled people who clearly have little understanding of their legal rights or the significance of participating in a record of interview.

When taken into police custody, clients with intellectual disabilities generally suffer distress and anxiety to a significantly greater degree than defendants who are not impaired. Many clients with disabilities do not understand why they have been arrested or when they will be released. This frequently results in them becoming agitated and aggressive while in custody, leading to bail being refused because of a belief the person appears dangerous.



Another problem experienced by people with intellectual impairment has been the repeated issuing by police of “on the spot” fines for minor matters such as loitering and public nuisance offences. As a consequence, many disabled people on low incomes build up a large number of fines that they cannot afford to pay.

ACCESS TO CLIENTS

The inability of prison authorities to accommodate professional access by lawyers or forensic psychologists and psychiatrists leads to unacceptable delays in finalising court matters and it extends the periods in custody for disabled defendants.

Legal practitioners and healthcare professionals frequently complain that they are unable to secure sufficient access to clients to take instructions and carry out assessments. Forensic psychologists and psychiatrists express frustration that they have little time to obtain a client history, let alone conduct detailed tests to determine the nature of the defendant’s intellectual disability or psychiatric condition. This information is often vital in relation to bail applications, sentencing and criminal trials.

PROGRESS AND THE ROAD AHEAD

There is no doubt the SA Government has done much to recognise the rights and needs of vulnerable people caught up in the criminal justice system. It has taken a lead and continues to move forward. However, it is my view that much more needs to be done. Cultural change must continue. Improvements are urgently required to ensure that vulnerable people charged with criminal offences are treated with informed understanding, dignity and fairness.

Sadly, on so many fronts, we continue to fall well short of what is required in a civil society. Just as the legal profession and the community justifiably call for an understanding of the subtleties of gender discrimination, so must we all recognise and address the stark realities of discrimination against people with disability in our justice system.

CASE STUDIES

Mental impairment, not criminal conduct

In one recent case, a client with Asperger’s Syndrome was served with an Interim Paedophile Restraining Order. He had never committed a sexual offence against an adult or a child and there was nothing in his background to suggest he was at risk of doing so. The case against him was based upon observations of him at public events where he would stand openly watching children playing. At no time was he seen to approach or speak to any of the children, but his behaviour attracted the attention of police.

Prosecutors refused to withdraw the application for a permanent Paedophile Restraining Order despite the defence obtaining two expert reports concluding that there was no evidence suggesting the client was a paedophile or posed a threat to children currently or in the future.

In the opinion of the expert psychologists, the client’s behaviour was a harmless feature of his Asperger’s Syndrome which caused him to focus obsessively on particular behaviours for limited periods. They were confident his fixated interest on watching children play would shift, in time, to something else that would attract his fixated attention.

After a two-day trial in the Magistrates Court, the Magistrate refused to grant the permanent order.

These kinds of cases are not uncommon and appear to reflect the difficulties of distinguishing between criminal conduct and the behaviour of individuals with mental impairment.

Deafness and injustice

The prison system poses very significant difficulties for vulnerable disabled people in custody.

In my experience, lawyers are generally satisfied with court responses to the needs of disabled people. However, the trend towards court appearances by AVL (audio visual links) does cause problems for those in custody with impaired hearing.

A lawyer was recently acting for a client in custody who was profoundly deaf. The client was charged with a very serious arson offence, and he had limited communication abilities. He was unable to use sign language and relied on lip-reading.

Shortly before the defendant was due to answer the charge in the Committal Court, his lawyer wrote to the court registry requesting that the client be allowed to appear in person because the client could not interpret (through lip-reading) what was being said over the video link.

The application was refused by the Court and the client was forced to appear via video link. He was unable to follow the proceedings because he was could not adequately lip-read what the parties were saying by looking at a television screen.

In contrast, when the matter was eventually committed to the District Court, he appeared in court in person and was permitted to sit with a social worker who related everything that was said.

Due care in custody

Lawyers have expressed concerns to me about correctional facilities complying with their duty of care to some disabled inmates.

For example, a colleague recently represented a client who had special needs because of his dwarfism. He was arrested for a serious criminal offence and remanded in custody. A device was needed to facilitate his sanitary needs because he had very short arms. However, prison authorities did not assist him to obtain the special aides which were necessary to address his physical requirements and uphold his dignity.

The same client suffered chronic back pain due to a compressed spine. Unfortunately, the prison did not provide furniture suitable for a person of his stature. As a result, the client was forced to jump from chairs and his bed, and this increased his pain and distress. **B**

Large firm pro bono work grows but extra capacity hard to find

JOHN CORKER, CHIEF EXECUTIVE OFFICER, AUSTRALIAN PRO BONO CENTRE

Lawyers in large law firms in Australia averaged 34.8 hours of pro bono legal work in 2016 — 9.7% more than in 2014, according to a new report by the Australian Pro Bono Centre (the Centre). The *Report on the Fifth National Law Firm Pro Bono Survey: Australian firms with fifty or more lawyers* collates and analyses data provided by 41 of the 58 large law firms in Australia, including 19 of 20 of the largest firms. However, 83% of firms cited “firm capacity” as one of the three biggest challenges facing their pro bono program, and over half said that their internal pro bono target was likely to remain the same in 2017.

The Report found that the pro bono participation rate amongst lawyers in the respondent firms had increased for the first time since 2010, with the average rate rising to 57% of lawyers in the firm, up from 50% in 2014. The participation of partners also rose from 40% to 46%. Seventeen of the firms met the National Pro Bono Aspirational Target of 35 hours per lawyer per annum, up from 12 firms meeting it in 2014.

The growth in pro bono can be traced mainly to firms of between 201 and 449 Full-time equivalent (FTE) lawyers — where pro bono rose by 39.7% on a per-lawyer basis (to an average of 35.9 hours) — and firms of between 50 and 200 FTE

lawyers, where pro bono increased by 26.1% on a per-lawyer basis (to an average of 22.2 hours). In the seven largest firms in Australia (more than 450 FTE lawyers), pro bono performance remained generally stable at an average of 39.4 hours per lawyer.

Much of the growth came from work that is now being done for asylum seekers, particularly for the large amount of “legacy caseload” applicants who only often have 30 days to complete an application for refugee status after being invited by the Department to do so, or face sanctions, including the loss of support payments, having their bridging visa and work rights revoked and losing access to Medicare. A number of mid-size firms are now involved, working in partnership with specialist Community Legal Centres (CLCs) to take instructions and help applicants complete these lengthy application forms.

Immigration, in 2016, ranked third in the list of areas of law in which the most pro bono work is done, moving up from 12th in 2014. Forty per cent of firms in the survey listed immigration in their top five areas of pro bono practice, up from 15% in 2014. Notably, in 2016 several firms doing this work paid sums of more than \$25,000 to cover interpreters’ and translators’ fees in these matters, there being no other option for the clients involved.

In every Survey Report since 2008, family law and criminal law have been the areas where requests for pro bono assistance were most often rejected by large firms. Research by the Centre indicates that a key reason for this is simply because very few large firms have expertise in these areas of law. The next most rejected areas were (in order) immigration, debt and employment law, indicating continuing unmet legal demand in these areas.

“Despite the growth, the performance across the respondent firms was still strikingly uneven, ranging from 4 hours of pro bono work per lawyer a year, to

71 hours. There is clearly room for a much stronger effort at several firms,” said John Corker, CEO of the Centre. “The Survey allows firms to benchmark themselves against their peers and firms are encouraged to do so,” he said.

Another area of concern identified by the survey was the growth in responses to requests from CLCs in light of impact of the forthcoming funding cuts to these organisations; the issue being that the decreased capacity of CLCs will not only reduce their capacity to provide services but may also reduce the ability of law firms to do pro bono work. In 2016, overall large firms received 20% of their pro bono matters from CLCs, with mid-size firms receiving up to 33% of matters this way.

The Survey results also indicated a larger investment by firms in pro bono coordination and management since 2014. Twenty-six law firms (representing 70% of all firms with pro bono coordinators or managers) reported that their pro bono program/practice coordinator/manager received some measure of payment, fee relief or billable credit specifically for carrying out the role. This was a sharp increase on 2014, where only 13 firms reported doing so, and on 2012 when only 6 firms reported doing so. Forty per cent of firms with a pro bono coordinator/manager also reported that the position was now a full-time one.

In 2016 the Centre produced the *Australian Pro Bono Best Practice Guide*. Thirty-seven out of 41 firms (90%) indicated that they found the Guide either “useful” or “very useful” with the three most nominated elements where firms felt their programs could be improved; that being broad engagement of staff and appropriate training, adequate crediting and recognition of pro bono legal work within the firm, and strong and deep relationships with community partners.

The full report is available for download from the Centre’s website. **B**



John Corker kicks off the National Access to Justice & Pro Bono Conference in Adelaide

Workplace Morning Teas confronting cancer head on

LINCOLN SIZE, CHIEF EXECUTIVE, CANCER COUNCIL SA

Australia's Biggest Morning Tea is one of Cancer Council's leading annual fundraising events.

With one Australian diagnosed with cancer approximately every five minutes, the length of an average tea break, we are calling on workplaces from across the state to stop for morning tea and a cuppa to raise funds for all those affected by cancer.

This year being the 24th year of the event, we will be celebrating the unique cancer support services that Australia's Biggest Morning Tea hosts help fund.

In the past financial year, Cancer Council SA was able to provide over 7,500 South

Australians with information and support via 13 11 20, over \$103,000 in financial assistance to those in need and over 31,000 nights of accommodation at Cancer Council Lodge for those travelling to Adelaide for cancer treatment.

Each of these things makes the world of difference to someone affected by cancer and their family and they're only made possible because of the generous support of the community.

Over the next two months we hope to see over 3,500 biggest morning teas here in South Australia. Whether they're big or small, they all help us to work towards

a future where cancer leaves less devastation.

With the official day on May 25, events can be held anytime in May or June.

At Cancer Council SA we continue to be inspired by the many passionate and dedicated supporters across the state.

Each morning tea is making a difference in the fight to beat cancer and allows us to do the work we do to minimise the impact of cancer in the South Australian community.

To register to host a morning tea in your workplace, visit www.biggestmorningtea.com.au or phone 1300 65 65 85.

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Vulnerable witnesses in family violence matters

MEREDITH DICKSON, ELIZABETH EVATT CHAMBERS

Given the nature of the Family Law jurisdiction it could be argued that all parties who appear in Court could be described as “vulnerable witnesses”. There are however witnesses who require particular assistance when giving evidence including but not limited to:

- Victims of family violence;
- Persons where English is not their first language;
- Persons appearing with the assistance of a Litigation Guardian;
- Persons having a mental or physical disability; and
- Children.

Given the limited scope of this article my comments here are directed specifically to the issue of family violence noting that this is a difficult issue which confronts the Family Court of Australia and the Federal Circuit Court of Australia on a daily basis.

FAMILY VIOLENCE BEST PRACTICE PRINCIPLES

In response to the family violence epidemic now confronting Judicial Officers, the Family Court of Australia and the Federal Circuit Court of Australia have established the Family Violence Best Practice Principles (BPP). A Family Violence Committee comprising Justices of the Family Court of Australia and Judges of the Federal Circuit Court of Australia together with other court staff have been instrumental in updating the best practice principles with the more recent addition being published in December 2016.

It is stated that the Best Practice Principles (BPP) are “designed to provide practical guidance to Courts, legal practitioners, service providers, litigants and other interests persons in cases where issues of family violence or child abuse arise”.

The BPP are applicable in all cases involving family violence or child abuse or the risk of family violence or child abuse in proceedings before the Court. Pursuant



to Section 4AB of the *Family Law Act 1975* family violence means “violent, threatening or other behaviour by a person that coerces or controls a member of the persons’ family or causes the family member to be fearful”.

The section goes on to list ranges of behaviour that would constitute family violence including but not limited to:

- An assault;
- A sexual assault;
- Stalking;
- Repeated derogatory taunts;
- Intentionally damaging or destroying property;
- Unreasonably denying the family member financial autonomy that he or she would have had;
- Unreasonably withholding financial support;
- Preventing the family member from making or keeping connections with his or her family, friends or culture;
- Unlawfully depriving the family member or any member of the family members family or his or her liberty.

The BPP also acknowledges that victims

of family violence are “often traumatised and vulnerable witnesses” and that “it is essential that Judicial Officers and practitioners utilise the Courts powers to achieve a fair hearing”.

THE COURTS’ POWERS IN PROTECTING VULNERABLE WITNESSES

In addition to the Courts’ general discretion to control its own processes, Courts exercising jurisdiction under the *Family Law Act*:

- May direct or allow a person to give testimony and/or appear by video or audio link either from another location or in the same court facility (Section 102C-102D *Family Law Act*).
- Must forbid the asking of offensive, scandalous, insulting, abusive and hectoring questions unless it is essential to the interests of justice that the questions be answered. (Section 101 (1) and 101 (2) *Family Law Act*).
- May disallow questions asked in a manner or tone that is inappropriate or based on stereotype (Section 41 of the Evidence Act 1995 Cth).

- Disallow, misleading, harassing, intimidating or confusing questions (Section 41 of the *Evidence Act 1995* Cth).
 - A child cannot be called as a witness or be present in Court unless the Court makes an order to the contrary (Section 100B (2) of the *Family Law Act*).
 - May change the venue of the hearing to a different location (Section 27 (A) *Family Law Act*).
- In child related proceedings:
- The Court is to actively direct control and manage the conduct of proceedings and conduct proceedings in a way that will safeguard the parties to proceedings against family violence (Section 69 ZN (5) of the *Family Law Act*).
 - The Court can give directions or make orders about how particular evidence is to be given (Section 69ZX (1) (c) of the *Family Law Act*).
 - Make orders limiting or not allowing cross examination of a particular witness (Section 69ZX (2) *Family Law Act*).
 - Receive into evidence the transcript of evidence in any other proceedings before the Court or another Court or tribunal, and draw from that transcript any conclusion of fact that it thinks proper and adopt any of the recommendations, findings, decisions or Judgment of those bodies (Section 69ZX (3) of the *Family Law Act*).

In the exercise of its general powers to control proceedings the Court may:

- Require that alleged perpetrator be shielded from view whilst the victim is giving evidence, e.g. by way of a screen or some other physical barrier. More common now is the giving of evidence by video link with the parties sitting in separate courtrooms.

- Allow the victim to have a support person near or with them while giving evidence.
- Close the Court to the public or exclude specific persons from the courtroom.
- With forewarning refuse permission to continue cross examination.
- With forewarning, determine the proceedings be concluded without further input from a party.

In appropriate cases the court will (on application) order evidence by video link to ensure that parties do not come into contact with one another. This can be especially important if the alleged perpetrators of the family violence are unrepresented at Trial.

In cases where the parties are represented I would argue that there are occasions where the Court would benefit from having the evidence given with both parties present or at the very least the alleged victim being present in the courtroom whilst the alleged perpetrator is present by video link. The reason for this is obvious, namely that the firsthand evidence of a victim of family violence can be powerful evidence in determining parenting orders for children.

This occurred in the case of *Baranski* [2010] FMCA fam 918 and *Baranski* (2012) FamCA FC18. This was a parenting and property case involving serious allegations of family violence. The husband was incarcerated at the time of trial having been found guilty of assaulting his wife. For most of the trial the husband and wife did not come into contact with one another as arrangements had been made by the Court and correctional authorities for the parties to observe each other giving evidence from different locations by way of video link.

However as noted in paragraph 50 of the first instance Judgment delivered by His

Honour Federal Magistrate Brown (as he then was):

“Regrettably, on one occasion, the parties were present in Court at the same time. This occurred in the presence of the parties’ respective lawyers, counsel for the Independent Children’s Lawyer, court officers and myself...”

His Honour noted that the parties did not communicate directly with one another and were separated by the width of the courtroom. The husband was in the custody of Correctional Services staff at the time. His Honour noted that:

“There can be no doubting the strength of (the wife’s) emotional reaction to coming upon (the husband) unexpectedly. She was fearful and apprehensive and his appearance caused her to visibly shake. I do not think that these reactions were either feigned or exaggerated in any way...”

At the conclusion of the trial the Court declined to make any orders for time in favour of the husband and the children and granted the wife’s application to relocate to Victoria.

The husband appealed. One of the grounds of appeal was that:

“His Honour appears to have placed much emphasis on the impact of the wife of the domestic violence. He appears to have been effected by his own observations of the wife’s behaviour and demeanour in the courtroom...”

The Full Court did not accept that the learned Federal Magistrate gave excessive weight to the evidence of the wife. Nor was the Court persuaded that the learned Federal Magistrate impermissibly relied upon “his own observations of the wife’s behaviour and demeanour in the courtroom” (paragraph 58). Nor did the Full Court accept the submission made by the husband that His Honour had any obligation to inform the parties prior to the delivery of his Judgment that he would, or was likely to rely upon the wife’s demeanour in the way that he ultimately did (paragraph 58).

The Appeal was ultimately dismissed.

This case is a good example of where the firsthand exposure by the Court to the reaction of a vulnerable witness was of great assistance in determining the children’s best interests. **B**

“In appropriate cases the court will (on application) order evidence by video link to ensure that parties do not come into contact with one another. This can be especially important if the alleged perpetrators of the family violence are unrepresented at Trial.”

Young lawyers get on the green

DANIELA DI STEFANO, LAWYER, FINANCIAL SERVICES ENFORCEMENT, ASIC



facebook.com/YLCSA



In the midst of Fringe and Festival events in the month that is Mad March, the Young Lawyers' Committee hosted the Annual Young Lawyers Croquet Night at the South Terrace Croquet Club. Always a popular fixture on the Young Lawyers' Committee calendar, the event aligns with the Committee's focus on promoting the health and well-being of young lawyers by getting them out of the office and onto the greens!

The members of the South Terrace Croquet Club guided teams with expert tutelage; imparting their wisdom and divulging their croquet tips and tricks. The teams tried their hands at peels, rushes and cannons; some attempting to sabotage opponents while others elated to hit their ball in the right direction!

Following one or two rounds of croquet, the young lawyers stepped away from their mallets and antics on the greens were all

but forgiven. Sam Hooper (Tindall Gask Bentley) cooked up a barbecue and the young lawyers enjoyed an impressive spread and offerings from the Croquet Club bar at genuine 1970s prices.

Needless to say, it was a jovial evening for all!

The Young Lawyers' Committee thanks all those who attended the event and were otherwise involved, particularly the members of the South Terrace Croquet Club.



Pro bono work – a young lawyer's perspective

REBECCA CLAFTON, MEMBER, YOUNG LAWYERS' COMMITTEE



I started my career in law as a volunteer at a community legal centre, lending my skills and knowledge to assist people with current or impending legal problems in criminal and family law. For the most part, those clients were from low socio-economic areas, with little understanding (or sometimes a misguided understanding) of the legal system, and little or no resources. With no financial capacity to engage a paid solicitor, a client would visit the centre for legal advice, assistance with advocacy and sometimes representation in court. What they would also get is simply a listening ear and a helping hand in what might be the most trying time of their life – following an arrest and a night incarcerated, following receipt of a summons, or having received notice from an ex-spouse that he or she had taken the children out of the state and would not be returning.

As an associate at a large commercial firm now, my day-to-day dealings are generally with sophisticated corporate clients, taking instructions from in-house counsel or the commercially-savvy. Where we, as practitioners, may find ourselves assisting in

multi-million dollar litigation, bogged down in costly pre-trial interlocutorys, or liaising with experts in specialised industries, it is easy to forget that at a base level we are still always advising, in some way, on our clients' rights and obligations.

So the pro bono work that I am involved in now with the Housing Legal Clinic run by the Welfare Rights Centre, and the Self-Representation Service run by JusticeNet, takes me back to the very foundations of being a lawyer, that is, where a client presents a problem and the lawyer must have regard to relevant facts in order to tease out the legal issue, and consequently consider the way forward. In most cases, pro bono clients are simply not aware of their legal rights and obligations, and one of the first steps is simply to listen, ascertain what rights and obligations are relevant and convey them in plain English.

Pro bono work is interesting and engaging, and always rewarding. For young lawyers in particular, it hones our listening and communication skills, and the ability to distil relevant detail from irrelevant backstory. Following on from there, we learn strategy, advocacy, and client skills.

Those foundation skills are critical for all lawyers, and once learned are accessible to us for the rest of our careers, whichever paths we follow.

Pro bono work is also vital for the legal system at large. It facilitates access to justice to a sector of society that more often than not has little capacity to find the required advice, or fund actions, and indeed may need it the most. Where the court systems are underfunded and backlogged, the pro bono work practitioners provide can be crucial to clients' understanding of their legal rights and obligations, and what options may be open to them, so that court processes are used appropriately.

At a time where the dearth of funding for community legal centres means various services have been, and are, on the edge of survival, I believe it is incumbent upon all of us in the legal profession to carry out some level of pro bono work. The Young Lawyers' Committee encourages young lawyers who are interested in pro bono work to get in touch with services such as the Housing Legal Clinic and JusticeNet, and do our part to facilitate access to justice.

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ACCESS TO JUSTICE FOR OUR MOST VULNERABLE CITIZENS IS A RIGHT – NOT A PRIVILEGE

CHERYL AXLEBY, CEO, ABORIGINAL LEGAL RIGHTS MOVEMENT & CO-CHAIR, NATSILS

The following is a modified version of Cheryl Axleby's speech on 23 March at the National Access to Justice & Pro Bono Conference in Adelaide.

Aboriginal and Torres Strait Islander peoples had a complex system of law long before the establishment of the Westminster system in Australia, and our system of law is often referred to as "traditional law" or "lore".

Elders are the repository of "lore" - and our people's heritage and culture – going back 50,000 years. It is one reason why our Elders are held in such high regard.

But law and lore have conflicted often since invasion and in the two centuries of European colonisation. And "law" was and is consistently used to alienate, dispossess and abduct Aboriginal and Torres Strait Islander people from their land, waters, families and culture.

The intergenerational impacts of loss of country, of being punished for speaking language, attempted genocide and policies relating to the stolen generations – ATSI children taken away from their families by governments, churches and welfare groups – are many.

It doesn't take a qualified medical professional to know that Aboriginal and Torres Strait Islander people might struggle to deal with the myriad issues we face as individuals and as communities, and that's without being incarcerated.

Some of those things include:

- The continuing discrimination from significant sections of non-Indigenous Australia, including systemic discrimination in access to services, education, employment and so on.

- The many health problems which our families and friends battle daily, such as diabetes, heart disease, kidney disease, liver disease, and mental health issues through lived trauma.
- The deaths of our family and friends at such young ages, including soaring rates of suicide in some of our communities;
- A scourge of family violence impacting so deeply on our women and children that Aboriginal and Torres Strait Islander women are 34 times more likely to be hospitalised as a result of injuries caused by assault than non-Aboriginal and Torres Strait Islander women;
- The added caring responsibilities on many of our elders, especially women;
- The disproportionate police surveillance and criminalisation;
- The lack of self-empowerment opportunities.
- Governments continued attitude of *doing to us rather than with us*.

Is it any wonder closing the gap policies and programs continue to fail many of us?

A fair, equal and democratic system must be based on empathy and must be culturally inclusive. But that system is also based on another systemic effect – the effect of language and public discourse.

It will often be difficult separate the relationship between public discourse and changes in the law. But change does happen.

HISTORY OF ABORIGINAL LEGAL SERVICES IN AUSTRALIA

Redfern was the first Aboriginal community-controlled Aboriginal Legal Service. It was established in 1970.

The Redfern Aboriginal Legal Service was the first operation of its kind in Australia. It began in 1970 with *volunteers* providing *free legal advice* and *representation* to Aboriginal



Cheryl Axleby, CEO, Aboriginal Legal Rights Movement

people in inner Sydney. The origins of the Aboriginal Legal Service lay in the response of Aboriginal people to police activities in and around Redfern at the close of the 1960s.

There were many complaints of assaults in the cells. Aboriginal people were essentially at the mercy of the police and magistrates. While there was a limited scheme of "public defender" legal assistance, there was no effective legal representation. Most people appeared unrepresented and simply pleaded guilty. Many offences were very minor.

A Professor of Law, now Supreme Court Judge Wootten was approached by law student Peter Tobin to attend meetings with this group of Aboriginal people to see what help and advice he could give. Justice Wootten enlisted the aid of a number of prominent lawyers to attempt to change State Government policy towards Aboriginal people, in particular, the police activities around the inner city area. They attended hotels on Thursday, Friday and Saturday nights as observers to ascertain and establish the truthfulness of the claims being made by Aboriginal people, and whether their presence there would deter police from arresting large numbers of



A young child holds onto a stray dog. Photo: Asanka Brendon Ratnayake / abrfoto.com

Aboriginal people arbitrarily. What they observed confirmed the degree of abuse and intimidation by the police.

Meanwhile in South Australia the late Elliot Johnston QC similarly did what Judge Wooten achieved and worked with Aboriginal leaders and encouraged the legal profession in SA to help Aboriginal people in the justice system.

At first there was a call to take on the police and "teach them a lesson" in court. That gave way to a more constructive idea to establish a permanent source of legal advice and representation – an Aboriginal Legal Service that could tackle immediate abuses of power, and work to address systemic problems.

Aboriginal activists and lawyers set up the Aboriginal Legal Service in Redfern in 1970, staffed by volunteers. Similarly this occurred within SA.

A number of young student lawyers and practicing lawyers had offered to give their time and knowledge on a voluntary basis to arrange bail, interview Aboriginal people in the lock-up, and prepare the defense of Aboriginal people. The aim was to provide representation and reduce incarceration and police harassment of Aboriginal people.

The service was Australia's first free legal service, setting the model for mainstream community legal aid.

The Aboriginal Legal Service initially didn't apply for funding. They instead relied on volunteers, and they prided themselves on their autonomy. At the end of 1970, Justice Wooten drafted a submission on behalf of this group to the then Office of Aboriginal Affairs for funds to set up a full time shop-front legal office. He was successful.

In early 1971 the Sydney Aboriginal Legal Service received a government grant of \$24,500 for the salaries of a full time solicitor, a field officer and a secretary. The Aboriginal Legal Service was firmly established. They started a 24-hour answering service and in the first 12 months the Aboriginal Legal Service handled over 550 cases, mostly criminal matters. It was an historical act of self-determination.

Aboriginal Legal Services created a model for a new wave of Aboriginal community-controlled organisations in health, housing, child-care and other legal organisations around the country.

These new Aboriginal organisations were designed to provide much needed services and – more broadly – to contribute to the development of pride, dignity and self-respect in the Aboriginal community and the expectation for necessary social and political change for Aboriginal people. The involvement of Aboriginal people in both management and service delivery was

critical to the acceptability of Aboriginal Legal Service to Aboriginal communities.

The Aboriginal Legal Service deliberately planned and elected men and women who were leaders in their own communities to ensure culturally appropriate service delivery. Staff were selected from local communities. The Aboriginal Legal Service was establishing a track record of working with and for the Aboriginal community.

In the late 60s early 1970s discussions were happening in SA about the establishment of The Aboriginal Legal Rights Movement in SA. The word "Movement" still applies today. Gary Foley travelled to SA at the invitation of the SA Aboriginal leaders to share knowledge about the establishment of the Redfern legal service. Thereafter Australia's second Aboriginal community-controlled legal service was established in SA.

In 1972 the new Whitlam Labor Government pledged to fund representation for all Aboriginal people in all courts.

By 1974 there was an Aboriginal Legal Service in every State and Territory throughout the country.

Today, our ATSIILS are even more important, perhaps more than ever, when we look at the current alarming over representation of Aboriginal peoples with the increasing incarceration rates within the justice and child protection systems.

We continue to experience racism at all levels. We continue to experience oppression. There is a lack of understanding of the complexities we face with having to live within two worlds - our own cultural and community context and that of mainstream dominant culture context. Our rights and our cause for concern are often invisible.

Next year is the 50th anniversary of the 1967 Referendum, where Aboriginal and Torres Strait Islander people would finally be counted in the census and the Commonwealth was given the right to legislate on my people's behalf.

Last year was the 25th anniversary of the *Mabo vs Queensland* decision, *overturning* the legal doctrine of Terra Nullius – and recognising the ongoing and legal occupancy of Australia by Aboriginal and Torres Strait Islander people.

Such legal victories are hard-fought and often won at significant cost to those involved. Like many Aboriginal people, Eddie Mabo died too young at 55, and never saw the victory he had helped win for the Meriam Peoples of the Murray Islands – but also for Aboriginal and Torres Strait Islander people throughout Australia.

In another significant anniversary, it has been just over 25 years since the Royal Commission into Aboriginal Deaths in Custody handed down its recommendations to the Commonwealth Parliament. And yet many of those recommendations have not been implemented.

These anniversaries remind us of the atrocities and of how words and laws can impact our freedom. But what of the people behind the words - the individuals and communities working together to push the envelope and change public discourse? Having a *direct* role in policy and legal outcomes will give Aboriginal and Torres Strait Islanders more control of their land and an increasingly loud and powerful voice in our society – and in their own self-determination.

NATIONAL ABORIGINAL & TORRES STRAIT ISLANDERS LEGAL SERVICES

The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) is the peak national body for Aboriginal and Torres Strait Islander Legal Services (ATSILS). NATSILS membership is made up of CEOs and Chairpersons and Legal Officers of the:

- Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (ATSILS Qld);
- Aboriginal Legal Rights Movement Inc. (ALRM);
- Aboriginal Legal Service (NSW/ACT) (ALS NSW/ACT);
- Aboriginal Legal Service of Western Australia (Inc.) (ALSWA);
- Central Australian Aboriginal Legal Aid Service (CAALAS);
- North Australian Aboriginal Justice Agency (NAAJA);
- Tasmanian Aboriginal Community Legal Services (TACLS) and;
- Victorian Aboriginal Legal Service Co-operative Limited (VALS).

The ATSILS have over 40 years of operational experience and are the experts on the delivery of effective and culturally

The support, both in-kind from pro-bono partnerships mean that our services can stretch further.

competent legal assistance services to Aboriginal and Torres Strait Islander peoples collectively providing on average 200,000 legal assistances per year.

However, because all of the ATSILS are Aboriginal Community Controlled, they indeed have over 50,000 years of experience working with and for Aboriginal and Torres Strait Islander people - who continue to remain over-represented in the justice.

We advocate for the rights and freedoms of Aboriginal and Torres Strait Islander people in every part of this country. We're demanding to know why a baby boy is taken from his Aboriginal mother before she has even left the hospital, we're doing an appeal against conviction for a young Aboriginal man facing incarceration for doing a burnout, we're preparing an unlawful dismissal claim for a father that worked in a place where a sign was placed on a water fountain saying "whites only drinking water", we're talking to our brothers and sisters when they're talking about committing suicide, we're fighting for justice for a young Aboriginal woman who's final spoken words left her calling out in pain in a police station cell, we're scrutinising a system's treatment of young aboriginal boys before a Four Corners program powerfully tugs on the hearts and minds of non-indigenous communities. And when I say we, I mean Aboriginal and Torres Strait Islander communities. We are community controlled. The call on our services continues to grow yet our funding does not.

As another Royal Commission begins, this time focusing on youth detention and child protection in the Northern Territory – interpretation and understanding of the law becomes even more crucial.

NATSILS and our constituent legal services in the Northern Territory CAALAS and NAAJA will be at the frontline of the Royal Commission.

The lack of interpreters, despite this being a legal requirement is often overlooked in due to the low numbers of registered accredited interpreters. Perhaps, it is now timely to revisit as to whether or not there is culturally safety in place are

for Aboriginal and Torres Strait Islander peoples, who often only have the choice to be trained within a mainstream service construct.

PRIORITISING JUSTICE FOR FIRST NATION PEOPLES

It is alarming that as Government budgets become tighter, Aboriginal and Torres Strait Islander communities and organisations are often the first to experience budget cuts. Yet, there is such silence from the wider community, from many who think we already receive too much.

We have seen this many times before where we often become the political football, continually getting kicked around, as a means to achieve increase in popularity and votes and confidence, feeding into the often racist agenda where we are judged within a deficit mindset by the wider society.

This is despite the evidence that Aboriginal communities are in crisis due to ongoing trauma and oppression we experience as First Nations people. We all share concerns about the ever increasing levels of disadvantage faced by Aboriginal and Torres Strait Islander peoples in this country and the cuts to Aboriginal community programs and initiatives.

We must continue to stand united in this journey until we are satisfied that social justice has been achieved. The support, both in-kind from pro-bono partnerships mean that our services can stretch further.

As of the first of July 2017, ATSILS will see a decrease in funding of over \$6 million in the 2017/18 year, when compared to their last funding agreements which ended in 2015.

This represents an 8% slash of funding to ATSILS services in 2017/18 when compared with figures from 2014/15 financial year. These cuts will have a detrimental impact upon the ATSI people accessing the justice system.

ALRM will face a further budget cut of \$300,000 to its budget this year, this is additional to the budget cuts we faced

over the last couple of years. Many of our ATSIIL brothers and sisters similarly face cuts too. I am yet again disappointed, when informed by the Commonwealth Attorney General late last year, that the government will not be tabling a budget bid for the coming financial year to increase funding for ATSILS. Yet despite this, increasing policing, legislative reforms and surveillance measures in Aboriginal and Torres Strait Islander communities continues in a punitive manner. In Aboriginal communities, there is an extreme distrust of policing, child protection and criminal justice system and is well recognised as a barrier to access to justice.

Justice reinvestment is demonstrating with the Bourke experience a more positive way to decrease offending and much more cost effectively.

The Aboriginal community in Bourke has developed a model of self-determination and are taking charge and setting the priorities based on the needs identified for their community, rather than government setting the agenda.

Self-determination and reinvesting in these initiatives at the local level is the only way to redress high incarceration rates of ATSI peoples, by working alongside ATSI peoples. We have a clear message” ”do with us”. not do to us”. We have the solutions. But is anyone really listening?

Grandmothers against Removal have been successful in their leadership by setting up a model of self-determination,

to ensure that they are involved in the decision making of children that come to the attention of child protection.

In South Australia, ALRM through the Aboriginal Community Leadership Reference Group led is working collaboratively with SACOSS, the Australian Medical Association, the Law Society and Family Matters to highlight the deficits of the current Children and Young People (Safety) Bill. The watering down of the Aboriginal Child Placement Principles in the Bill is alarming and will have a detrimental impact on Aboriginal children.

We have developed with overarching support from over 37 support agencies and committees, including generous pro bono support to develop the “We have the solutions” campaign - a call for urgent Government action.

As a result of the Peake Aboriginal Bodies launch of the Redfern Statement in Parliament house in Canberra earlier this year, we achieved a commitment from the Prime Minister and Minister Scullion to hold a series of workshops to further our identified priorities within Health, Justice, Violence Prevention, Child Development, Safety and Well-being and Disability. These workshops are currently being developed and it is hoped that they are all delivered by 30 June.

We are calling for the restoration of the \$534 million cut from the indigenous affairs portfolio in the 2024 budget to invest in priority areas we outlined and to secure

national funding agreements between the commonwealth, states and territories (similar to the former National Partnership Agreements) which emphasis accountability to Aboriginal & Torres Strait Islander peoples and drive the implementation of national strategies to name only a few of the asks we have outlined in the Statement.

We are calling for COAG to adopt a Justice Targetso that there is a focus provided on justice, as has been the case with Closing the Gap, although we hope to achieve greater outcomes than the Closing the Gap targets where only one of the seven targets is on track. If if governments and NGO sector made a commitment of “doing with us” we know we can achieve a better report card.

Access to justice for the most vulnerable and disadvantaged citizens is a right - not a privilege. Without our services being adequately resourced many vulnerable and disadvantaged citizens will be increasingly at risk of becoming lost within the justice system and will continue to avoid mainstream services.

It is everyone’s moral responsibility to advocate for equitable access to justice, to ensure it is afforded to every vulnerable and disadvantaged citizen, especially for Aboriginal and Torres Strait Islander peoples.

Information about the establishment of Aboriginal Legal Services was sourced from the NSW/ACT Aboriginal Legal Service: www.alsnswact.org.au/pages/history B

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Yale Professor explores English legal history at SA Selden Society event

EMERITUS PROFESSOR WILFRID PREST. ADELAIDE LAW SCHOOL

Attracting a standing-room only audience of 100 plus to a lecture about English legal history at 5.30pm on a Thursday night during Adelaide's Mad March is no mean feat. But this was no ordinary lecturer, or lecture. John H Langbein, Emeritus Sterling Professor of Law and Legal History at Yale Law School, has established an international reputation for groundbreaking scholarship on the comparative history of criminal procedure in Western Europe from medieval times to the present. Langbein has written a string of major articles and books on legal history; among the latter are *Prosecuting Crime in the Renaissance* (1974), *Torture and the Law of Proof* (1977) and *The Origins of Adversary Criminal Trial* (2003), which received the Coif Biennial Book Award (2006) for an outstanding American law book. Moreover, his scholarship has contemporary as well as historical dimensions; a respected authority on trusts, probate and estate law, he has served as a US Uniform Law Commissioner since 1984.

Professor Langbein's long-standing association with South Australia stems from his interest in the 1975 Wills Act Amendment Act No. 2 (SA) and its provisions for ignoring "harmless error" in the requirements for executing a valid will, which he has termed "a triumph of law reform". Having edited the third volume of the 1979 Chicago University Press facsimile edition of Blackstone's *Commentaries on the Laws of England*, Langbein was a major presence at the Adelaide Law School's Blackstone colloquium in 2007. He subsequently became an active member of the Advisory Board for the variorum edition of the *Commentaries* edited from Adelaide and published by Oxford University Press in July 2016. A few months later an informal group interested in promoting legal history in this state learnt that Langbein

had been invited to speak at a symposium planned by the Society of Trust and Estate Practitioners for early March 2017. While he could be in Adelaide only briefly, Langbein generously agreed to deliver a public lecture to what in the event became the inaugural meeting of the Selden Society in South Australia. More on that shortly...

Under the title *Public Prosecution: the Most Underdeveloped of English Legal Institutions*, Professor Langbein traced the long and complex history of Crown law procedure, from the medieval ordeal and misleadingly-termed "appeal" of felony to the early modern system of private prosecution and "trial by altercation" between accused and victim before a lay jury. In the eighteenth century prosecutions were increasingly facilitated by solicitors acting for large corporations like the East India Company and various government agencies, by investigative London magistrates (notably the brother Henry and Sir John Fielding), and eventually by police prosecutors. Counsel for both defence and prosecution also made their appearance. But full-time professional officials, charged with assessing the evidence and determining whether it justified bringing a case to trial, were very late on the scene. Although a Director of Public Prosecutions was first appointed in the later nineteenth century, that office initiated very few cases until after World War II. Indeed before the Crown Prosecution Service began operations in 1986, the bulk of criminal prosecutions continued to be managed by the police.

The prevailing system in the civil law jurisdictions of continental Europe was very different. There, as in England, the 1215 papal prohibition against priests participating in the rituals of the ordeal — where guilt or innocence was supposedly signalled by direct Divine intervention — made it imperative to develop an alternative mode of trial. Based on procedures already



Emeritus Sterling Professor John Langbein

developed by the church's canon lawyers for dealing with accusations against the priesthood, this involved a legally-trained official, working in state office, charged with investigating the truth or otherwise of the charge. That officer interrogated witnesses, drew up a dossier of evidence and decided on this basis whether or not to proceed to trial before a panel of similarly qualified judges.

In characteristically direct and unassuming fashion, Professor Langbein confessed his inability to understand why nothing like this mode of criminal prosecution had crossed the Channel any earlier than the late Victorian era, and in closing invited responses to that puzzle from his audience. Although comments and questions from the floor cast some light on local prosecution practices, and relations between prosecutors and the executive arm of government, the speaker's bafflement appeared to be widely shared, along with a general sense of appreciation for his incisive, learned, lively, and wide-ranging exposition.

But what of the Selden Society? How does it relate to South Australia, and South Australians? Founded in London in 1887,

and named after John Selden, the great seventeenth-century jurist, politician, and scholar, the Selden's mission is 'to encourage the study and advance the knowledge of the history of English law'. From the beginning it has published an annual series of primary sources, mainly edited records and reports of proceedings in many different courts, together with treatises, formularies, etc., which now comprise 130 separate volumes. There are also occasional supplementary publications of relevant materials whose nature or size makes them unsuitable for the main series, while the annual lectures given at the Society's general meetings in London each July are also regularly published and distributed to members. These now number some 1700 individuals and institutions, with large contingents from the UK, USA, Canada, and Australia, and smaller numbers from other jurisdictions around the world.

Together with an "Honorary Correspondent" in each Australian state and territory, the Selden Society has long appointed a national Honorary Secretary, whose main function used to be collecting subscriptions and sending the proceeds to London. More recently, however, the Australian secretariat, now Queensland-based, has embarked upon a much more ambitious role. This has developed in conjunction with the Supreme Court Library in that state, publisher since 2005 of an annual yearbook containing articles on Queensland's legal history, as well as

lectures, memoranda, speeches, and essays relating to lawyers and the courts. With a view to developing closer links between the staff of the various Queensland law schools, the judiciary and the profession, there is also now an annual Selden Society lecture series in Brisbane, covering local, national, and international legal-historical topics. In 2015 seven lectures were given on "great judges". Last year these talks included David Jackson AM QC on Sir Harry Gibbs CJ, the Hon. Justice Margaret McMurdo (President of the Queensland Court of Appeal) on Justice Sandra Day O'Connor, myself on the *Commentaries* of Sir William Blackstone, Thomas Bradley QC on the 1944 Archibald Prize Case (*Attorney-General v. Trustees of the Art Gallery of NSW*), and the Hon. Margaret White AO on the Mabo litigation. Texts of these lectures will appear in the 2017 *Queensland Legal Yearbook*; they are also available as videos on the Supreme Court Library website: <http://legalheritage.sclqld.org.au/selden-society/>

The Selden Society does not formally recognize any constituent bodies other than its governing Council, which is elected from among the whole membership present at the AGM; its Rules contemplate no other roles for members, whether located within or beyond the UK. Yet the Council's most recent Annual Report expresses "pleasure at the continuing active programme of the *Australian chapter of the Society* [italics added]". Since previous Reports had merely commended activities

"by the Society's members in Queensland", the change in wording is not insignificant. While South Australians will not be alone in raising an eyebrow at the suggestion that in this context Queensland stands for all Australia, the Queenslanders have amply demonstrated the considerable scope for activities and events organized by local groups of Selden Society members and extending beyond the history of English law, narrowly defined.

The Selden Society's South Australian members had never sought to meet together as a body before John Langbein's lecture, but the resounding success of that venture suggests that there is good reason to persist with plans to stage further events to tap current local interest in legal history. To that end an attempt will be made to stage another public lecture in the second half of this year, this time to be followed by a social event. Meanwhile, enquiries about membership of the Selden Society may be addressed to the national secretary: librarian@sclqld.org.au. The current annual subscription for individuals is \$90, and for institutions \$110; these rates entitle members to the annual volume, report and published lecture, a copy of the Society's handbook, *Publications, Lists of Members and Rules*, concessional rates on the supplementary series and on other new books from publishers who give special offers to members, plus access to all the Society's publications and the extensive Legal Classics Library at the HeinOnline website. **B**

Society & PSA discuss prison overcrowding crisis

Law Society President Tony Rossi met with industrial officers of the Public Service Association (PSA), including General Secretary Neville Kitchen, on 29 March to discuss the issue of prison overcrowding.

The officers of the PSA, which represents the interests of corrections staff, conveyed to Mr Rossi the problems that prison staff faced with regards to overcrowding and other challenges facing

the prison system. Matters discussed included the adequacy of mental health services, number of high security beds, the impact of new domestic violence laws on the prison population, drug addiction, and workload pressure on parole officers since the introduction of home detention laws.

Mr Rossi also met with Caitlin Chittenden, Project Officer with the Department of Correctional Services, to discuss the referral and entry process for alleged offenders

into the Bail Accommodation Support Program. The program, operated by Anglicare, is due to launch mid-May and will provide accommodation for alleged offenders on bail who do not have other accommodation options. The Society, through its Criminal Law Committee, which supports the program, will consider the proposal in detail and continue to participate in the Department's consultation. **B**

Real Hurt. Real People: Generating the political will to fix the legal aid crisis

FIONA MCLEOD SC, PRESIDENT, LAW COUNCIL OF AUSTRALIA

The following is an abridged version of Fiona McLeod SC's opening address at the National Access to Justice & Pro Bono Conference in Adelaide on 23 March.

Last year I acted for a man who had been involuntarily detained in a mental health institution in Werribee, Victoria, who was being subjected to involuntary treatment. We sought to challenge the decision in our Supreme Court.

The relevant State Mental Health Act provides strict protections for the rights of individuals- his detention had been overturned by the relevant local tribunal after a close review of all the recent history and circumstances. But as so often happens in this field, the psychiatrists in the hospital decided, without further consultation with the client or review of his condition, that he should stay- in clear breach of the Act.

The decision was made in a group discussion by doctors, most of whom had never seen the young man, based on a working diagnosis that was not confirmed by physical or mental examination of even the most cursory kind and contrary to a report on his condition and prognosis from his long term treating psychiatrist. There was no emergency here, no threat to life or property. There had been no acute episode for 20 years. There was nothing on his file or in his nursing notes to suggest anything other than appropriate and polite behaviour.

It was simply a case of doctor knows best.

And it happened to accord with the wishes of his parents who relied on the medical services to resolve conflict with their son.

While in many cases doctors do know best, in this case there was a clear breach of the Act and an abuse of the patient's

rights resulting in his involuntary detention in a mental health facility, and repeated administration of powerful anti-psychotic medication against his will and contrary to his needs.

How did his case come to me? A dedicated group of lawyers at Victoria Legal Aid stepped in and sought my assistance to challenge the decision.

My involvement in these cases is somewhat ad hoc. Many of you here undertake these cases every day of every year. And you already know that without access to lawyers, many are simply drowning in the system.

The prevalence of mental illness in our general community is a stark reality for those facing the justice system.

In another case, involving a 64-year-old man, a deterioration in his mental health triggered a chain of events that threatened to overwhelm him.

He lost his job, couldn't keep up with his rent and tried to end his life. He began living off his superannuation, credit card and a bank loan.

He incurred more than \$90,000 of debts, including a \$45,000 credit card debt.

Phil first met with a CLC lawyer when he was an involuntary patient at the Princess Alexandra Hospital in Queensland

Medical staff believed his declining mental health had adversely affected his financial judgment for a considerable time.

So his lawyers corresponded with many parties on Phil's behalf, including submitting hardship applications to creditors, obtaining supporting documentation from health workers, and lodging complaints with the Financial Ombudsman Service.

Through this they were able to negotiate temporary repayment freezes, manageable payment plans, and a full waiver of the \$45,000 credit card debt.

For another young woman I met a few years back, separating from her violent



Fiona McLeod SC

husband required an extraordinary act of courage. She took the kids and camped in the car for two weeks, too ashamed to tell her family where they were and why they had bolted. Every night after the kids fell asleep she wept at having left the dog behind.

When she came before the Family Circuit Court the lawyer who had assisted her with the papers could not appear. Her ex cross-examined her - he was pulled up with a rebuke by the Judge when he called her a "lying c...", but the re-traumatisation she experienced meant she was unable to articulate to the judge why her allegations of violence were valid and why she was afraid for her own welfare and that of her children.

Although the funding guidelines have been changed in that particular case in that particular State, the pressures on both the relevant community legal centre who assisted her with her application and on the courts, plus widespread press about a couple of high profile cases involving fathers killing their children at the time, meant she was, for about two years of her life, in a constant state of fear that her children would be abducted or murdered while in the care of her ex.

ATSILS

Add to this cocktail, in another similar case in a remote community, the persistent attitude of police that domestic violence is not a matter requiring their attention, and the fact that the local legal centre was conflicted out by acting for the father on his criminal charges, and you have a recipe for disaster.

In Western Australia, for example the Aboriginal Legal Service has just three family lawyers to service an Aboriginal population of roughly 94,000, dispersed over a land-area roughly equivalent in size to the United Kingdom, South Africa and India – combined. This is despite acute legal problems affecting so many Indigenous families.

We know the stories and we know the answer must involve governments who understand and commit to their obligation to deliver the infrastructure of justice for all people.

But we know that successive federal governments have walked away from that obligation. They have walked away from the hardship and pain that results.

And this government appears determined, today, to play a bizarre game of “dare” with recurrent funding for community legal centres three months out from having centres lay off critical staff or, in some cases, to close their doors.

PRO BONO WORK

As the legal profession’s peak body, we have been determined to point out that while a serious access to justice problem has been created by the funding crisis - it is a crisis that would be worse were it not for the culture of pro bono ingrained deep in the Australian profession.

The pro bono work undertaken by Australian lawyers is a matter of enormous pride for us.

Australian lawyers give away literally hundreds of thousands of pro bono work hours every year to those who have no one else to turn to and cannot afford to pay for legal services.

The Australian Pro Bono Centre’s latest report finds 402 thousand hours of pro bono services were provided in 2015/16.

That’s 35 of pro bono legal services, per lawyer, per year.

Roughly one week of unpaid work a year for every Australian lawyer.

And of course we know the official numbers will tend to vastly under-represent the actual level of pro bono achieved by private practitioners.

Yet remarkable though this contribution is, we know pro bono cannot ever be a substitute for properly funded legal aid services.

Indeed, in order for pro bono to be truly effective a strong legal assistance sector is vital, especially the Aboriginal and Torres Strait Islander Legal Services and Community Legal Centres, both of which are in fact predicated on a model which enables legal professionals to work for free.

That is why cuts to these services are so damaging.

COMMUNITY LEGAL CENTRES

CLCs are a critical safety net in our justice system. Yet they are shamefully underfunded.

In the last year CLCs estimate they were forced to turn away some 160,000 people seeking help; 160,000 people who thought their situation was serious enough to seek legal assistance; 160,000 people, the majority of whom would not have had other viable options for legal advice.

How many of those turned away now have exacerbated problems?

How have those problems spread within their families, their social networks, their communities?

This we don’t know. But we can take an educated guess.

At the end of 2014, the hard noses at the Productivity Commission released a report calling for an extra \$120 million a year from the federal government and an extra \$80 million from state and territory governments to bolster the legal assistance sector. Some \$14.4 million of this would flow directly to CLCs.

The Productivity Commission’s research showed that the flow on effects of allowing legal issues to fester would cost many times more in direct costs and in terms of social impact.

The cost benefit analysis undertaken means the economic case for additional funding is unimpeachable.

CLCs managed to assist over 216,000

clients last year with advice and casework services.

Currently scheduled are national funding cuts to CLCs under the National Partnership Agreement amounting to \$34.83m between 1 July 2017 and 30 June 2020.

That is a 30 per cent cut to Commonwealth funding nationally that is likely to lead to 36,000 fewer clients assisted and 46,000 fewer advices provided (*Editor’s Note: On 24 April the Federal Government announced it will reverse the \$34.83 million in funding cuts to Community Legal Centres that were due to take effect from July*).

REASON FOR HOPE

Every day the Courts, in their “spare time”, are innovating and working to find ways to use technology and efficiencies to improve access to justice.

Every day great lawyers are working, as staff or volunteers at Legal Aid Commissions and Community Legal services and centres across the country, confronting the unrelenting demand and assisting our most vulnerable.

And every day law firms and bars across the country step up to advise and appear for those in need.

Last year the Law Council conducted a national poll, demographically weighted, of over a thousand Australians.

Eighty-one per cent agreed that “In Australia, anyone who encounters a serious legal issue, but cannot afford a lawyer, should be able to rely on legal representation being provided through legal aid”.

That means that four in five Australians believe there should be a right to something that many simply cannot access.

They were also unaware that legal aid funding is so scarce that even if you’re living below the poverty line, you’re unlikely to qualify.

They did not know that people are being forced to represent themselves, impacting the courts and the workloads on judges every day.

This poll demonstrates overwhelming support for a universal legal safety net, our “LawCare”.

And the public support is out there that ultimately will translate into the political will that has been so absent. **B**

Making a complaint about another lawyer

GREG MAY, LEGAL PROFESSION CONDUCT COMMISSIONER



We are receiving numerous complaints from lawyers about other lawyers – certainly more than at any other time since I started my role. It is therefore perhaps worth reminding the profession of the circumstances in which such a complaint is appropriate and when it is not.

It is clearly the case that circumstances will arise when it is appropriate for one lawyer to make a complaint to me about another lawyer. As Professor Dal Pont says in “Lawyers’ Professional Responsibility” (at [24.15] and [21.205] respectively):

“There is scope for lawyers to report other lawyers’ misconduct. It has been said, to this end, that ‘it is essential to the maintenance of professional standards and the confidence of the public in the (largely) self-regulated legal profession, that where professional standards are not met, and the matter cannot be resolved, the issue be referred to the appropriate authority’, and that ‘practitioners have a professional obligation to do so.’” (and he refers to *Legal Practitioners Complaints Committee v Fleming* [2006] WASAT 352 at [78]).

Prof Dal Pont also says:

“A lawyer concerned about the behaviour of another lawyer, and on reasonable grounds believes it to be professionally inappropriate, should bring the matter to the attention of the relevant professional body, which may be able to resolve it. Where this course proves fruitless or is otherwise inappropriate, a formal complaint may be made within the processes set up by statute for this purpose ... In any event, it is often courteous, prior to contacting a professional body or lodging a complaint, to correspond with the lawyer in question, detailing the concerns and inviting a response.”

However, before making a complaint to me you should have regard to rule 32.1 of the Australian Solicitors Conduct Rules:

“A solicitor must not make an allegation against another Australian legal practitioner of unsatisfactory professional conduct or

professional misconduct unless the allegation is made bona fide and the solicitor believes on reasonable grounds that available material by which the allegation could be supported provides a proper basis for it.”

Professor Dal Pont notes (at [21.205]) that there has been “more than one occasion where a lawyer has been disciplined for making allegations of impropriety against one or more opposing lawyers without reasonable grounds” – and he refers to *McLaren v Legal Practitioners Disciplinary Tribunal* (2010) 26 NTLR 45 and *Legal Profession Complaints Committee v in de Braekt* [2011] WASAT1.

In the first of those cases, McLaren (a solicitor) had complained to the NT Law Society that three practitioners of law firm Cridlands had engaged in misconduct by misusing the confidential information of the firm’s client the Uniting Church. The complaint “effectively accused Cridlands of fraud” (that is, it didn’t use the word “fraud” but that was the “natural meaning and effect of . . . the allegations”).

The Professional Standards Committee of the Law Society was concerned that, while other aspects of McLaren’s complaint were rightly raised, the allegation of (effectively) fraud was made with no justification.

Before the disciplinary hearing in the Legal Practitioners Disciplinary Tribunal, McLaren admitted that she “did not have evidentiary material capable of supporting the [relevant] allegations”. It also transpired that McLaren did not have instructions from the Church to make those allegations. The Tribunal found that McLaren had engaged in professional misconduct. McLaren appealed against the Tribunal’s decision.

The Supreme Court agreed with the Tribunal (in most respects) and dismissed McLaren’s appeal. At para 152 of Martin CJ’s judgment, he said:

“In my view, when the practitioner’s conduct is viewed in its entirety, and particularly having regard to the seriousness of the

allegations against the individual solicitors, the maintenance of those allegations and the practitioner’s knowledge of the absence of instructions and the absence of evidentiary material to support the allegations, the practitioner’s conduct amounted to professional misconduct under the LPA ...”

It is also worth noting McLaren’s submission that, while she may have been in breach of the Conduct Rules, that did not amount to professional misconduct. Section 70(a) of our Legal Practitioners Act of course now makes it clear that a breach of the ASCRs is capable of amounting to misconduct.

It may sound like I’m trying to discourage you from making a complaint about another lawyer! I’m actually not – it’s just that it needs to be made on the right basis and for the right reasons.

CLARIFICATION

In my article in the March 2017 Bulletin, I dealt with some issues relating to costs recovery proceedings taken by lawyers. In looking at the different powers of the Magistrates Court and the Supreme Court, I referred to *Cavallaro v FNE Lawyers* [2012] SASC 189. After describing what it was for the Magistrates Court to determine (i.e. details of the retainer and contractual issues), I went on to say that it is for the Supreme Court to decide:

- whether the practitioner has been negligent, and if so the impact of that negligence on the fees (on the basis of *Cavallaro*); and
- whether the practitioner has a claim for fees based on quantum meruit (see clause 21(c) of Schedule 3 of the Act).

I should have made it clearer that the question of negligence is only relevant in the Supreme Court in the context of its consideration of its impact on costs. More broadly, if the client counter-claims in the costs recovery proceedings that the practitioner’s negligence has given rise to loss or damage, then that is for the Magistrates Court to determine. **B**

Is it worth suing for unpaid fees?

GIANNA DI STEFANO, PII RISK MANAGER, LAW CLAIMS

The decision to sue for unpaid fees should not be made lightly. The reality is that clients often respond with a counterclaim for damages, asserting negligence.

An often nearly foolproof way to be sued for professional negligence is to sue a client (particularly a disgruntled one) for unpaid fees.

Claims in negligence arising from actions by practitioners in pursuit of their fees are a common source of notification to Law Claims.

Whilst practitioners are entitled to be paid for their services, the risks and cost of being sued by a client will often outweigh the potential benefits of taking enforcement action. Even though there may have been no negligence in the performance of the retainer, resolving

these types of claims can be time consuming.

Practitioners thinking of taking action should firstly address the reasons for the unpaid fees, and consider the following:

- the potential costs that will be incurred;
- the amount of down time that can be lost in defending a cross claim;
- whether or not the unpaid amount is substantial;
- assess the result achieved for the client in the underlying matter;
- whether the relationship with the client was good prior to the fee dispute; and
- is the potential judgment collectable/ what amount can be realistically recovered?

Often a non-paying client will provide the useful information. Communicate with your client to understand why the fees remain unpaid and listen so you understand what the problem really is.

In many instances, unpaid fees result from short comings in one or more of

the following risk management categories, leading in turn to dissatisfied clients:

- client selection (acceptance of clients or matters that should not have been accepted in the first place);
- client communication (lack of clear and timely communications or periodic updates);
- management of client expectations;
- the quality of the services provided; and
- managing the firm's business practices including client billings.

Talking to the client first might assist in resolving the client's concerns and getting the unpaid account paid. Explaining all the work done to justify the account may be helpful. Responding to client questions may also help. An offer to compromise or to mediate may also become a sensible option.

Of course, there are clients who use negligence allegations against a practitioner as a tactic to try and reduce and/or defer, or avoid altogether the payment of fees. In such cases there may be little choice other than to file a claim. However, ultimately, choose your battle carefully. Often a claim for unpaid fees involves significant risks for a firm and this course of action should only be undertaken after a thorough consideration of the individual matter and only if the account is large enough to justify the aggravation and exposure to a claim that could eventuate.

Disputes about fees and disbursements are not indemnified by the Professional Indemnity Insurance Policy. Further, the costs incurred in defending any counterclaim for damages where there is a dispute about unpaid fees, or where the client is then also seeking to recover fees paid, are also excluded from indemnity under the Policy, unless the practitioner grants authority to the insurers to conduct or resolve the dispute with respect to the fees in such a manner as the insurers in their discretion decide.



Tax and the business of share trading

ANDREW SHAW, PRINCIPAL, SHAW LAWYERS

“Risk comes from not knowing what you’re doing” – Warren Buffett

Several recent decisions of the Administrative Appeals Tribunal (AAT) illustrate difficulties in claiming a tax deduction for losses on the sale of shares. In each case, the AAT rejected the taxpayer’s contention that he/she was carrying on a “business” of “share trading”. As a result, the taxpayer was not entitled to a tax deduction for losses incurred on the sales.¹

CARRYING ON A BUSINESS

A loss or outgoing may be deducted from assessable income to the extent that it is “necessarily incurred in carrying on a *business for the purpose of gaining or producing your assessable income.”² Whether a person carries on a business must be considered on a case by case basis. No single factor is necessarily determinative. It is based on the “large or general impression gained” from the nature and extent of activities under review and the purpose of the individual engaging in them.³

A “share trader” is someone who carries out business activities for the purpose of earning income from buying and selling shares. A share trader is different from an investor or speculator.⁴

Most recently, in *Spence v Commissioner of Taxation*, the AAT noted that the following factors have been endorsed as “key matters” in determining whether a business of share trading is carried on:⁵

- the nature of the activities, and whether they have the purpose of profit making;
- the complexity and magnitude of the undertaking;
- an intention to engage in trade regularly, routinely or systematically;
- operating in a business-like manner and the degree of sophistication involved;
- whether any profit/loss is regarded as arising from a discernible pattern of trading;



Warren Buffett, CEO, Berkshire Hathaway

- the volume of the taxpayer’s operations and the amount of capital employed by him;
- and more particularly in respect of share traders:
- repetition and regularity in the buying and selling of shares;
- turnover;
- whether the taxpayer is operating to a plan, setting budgets and targets, keeping records;
- maintenance of an office;
- accounting for the share transactions on a gross receipts basis;
- whether the taxpayer is engaged in another full time profession.

BURDEN OF PROOF

To successfully challenge a tax assessment, a taxpayer must prove that the assessment is excessive *and* what the correct assessment should have been. It is not enough to show that the Commissioner made an error. The taxpayer must also prove what the correct position should be: “There is no onus imposed on [the Commissioner]. He is neither required to support the assessment by evidence nor to establish that the assessment is correct.”⁶

PITFALLS FOR WANNABE SHARE TRADERS

In each AAT decision referred to in Endnote 1, the taxpayers failed to discharge that burden. They were unsuccessful for similar reasons: lack of readily verifiable documentation such as bank statements, share trading reports, business plans and loan agreements, unsupported self-serving statements and inconsistent evidence, a small number of share transactions involving shares purchased for long term growth (*Spence*); lack of substantiation or even a “rudimentary” business plan, lack of sophistication in conduct of trades, little evidence of targets or budgets or risk minimisation strategies (*Osborne*); lack of regular or routine trading, no business plan other than “in the head” of the taxpayer, unsophisticated activities, taxpayer’s unrelated full-time employment inconsistent with share trading business (*Hartley*); no written business plan in relevant years, no regular and systematic share transactions, lack of sophistication, no demonstrated pattern of trading as opposed to investment in shares (*Devi*).

The outcome had been different in *Shields* (1999).⁷ The AAT held that the taxpayer was carrying on business as a share trader

(and not as a speculator) even though the taxpayer was employed elsewhere on a full-time basis, the share trading business lasted for under one month, and no profit was derived from the share trading business. What was critical, however, was the AAT's conclusion that the taxpayer's activities over that period were "so carefully and systematically organised and handled... that such activities can be characterised as being in the course of a business". Unlike speculators and gamblers, the taxpayer did not rely on good fortune. He brought effort and expertise to his activities, was organised and sought to minimise risks, and undertook a series of transactions albeit relatively small in number which was nonetheless a commercial operation carried out to derive a profit. The taxpayer terminated his share activities when he reached a conclusion that the risk/reward ratio was not sufficiently favourable. His activities were "indeed a business".

TAKE HOME MESSAGES

- Tax cases about whether a business exists are inevitably won or lost on the facts. In any dispute, the facts will be adduced by oral evidence and from written materials. Many tax cases are lost because the taxpayer simply cannot recall why certain things were done in the way they were, or there is a lack of evidence of what was intended and what was actually done. It is very difficult for a decision-maker to make findings of fact to support the contention that a business exists if there is no, or insufficient, evidence to support such findings, or if the taxpayer's records are inadequate or disordered. Simply, the available evidence must support the contentions advanced.⁸
- The ATO appears to place substantial weight on creation of a "business plan".⁹ Taxpayers should be encouraged to record, contemporaneously and in writing, their intentions and the steps actually taken by them before, and at

the time of, starting business as a share trader. At the very least, a business plan relating to a share trading business should include a description of the business, the trading activities expected to generate profits, research and investigations undertaken, technology and equipment to be used in the business, expected capital outlays and funding, and a budget/profit forecast. A business plan must contain sufficient information to be meaningful, and it must have a reasonable commercial basis.

- Taxpayers should follow a business plan and budget accurately. Failure to adhere to a business plan, and to adjust it to take account of unexpected events, may be fatal if there are material discrepancies between the business plan and the way in which activities are actually carried out.

Tax Files is contributed by members of the Taxation Committee of the Business Law Section of the Law Council of Australia. B

Endnotes

- 1 *Spence v Commissioner of Taxation* [2017] AATA 307; *Devi v Commissioner of Taxation* [2016] AATA 67; *Estate of the late Joan E Osborne v Commissioner of Taxation* [2014] AATA 128; *Hartley v Commissioner of Taxation* [2013] AATA 601.
- 2 Section 8-1(1)(b) of the *Income Tax Assessment Act 1997* (Cth).
- 3 *John v FCT* (1989) 166 CLR 417 (share trader business); *Martin v FCT* (1953) 90 CLR 470 (betting business); *Commissioner of Taxation v Radnor Pty Ltd* (1991) 102 ALR 187, 202 (share trader business); ATO Taxation Ruling TR 1997/11 at [12] – [18].
- 4 *Shields v DFCT* [1999] 99 AATA 4.
- 5 *Spence* at [28] – [29], citing *Shields v Commissioner of Taxation* and *AAT Case 6,297* (1990) 21 ATR 3747.
- 6 *Spence* at [33], citing *Gauci v Commissioner of Taxation* (1975) 135 CLR 81 and *Federal Commissioner of Taxation v Dalco* (1990) 168 CLR 614.
- 7 *Shields v DCT* [1999] AATA 4, at [18] – [19].
- 8 See the excellent paper by (now Federal Court Justice) GT Pagone, QC, "Going to Court with the ATO" (2004) Taxation Institute of Australia, SA State Convention Papers 2004.
- 9 See TR 97/11, at [110] – [115].

CPD Events

For further details and to register:
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All sessions that are being held at LSSA, will be held at Level 10 Terrace Towers, 178 North Terrace Adelaide

SACAT Significant Decisions

24 May 2017
 5.30pm – 7.00pm 1.5 Units *

Constitutional Law

31 May 2017
 5.30pm – 7.00pm 1.5 Units *

WHS Incidents

12 June 2017
 5.30pm – 7.00pm 1.5 Units *

Relocation in the Full Court of the Family Court

28 June 2017
 5.30pm – 7.00pm 1.5 Units *

*Total CPD Units are accurate at time of printing and should be taken as a guide only.
 HAVE AN IDEA FOR A FUTURE SEMINAR?

We invite practitioners to tell us what seminar they would like to see conducted next. Email us at cpd@lawsocietyasa.asn.au with your ideas.

Overcoming barriers in the criminal justice system for people with a disability

**ALASTAIR MCEWIN. DISABILITY DISCRIMINATION COMMISSIONER.
AUSTRALIAN HUMAN RIGHTS COMMISSION**



People with disability experience significant breaches of their human rights when interacting with the criminal justice system. These breaches result in many people with disability becoming entrenched in a system that does not provide them with the support they need to navigate what can be a complex and bewildering experience for any person.

The following case study illustrates some of the barriers people with disability experience:

Chris (not his real name) has a history of poor experiences with the criminal justice system. He has an acquired brain injury and is very vulnerable to coercion. Chris has a fascination with trains and often spends time around train stations after work. On numerous occasions, police officers at the train stations have questioned him about various crimes.

On one occasion, police questioned Chris very aggressively about a crime. Chris did not know how to respond or how to deal with the situation. He admitted to committing an offence that he did not commit just because he was scared and wanted the police to stop questioning him.

Chris was then required to go to court to defend the charge against him. Chris was found not guilty after trial. Chris has experienced a number of mental health issues since his experience with police and in the court room, and is now unable to work. He is scared of leaving his home and feels isolated, lonely and disconnected from society.

In his national consultations held from October 2016 to March 2017, the

Australian Disability Discrimination Commissioner, Alastair McEwin, heard of the experience of Chris and the experiences of many other people with disability in the criminal justice system. Some of the experiences include:

- Lack of support to assist people with disability to communicate and participate in all stages of the criminal justice process;
- Police, lawyers, judges and other staff do not always identify disability and respond to it appropriately;
- Measures to divert people with disability out of the criminal justice system are underutilised, not available or not effective;
- In prison, people with disability do not have access to supports, adjustments and aids;
- Specialised, intensive, holistic services designed to address the over-representation of people with disability in prison are at risk of being unfunded and discontinued under the National Disability Insurance Scheme (NDIS); and
- Aboriginal and Torres Strait Islander people with disability have very high levels of unmet disability care needs and find themselves trapped in a cycle of regular police contact and control instead of support.

Underpinning all of these experiences is the fact that, often, it is the person's disability that will define their experience with the justice system. This has been described as the "criminalisation of disability".

There is a critical need for appropriate support when people with disability first come into contact with the criminal justice system, such as communication aides for people with intellectual or cognitive disability or speech impairment. Far too often, we are told of stories where a person with an intellectual disability is attempting to tell their story to a police officer yet they are dismissed as having nothing to say of value because of how they communicate. It is important that a person with intellectual disability has a safe and supportive environment to tell their story. This can include providing them with a support person who is familiar with their communication style. If it takes an extra hour to take evidence from them, then that is how it should be.

People with disability, in particular women and children with disability, are vulnerable to abuse. Ninety per cent of Australian women with an intellectual disability have been subjected to sexual abuse, with more than two-thirds having been sexually abused before they turn 18 years of age. Yet all too often, those in the justice system who are tasked with supporting them dismiss their stories or create barriers that prevent them from having their stories become part of the evidence base when someone is accused of a crime.

This is why, for example, the work that the Victorian Equal Opportunity and Human Rights Commission are doing with Victoria Police to improve communication access is so important. Further, in recognising the role that judges play, the work the Victorian Commission is doing with the Judicial College of Victoria to consider the needs of people with disabilities in court and tribunal proceedings through the Disability Access Benchbook is also important. Further, in NSW, the work the NSW Criminal Justice Support Network does is critical

...often, it is the person's disability that will define their experience with the justice system. This has been described as the 'criminalisation of disability'

in supporting people with intellectual disability who come into contact with the justice system.

I appreciate that the need to have a “plan” is an oft-used cliché, however there is one plan that I have seen that I believe is starting to have some positive effect in redressing systemic barriers for people with disability accessing justice. In South Australia, the Government marks three years of its Disability Justice Plan. Part of the plan looks at what needs to change in recording evidence from people who are vulnerable. To that end, the *Statutes Amendment (Vulnerable Witnesses) Act 2015* recently commenced. This Act is designed to improve the position of children and persons with cognitive disability within the

criminal justice system, both in and out of court.

This is a great step in recognising that current evidence laws do not allow for the taking of evidence of people who do not communicate in a way to which lawyers and judges are accustomed. I applaud the South Australian Government for this important step. Sadly, dedicated disability justice plans like the South Australian one are not widespread in Australia and I believe this needs to change.

Other initiatives that increase access to justice for people with disability are:

- Information about criminal justice processes in accessible formats,
- Access to independent advocates and support,

- Specialist communication assistance to support people with disability in criminal justice processes,
- Programs to increase police understanding of people with disability, and
- Activities to build the capacity of disability service providers working with people with criminal justice histories.

We will know that people with disability, regardless of age, cultural, Indigenous or linguistic background or impairment, are enjoying their right to be equal before the law when they have the modifications, aids and supports they need to take part in all aspects of the criminal justice process. **B**

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For more information please visit the website or contact the Law Society: reception@lawsociety.asn.au



Managing psychosocial risks at work

DR REBECCA MICHALAK, PRINCIPAL CONSULTANT, PSYCHSAFE

In 1835, four hundredweight of mutton fell from an overloaded wagon onto a butcher servant, dislocating his shoulder, breaking his thigh, and causing a number of other injuries.

The incident led to the landmark *Priestley v Fowler* (1837) common law case. The jury debated, amongst other things, whether the defendant engaged in “pigheadedness” – in other words, whether the butcher knowingly over-loaded the wagon, thus causing or at the very least contributing to the accident.

The resulting judgment in favour of the plaintiff effectively paved the way for changes in the meaning and extent of employer and employee safety duties and liabilities, setting a precedent, and arguably underpinning our modern workplace health and safety legislative framework.

Workplace health and safety (WHS) standards have come a long way since 1835, and you would be forgiven for thinking that employers have workplace safety issues pretty much under control nowadays.

Air quality sensors have replaced canaries in mineshafts, warning signs galore adorn stairwells and lunchroom boiling water dispensers, and ergonomic keyboards and chairs are omnipresent.

“Safety” also appears as a core value on corporate vision and mission statements across the country, often alongside the ubiquitous statement that “people are our greatest asset.”

Unfortunately, more-than-decade-and-a-half in management and HR roles tells a very different story. Rhetoric abounds, and, in my experience, if one scratches just a little bit, the shiny surface of these safety claims is exposed, revealing a decidedly lackluster reality.

In law specifically, no natural – let alone subterranean – assets exist. Think about it. The law is a common good. Your business does not own this good. Your strategic competitive advantage lies in how you use this common good to produce products and services, which requires knowledge-workers.

In the absence of knowledge-workers,

your business is essentially sans assets. Sans revenue. Pretty much sans a business (ok, yes, we have Lawbot, for contracts. But Lawbot depends upon knowledge-workers, to create and run Lawbot).

Strategically, for what the OECD classifies as a knowledge-based economy, our current approach to WHS is far less advanced than it should be, and that we’d ever like to concede. While humans are considered the most advanced species on earth, our approach to certain aspects of WHS is still back there hanging out with the hominina (a.k.a. chimps).

Don’t get me wrong – we do seem to be across the need to prevent physical injuries. You can (probably) give yourself a tick.

However, employers appear decidedly stuck in the “slips, trips and falls” WHS era. The requirement to ensure workplaces are not just physically but also psychologically and emotionally safe remain poorly, if at all, understood, aspects of WHS law.

Unsurprisingly, when it comes to risk management of factors affecting psychological and emotional safety, otherwise known as “psychosocial risks”, workplaces fare.... well.... not so well.

In my experience, organisations are more likely to have detailed risk management/disaster recovery/business continuity plans for a “two Boeing 767’s flew into the office block” scenario than they are to have strategies to effectively manage psychosocial risks. Ironically including the psychosocial risks inherent to the fallout of said crisis of plane into building scenario (did someone say survivor post-traumatic stress disorder...?)

This failure exists despite a plethora of empirical data and anecdotal evidence that employees are exposed to these risks on a daily basis, if not multiple times a day. Recent research suggests poor interpersonal and/or leadership behaviours, including mistreatment, sexual harassment, incivility and bullying, are common, and for all intents and purposes, culturally pervasive in legal. As in amongst lawyers, risk exposure affects the majority, and for some risks, exceeds 90%.

The above in mind, I suggest leaders and managers need to stop, consider and strategise, because:

Psychological and emotional safety is as important as physical safety.

Not an add on; not a nice to have. A legislated requirement. Firm and officer liabilities for negligence offences for failing to provide a psychologically and emotionally safe working environment are the same as for failing on the physical safety front. The terms “significant” and “severe” spring to mind. While Priestley’s £100 is ‘only’ about \$18,000 in today’s terms, a Category 1 Reckless Negligence offence can now attract a \$3 million fine for the employer, and 6,000 units in personal officer liability (in QLD that translates into \$600,000). And/or five years in jail. Take your pick. D & O insurance does not cover WHS breaches by the way. It’s a bit like crashing your car while drink driving; no insurer covers that scenario. Oh, and much like simply having unsafe scaffolding up on a construction site is enough to attract a WHS fine even if no one has fallen off it (yet), a psychological injury does not need to actually occur for you to be considered recklessly negligent in failing to provide a psychsafe working environment.

Resilience and mindfulness are psychosocial risk “fire blankies.”

I have seen some fairly questionable safety conduct in my time – including walking in on someone disconnecting a 920kg drum of liquefied chlorine gas sans breathing apparatus – and without closing the live flow valve off first.

I’m pretty sure my sprint exit from that chemical storage room would have given Usain Bolt a run for his money. No, seriously. I think I flew.

But I have to admit I am yet to see an employee douse an office in fuel and set it on fire, only to joyfully pull out a fire blanket and declare “It’s all good” or “This is fun!” whilst attempting to smother rampant flames.

Tiered (read: “legitimate”) risk management plans should include, but not rely solely on “fire blankies.”

Resilience and mindfulness strategies have their place. But these strategies really only come into their own after exposure to the risk. After 400 weight of mutton falls on your servant. This approach is a little bit like wanting to be an after-the-fact accessory. To grievous bodily harm, manslaughter, murder.

I've noticed the legal profession has an unnatural obsession with "fire blankies." They should probably see someone about that.

Failure to primary prevent is costing you – and your insurers – money. A lot of it.

Evidence suggests merely being exposed to psychosocial risks negatively impacts all five aspects of job performance, translating into (*cough* SUBSTANTIALLY) lowered profitability. Employees who merely witness a risk exposure event also suffer psychologically and job-performance wise, causing a ripple effect.

Decade-long trends also show amongst other confronting stats, psychological

injury claims are not only the single disease-related category of injury on the increase, these claims are, by a long shot, the most expensive claim type.

In addition, poor mental health is considered the elephant in the room in approximately 1 in 3 professional indemnity claims.

It is unsurprising that Worker Compensation and Professional Indemnity insurers have started to cotton on to the "pfffttt, but that's what insurance is for" attitude to psychosocial risk management. A more eyes wide open and move on from current "community" or "number, not cost of claim" approaches to setting premiums is underway.

After all, it is logical a car insurer would probably have an issue with someone deliberately driving their Ferrari into a wall at 140kph thinking "wahoo, this thing is fitted with airbags."

Life and income protection insurers are also unimpressed with the exponential

increases in TPD claims coming out of the legal profession by those who self-select out and then are declared psychologically unfit to work. In many cases, ever again.

The slips, trips and falls approach to WHS is decades out of date. When it comes to psychological and emotional safety, 1964 does not cut the mutton; Times have changed. Failing to recognize, respect and proactively integrate these changes into your firm's risk management plan is not only a display of "pig-headedness," but also akin to being as old as Bob Dylan's "The Times, They Are A-Changin'," and getting caught with your pants down. In public.

Does your firm have a psychosocial risk management plan? Is it tiered to cover primary prevention, early intervention and tertiary intervention strategies? Or do you rely on mindfulness and resilience strategies?

This article was originally published in ALPMA's blog "A Survival Guide for Legal Practice Managers".

Books written by lawyers, for lawyers

The Law Society receives several books written by practitioners that provide valuable insights into different aspects of the profession. Here are summaries of three books that feature practical advice, entertaining anecdotes and words of wisdom.

HAPPY LAWYER HAPPY LIFE

By Clarissa Rayward

Director of the Brisbane Family Law Centre Clarissa Rayward wrote *Happy Lawyer Happy Life* in response to her own experience of unhappiness as a lawyer.

"I have never regretted my decision to study law," she said. "But I have often regretted the impact that I have allowed the practice of law to have on my life. It is this sense of regret, which I have come to accept, understand and manage, that has inspired this book."

The book is designed to be a practical guide to finding happiness as a lawyer.

More info:

www.thehappyfamilylawyer.com



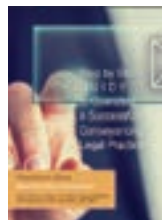
STEP BY STEP GUIDE TO OPERATING A SUCCESSFUL CONVEYANCING / LEGAL PRACTICE

By Garth Brown

Step by Step Guide to Operating a Successful Conveyancing / Legal Practice, an eBook, is a comprehensive guide to operating a conveyancing practice. It is particularly valuable for practitioners starting out in conveyancing business.

Garth Brown, 2015 Australian Institute of Conveyancers NSW Division conveyancer of the year, covers a range of material about marketing, communications, technology and purchaser risk strategies that are common across the Australian Conveyancing and other Legal Specialty Landscape.

The book also provides guidance on issues relating to e-conveyancing, including Verification of identity, Australia Post, Door Step verifications, Sign to Exchange (signing of Contracts digitally), eCOS (electronic Contracts) PEXA (Property Exchange Australia), to assist practitioners



in running a full end-to-end paperless office.

More info:

www.conveyancers.net.au/guide/

REAL ESTATE ESCAPES

By Tim O'Dwyer

Real Estate Escapes is a collection of tales where not all agents, solicitors and conveyancers are created equal, and where not all escapes are successful. Drawing from over four decades experience, author Tim O'Dwyer, a Queensland solicitor, combines his knowledge of the subject with an ability to explain these true tales of getting out of contracts, leases, prosecutions and legal liability in a simple and entertaining way.

The book also contains a foreword by finance commentator Noel Whittaker AM, who warns of the dangers of predatory "property spruikers".

More info:

www.realestateescapes.com.au



Budget submission calls for greater investment in justice

On 4 April, President Tony Rossi sent the Law Society of SA's 2017-18 State Budget Submission to SA Treasurer, the Hon. Tom Koutsantonis.

The budget submission sets out 10 key priorities that the Society considers should be included in the upcoming State Budget.

The number one priority in the submission was the construction of a new courts precinct. The second priority is urgent upgrades and restoration of existing court buildings.

Mr Rossi said the planned building of a new \$500 million courts precinct, which the Government shelved in 2015, was "a missed opportunity to bring justice into the 21st century".

Mr Rossi also said the State's existing court buildings lacked basic facilities such as disability access and parent rooms and this needed to be rectified immediately.

The following is a summary of the Law Society's 10 State budget priorities

1. NEW COURTS BUILDING



THE ISSUE: The State's dilapidated and antiquated court buildings are not fit for purpose

KEY ASK: A commitment to the funding of a new, fit-for-purpose court facility akin to the \$500 million proposed redevelopment of the courts that the State Government announced in September 2013 and shelved in March 2015.

2. DISABILITY ACCESS IN THE COURTS & URGENT UPGRADES



THE ISSUE: The State's court buildings lack basic disability access and other facilities such as parents' rooms and secure witness rooms.

KEY ASKS: South Australia's court buildings to be upgraded to accommodate people with disabilities and be brought up to a standard that reflects modern building codes and practices.

- The provision of \$10 million to restore the Sir Samuel Way building to an adequate standard.

3. LEGAL AID FUNDING



THE ISSUE: The Legal Services Commission and community legal centres have been stripped of significant Federal and State Government funding.

KEY ASKS: Immediately restore \$6 million to the Legal Services Commission

- Provide \$1.85 million to Community Legal Centres to reflect the fact that 40% of the work of CLCs involve State-based laws.
- \$300,000 in funding to the Aboriginal Legal Rights Movement

4. MORE DISTRICT COURT JUDGES



THE ISSUE: The District Court has been two judges down since 2013 due to budget cuts imposed by the Government.

KEY ASK: Funding be provided to enable the Courts Administration Authority to hire two more District Court Judges.

5. ADEQUATE FUNDING FOR COURTS ADMINISTRATION AUTHORITY



THE ISSUE: The Courts Administration Authority has been under-funded for several years and increased court fees imposed by the Government will increase the cost of justice and will go into General Revenue rather than the Courts.

KEY ASKS: A significant increase in the Courts Administration Authority's budget to enable it to operate effectively.

- An independent authority be created to determine a formula to decide the amount appropriate to be provided by the Government to the CAA in order to allow the CAA to provide the level of service required. In this process, a funding formula could also be developed to independently determine the amount that is required to financially support the Judges and the Registry.
- That tiered civil lodgment fees and security fees not be imposed upon litigants.

6. MORE RESOURCES TO PROTECT AT-RISK CHILDREN



THE ISSUE: The Nyland Royal Commission identified major failings within the State's child protection system. Recent amendments to the Children and Young People (Safety) Bill (currently before Parliament at the time of writing) ensure that the CHiled Executive must follow up notifications relating to child at risk of harm.

KEY ASK: That the Department of Child Protection is sufficiently resourced so that, upon every notification relating to a child at risk of harm, it has the capacity to investigate or assess the circumstances of the child.

7. GREATER INVESTMENT IN CORRECTIONS SYSTEM



THE ISSUE: There is an overcrowding crisis in the State's prison system, prisoner rehabilitation services are inadequate, mental health services for prisoners and defendants are insufficient, and remandees are facing too much time in custody due to court delays.

KEY ASKS: Allocation of funding to establish and build on rehabilitative programs aimed at diverting people away from prison.

- Sufficient allocation of funds to support the execution of the Government's "10by20" strategy to reduce re-offending by 10% by 2020.
- Inclusion of funding for a mother and baby facility in South Australia's corrections system.
- Provision of funding to increase psychological and psychiatric services to defendants and prisoners.

8. PRESERVING STATE OWNERSHIP OF THE LAND SERVICES GROUP



THE ISSUE: The Government is in the process of privatising the Land Services Group. The Society believes this will increase costs to consumers and put sensitive personal data at risk.

KEY ASK: That the State Government halts the sale of the Land Services Group so that the Group remains a public asset.

9. UPGRADES TO PROBATE REGISTRY



THE ISSUE: The Probate Registry is under-staffed, under-resourced, and operating in sub-standard accommodation. Recent increased in probate filing fees imposed by the Government are collected by the Courts but go into General Revenue.

KEY ASK: Funds from increased probate fees be applied to upgrading the Probate Registry facilities and the appointment of new staff.

10. LEGAL AID FOR SACAT MATTERS



THE ISSUE: People appearing before SACAT, particularly in relation to guardianship matters, often do not have the capacity to access to independent legal advice.

KEY ASKS:

- A fund be established as a supplement to the Legal Services Commission budget to enable the provision of basic legal representation for people subject to guardianship, medical treatment and residence orders.
- Funding be allocated towards legal representation for clients appearing before SACAT, including funding for appropriately qualified practitioners to engage in alternative dispute resolution so more matters can be resolved quicker.

Can domestic violence affect property settlement?

QIJUN JIA, CONNOLLY & CO

Since the no-fault principle was enacted in the *Family Law Act 1975* (Cth)¹, the Courts had insistently held that the spousal conduct during the marriage was not relevant to the matrimonial property settlement. The Full Court of the Family Court in *Kenyon*², however, made its own decision to uphold the observation that domestic violence would be a relevant factor in determining the matrimonial or de facto property settlement, and awarded a greater share of the property to the abused spouse.

This essay will discuss the relevance of domestic violence in a matrimonial property settlement and further explore the extent to which it is relevant in the context of the no-fault philosophy.

GROUNDINGS ON WHICH DOMESTIC VIOLENCE IS RELEVANT

Inevitable Fault

The matrimonial property settlement is usually triggered by the breakdown of marriage or de facto relationship. The only ground for a marital termination is the irretrievable breakdown of the relationship, demonstrated by 12 months of separation.

The no-fault principle is based upon a presumption that the parties have a common desire to terminate their relationship and therefore it is not necessary to consider which party is at fault. The government's motivation for legislating the no-fault principle was to provide Australian divorcing couples a dignified way to end their marriage, by avoiding the embarrassment and distress of having to parade faults in public. However, fault can never go away completely.

1. Fault is an inevitable facet of the marital breakdown.

- Fault always exists between the divorcing parties. The divorcing

parties tend to make sense of what's going wrong by reference to the degree of imputation of blame through revisiting the past of the marriage. Accordingly, wrongdoing by the other party is part of the reason many separated spouses resort to legal processes, and the law needs to find some way to acknowledge this reality.

- One party's misbehavior may increase the sense of injury felt by another who has been betrayed, and that this injury unavoidably will trigger legal battles over children and property.
 - Children's paramount interests might be compromised if spousal misbehavior is not mentioned.
2. Marriage retains sacramental connotations. Moral duty has a "proper place in the exposition of the legislative purpose, and in the understanding and application of the statutory text."³
- Moral duty is addressed in Pt VIII of the *FLA*. In *Vigolo*, Gleeson CJ observed that the concept in relation to legislation is "based upon the idea of a moral obligation arising from a familial relationship."⁴
 - Moral duty between the parties implies that any party who breached the duty would be compulsorily subject to some degree of financial compensation and punishment where the innocent party has suffered harm as a result of the betrayal.

- One party who is responsible for the breakdown of the marriage may voluntarily relinquish a portion of the matrimonial property as a form of compensation in exchange for peace of mind.

In my view, therefore, it is unpersuasive to talk about the matrimonial property settlement in the absence of fault.

Implied Statutory Authority

The *FLA* does not give an explicit reference to the relevance of fault in the matrimonial property settlement. However, an indirect reference could be found in either s 75 or s 79, giving rise to problems of interpretation.

S 75(2)(o) empowers the Court a discretion to have regard to the spousal conduct if it is relevant. It allows the Courts to consider "any other fact or circumstance" which the justice of the case requires to be taken into account.

The issue here is whether domestic violence falls into the category of "any other fact or circumstance."

Crockett J interpreted the words "any other fact or circumstance" as an economic nature only. However, his Honour believed that misconduct could still be taken into account by virtue of s 79(2).⁵

S 79(2) gives the Courts a much wider discretion to "make such order as it considers appropriate" to alter the parties' interests in their property where it is just and equitable "in all the circumstances."

Domestic violence is only relevant provided that violence occurred during the marriage has a discernible impact upon the contributions of the other party, and that violence is so sufficiently severe to shock the conscience of the Court.

Even if, as Strauss J observed, the words “in all the circumstances” do not provide any justification for taking into account matters which are outside the contemplation of the Act, domestic violence could be relevant to one of the considerations in s 79(4) where it has a direct financial consequence.⁶

I am of the view that domestic violence should be factored into the property distribution at the end of a relationship either as a negative contribution to the property of the family under s 79(4)(c), or as creating needs in the victim under s 75(2).

It must be indicated that the Family Law Council had recommended to the Attorney-General to include an express reference to the relevance of domestic violence in s 79 and an early draft of the *Family Law Amendment Bill 2002* (Cth) had adopted this recommendation.

EXTENT TO WHICH DOMESTIC VIOLENCE IS RELEVANT

There is no clear indication on how much violence must be shown in determining distribution of the matrimonial property. At least, however, the following factors should be taken into account.

Imbalanced burden

A marriage can be regarded as a sort of partnership. The “unite property” principle in the partnership presumes that each party contributes to the matrimonial property equally.

Domestic violence conducted by one party towards the other may change the balance by affecting the contribution of property under s 79(4). The Full Court in *Kennon* considered the battery and assault that one party had to endure during the marriage and connected this adverse impact to the financial contribution of that party.⁷

When it comes to the relevance of domestic violence, it is crucial to inquire into whether domestic violence has placed an additional burden on the innocent party.

Severe consequence

The “floodgates” issue was also considered in applying the *Kennon* principle which “may become common coinage in property cases and be used inappropriately as tactical weapons.” Fogarty and Lindenmayer JJ upheld that the *Kennon* principle should only apply in exceptional cases, in which the violent conduct occurred during the marriage has significantly affected the contributions. Their Honours further held that such domestic abuse must be for a sufficient duration during the marriage.⁸

Domestic violence is only relevant provided that violence occurred during the marriage has a discernible impact upon the contributions of the other party, and that violence is so sufficiently severe to shock the conscience of the Court.

Cause of breakdown

To be relevant, domestic violence must be related to the cause of breakdown. In *Gates*, Crockett J observed that s 79(2) concerns that one party had “engaged in particularly reprehensible behavior which led to the breakdown of the marriage.”⁹ In *Kennon*, Fogarty and Lindenmayer JJ stated that it is relevant when conduct does ‘encompass conduct related to the breakdown of the marriage.’¹⁰

CRITIQUE OF THE KENNON PRINCIPLE

The *Kennon* principle, however, was criticised for leaving too many grey areas which resulted in judicial indeterminacy. Its applicability has been severely restricted accordingly.

In *Palmer v Palmer*, Federal Magistrate

Brewster has rejected the application of the *Kennon* principle, founding that the statement by the majority of the judges in *Kennon* was *obiter dicta*, not *ratio decidendi*, and was therefore not binding upon him.¹¹

In *Yen v Yen*, Cronin J insisted that issues of conduct giving rise to compensation and damages were not matters with which this court would normally deal. The abused conduct claimed by the wife in tort is not connected to the marriage breakdown and any property proceedings.¹²

CONCLUSION

Based on the above analysis, it is justifiable to take into account one party’s violent conduct when determining the matrimonial property settlement at the end of a relationship. However, due to the continuance of the no-fault philosophy and the “floodgates” concern, the *Kennon* principle applies only in special circumstances. As *Kennon* has established, the court only could adjust the property settlement where a “course of conduct” by one spouse has had a “significant adverse impact” upon their partner’s contributions. Additionally, it is essential to bear in mind that factoring domestic violence into the property settlement matters does not imply revival of the fault principle which was clearly eradicated by the *FLA*. **B**

Endnotes

- 1 *The Family Law Act 1975* (Cth) s 48 (*FLA*).
- 2 *Kennon v Kennon* [1997] FamCA 27 (*Kennon*).
- 3 *Vigolo v Bostin* (2005) HCA 11, 25 (Gleeson CJ).
- 4 *Ibid* 12 (Gleeson CJ).
- 5 *Gates v Gates* (1976) 26 FLR 81, 84, 92 (*Gates*).
- 6 *In the Marriage of Ferguson* (1978) 34 FLR 342, 359 (Strauss J).
- 7 *Kennon* 24 (Fogarty and Lindenmayer JJ).
- 8 *Ibid*.
- 9 *Gates* 92.
- 10 *Kennon* 24 (Fogarty and Lindenmayer JJ).
- 11 *Palmer & Palmer* (2010) FMC.Afam 999, 74.
- 12 *Yen v Yen* (2010) 42 Fam LR 691, 47-48.

Family Law Case Notes

ROB GLADE-WRIGHT, THE FAMILY LAW BOOK

PROPERTY – RECONCILIATION AFTER FINAL ORDER – WIFE APPEALS DISMISSAL OF HER S 79A APPLICATION – HUSBAND’S FAILURE TO DISCLOSE

In *Waterman* [2017] FamCAFC 23 (8 February 2017) the Full Court (Bryant CJ, Murphy J and Kent JJ) allowed the wife’s appeal against Judge Newbrun’s dismissal of her s 79A application for the setting aside of a final property order made before the parties – who had two children – reconciled. The order required the sale of their home and an equal division of proceeds. The wife argued miscarriage of justice due to the husband’s failure to disclose his financial circumstances and that the parties had impliedly consented to the order being set aside.

Murphy J (with whom Bryant CJ and Kent J agreed) at [(34)] cited *Morrison* [1994] FamCA 153 in which the Full Court said that “[o]rdinarily, a failure to comply with th[e] duty [of disclosure] will amount to a miscarriage of justice”, continuing at [61]:

“Taken together ... the wife’s lack of literacy; the husband’s failure to disclose; ... the wife’s self-representation ... [when] the husband’s solicitor ‘told’ the wife of the proposed orders; ... [that] that occurred at the husband’s solicitor’s office; the fact that the orders were read to her only once ... ; and ... that she was not advised as to entitlements, all, in my view, amount to a miscarriage of justice ... ”

Murphy J said [(66)] that “[r]econciliation is not, of itself, sufficient for a finding that the parties had impliedly consented to the setting aside of a s 79 consent order ... Rather, any such finding is made by reference to the ... circumstances ... [of]

the parties’ relationship by which the ... intention is to be inferred”; and that [(77)] “[n]otably absent ... from the ultimate findings made by his Honour ... is any mention of ... the parties’ respective contributions”; and concluded [(88)]:

“I am unable to see ... how it was reasonably open to his Honour to conclude in 2016 that the parties did intend to bring an end to their financial relationships by the 1998 orders.”

CHILDREN – MOTHER “ORCHESTRATED” FATHER’S EXCLUSION FROM CHILD’S LIFE – TRIAL JUDGE GAVE INSUFFICIENT WEIGHT TO MOTHER’S NEGLIGENCE AND EXPOSURE OF CHILD TO VIOLENCE

In *Bangi & Belov* [2017] FamCAFC 5 (3 February 2017) the Full Court (Ainslie-Wallace, Murphy & Cronin JJ) allowed the father’s appeal against Hannam J’s parenting order for a 10 year old child after a nine day trial. The mother only attended the first five days, telling the court that if the orders made did not accord with her wishes she would not obey them [(107)], and did not attend the appeal. The father had sought orders that the child live with him, arguing “that the child was at risk of harm in the mother’s care” [(2)].

The trial judge ordered that the child live with the mother and spend five nights a fortnight and half of holidays with the father. He argued on appeal that the order was based on inconsistent findings as to the mother’s parenting capacity and that the family consultant’s findings as to the mother being the child’s primary attachment figure was in ignorance of other evidence, such as violence in the mother’s household.

The Full Court said [(6)-[19)] that for two years after separation “the father had been excluded from the child’s life”; “the mother orchestrated that exclusion”; the mother did not co-operate with an order that the mother take the child to a psychologist for therapy; the trial judge rejected the mother’s claim that the father had been violent or abusive; that the mother “lacked credibility and ... had been violent to both the father and the child” and had “exposed [the child] to ... drunkenness ... [by] the mother’s partner ... and ... violence between the mother and her partner”.

The trial judge [(22)] said that “removal of the child from the mother would be traumatic for him” and found that the mother’s attitude had “changed”, a finding that “did not sit comfortably with other findings made by her Honour” [(104)]. All “charges against the father were dismissed as were the domestic violence orders” [(41)]. The Full Court referred [(102)] to “cogent evidence, accepted by her Honour, from a person unconnected with the proceedings (Mr JJ) of a significant lack of parental care ... and ... exposure to regular family violence ... That evidence was entirely supportive of the father’s evidence”.

The family consultant said [(109)] that removal of the child was “an option if her Honour found the mother had significant deficits in her ... parenting”. The trial judge’s findings were “based upon the evidence of the family consultant” [(112)] who was not made aware of the evidence of Mr JJ, the Full Court saying [(114)] that “[t]he failure to have the family consultant express opinions postulated upon the trial judge’s acceptance of Mr JJ’s evidence (and the father’s evidence seen in its light) is in our view a significant omission”. **B**



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G Monahan
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CHILDREN AND THE LAW IN AUSTRALIA

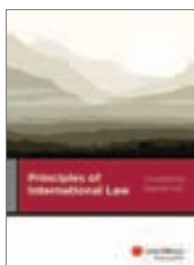
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(Honouring Elliott Johnston)
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Elder Abuse and Self-Managed Super Funds

ANDREW PROEBSTL, CHIEF EXECUTIVE, LEGALSUPER



Elder abuse within Self-Managed Super Funds is a focus of a new Australian Law Reform Commission discussion paper.

An Australian Law Reform Commission (ALRC) discussion paper has highlighted concerns about the risk of elder abuse within Self-Managed Super Funds (SMSFs) and has sought feedback about steps that could be taken to lessen its likelihood.

The ALRC's *Elder Abuse* discussion paper was released in December last year¹. At the time of writing this column, the ALRC was scheduled to report its findings to the Federal Attorney-General George Brandis QC in May.

In the discussion paper, the ALRC notes that "[f]inancial abuse is one of the most common types of elder abuse."²

The discussion paper continues: "superannuation funds may also be the target of elder financial abuse, particularly less regulated self-managed funds. For example, an individual trustee of a self-managed fund who loses decision-making ability may be vulnerable to abuse."³

The legal framework for SMSFs was established in 1999 and, as the discussion paper notes: "The risk of vulnerability to financial abuse in relation to a SMSF arises in part because the regulatory framework for SMSFs was designed on the premise of self-protection."⁴

While this independent "self-protection" may have been seen as an attractive attribute of SMSFs, an ageing population means that an increasing number of older SMSF directors are likely to be vulnerable to financial elder abuse.

The ALRC concluded in the discussion paper: "A regulatory framework that relies on self-protection may be problematic, as a larger number of SMSFs come under the control of older people who may have diminishing decision-making ability. The risk associated with trustee capacity was also

noted by the Financial Services Institute of Australasia (FINSIA): "the issues of population ageing and cognitive decline are a "silent tsunami" for self-managed super funds (SMSFs), exposing investors in this sector to financial abuse, including fraud and inappropriate investment advice."⁵

Whereas SMSFs rely on "self-protection" all other (managed) super funds are subject to oversight by an independent regulator – the Australian Prudential Regulation Authority (APRA).

In the words of the discussion paper, the age profile of SMSF members shows that there is an "emerging risk" of financial elder abuse in relation to SMSFs.

Currently, 8.8 per cent of SMSFs have members aged over 75 years of age — the most vulnerable cohort for elder abuse, according to the ALRC. 55 per cent of SMSF members are aged between 55 and 74 years of age.

As the ALRC notes - "in the coming decades, a greater number of older and more vulnerable individuals will have a SMSF."⁶

The ALRC also notes that "Alzheimer's Australia has submitted that approximately 20% of people over 65 years may develop dementia. Accordingly, what happens when a SMSF trustee loses decision-making ability is of critical concern in managing the risk of elder abuse."⁷

To provide further context, Alzheimer's Australia latest research also shows that:

- There are more than 353,800 Australians living with dementia;
- This number is expected to increase to 400,000 in less than five years; and
- Without a medical breakthrough, the number of people with dementia is expected to be almost 900,000 by 2050.⁸

In light of the concerns about the potential for financial elder abuse in relation to SMSFs, the ALRC discussion paper asked the following questions:

"Should the *Superannuation Industry (Supervision) Act 1993* (Cth) be amended to:

- require that all self-managed superannuation funds have a corporate trustee;
- prescribe certain arrangements for

the management of self-managed superannuation funds in the event that a trustee loses capacity;

- impose additional compliance obligations on trustees and directors when they are not a member of the fund; and
- give the Superannuation Complaints Tribunal jurisdiction to resolve disputes involving self-managed superannuation funds?"

It also asked: "should there be restrictions as to who may provide advice on, and prepare documentation for, the establishment of self-managed superannuation funds?"⁹

While it is the case that for some people, age may never become a barrier to their ability to competently discharge all the responsibilities involved in running a SMSF, others will, over time, lose capacity to do so and may find themselves vulnerable to financial elder abuse.

It is also possible that even in instances where financial elder abuse is thankfully not an issue, older trustees may begin to struggle with the extensive legal, taxation, compliance and administrative responsibilities involved in setting up, running, paying benefits from and winding up a SMSF.

While many SMSF trustees engage professionals to assist them in running their fund, the ultimate financial and legal responsibility for the fund lies with the Trustee(s) of the fund - not the professionals they may choose to engage to carry out various duties.

People looking for more information on the impacts of ageing on the ability of some trustees to manage a SMSF may be interested in visiting ASIC's MoneySmart website which has information about "Memory loss, dementia and SMSFs."

The website says that: "As trustee of your SMSF, you should plan for the possibility that some form of impairment could stop you from being able to properly manage your fund. It's better to make a contingency plan while you're capable of making good decisions than waiting until your health deteriorates. If you're not able to run your fund you could:

- Transfer your SMSF assets to a managed super fund
- Appoint a person you trust to take over your trustee responsibilities as your legal personal representative.^{9,10}

Whichever option a trustee of a SMSF may end up considering if they fear they are losing capacity, it is advisable, as part of this process, to speak with your fellow

trustee/s, your financial adviser, your legal representative, members of your family and a managed super fund before making a decision. **B**

Endnotes

- 1 See <https://www.alrc.gov.au/news-media/media-release/elder-abuse-discussion-paper>
- 2 Australian Law Reform Commission Discussion Paper *Elder Abuse* (December 2016), page 127

- 3 Note 2 above, page 127
- 4 Note 2 above, page 138
- 5 Note 2 above, page 139
- 6 Note 2 above, page 138
- 7 Note 2 above, page 140
- 8 See <https://www.fightdementia.org.au/statistics>
- 9 Note 2 above, page 137
- 10 See <https://www.moneysmart.gov.au/superannuation-and-retirement/self-managed-super-fund-smsf>

GAZING IN THE GAZETTE

4 March 2017 – 3 April 2017

A MONTHLY REVIEW OF ACTS, APPOINTMENTS, REGULATIONS AND RULES COMPILED BY MELLOR OLSSON'S ELIZABETH OLSSON.

Acts Proclaimed

Housing Improvement Act 2016 (No 36 of 2016)

Commencement: 3 April 2017
Gazetted: 7 March 2017,
No. 13 of 2017

Statutes Amendment (Surrogacy Eligibility) Act 2017 (No 6 of 2017)

Commencement: 21 March 2017
Gazetted: 21 March 2017,
No. 17 of 2017

Planning, Development and Infrastructure Act 2016 (No 14 of 2016)

Commencement except ss 4; 11; 49; 50; 51(1)(b) and (c); 53; 58 to 161; Part 13 Division 1 Subdivision 3; ss 192 to 232; 234; 235; 237; 239; 240; Schedule 6:

1 April 2017
Gazetted: 28 March 2017,
No. 18 of 2017

Statutes Amendment (Budget 2016) Act 2016 (No 57 of 2016)

Commencement Part 8:

3 April 2017
Gazetted: 28 March 2017,
No. 18 of 2017

Statutes Amendment (Planning, Development and Infrastructure) Act 2017 (No 5 of 2017)

Commencement except ss4-9; Parts 3-27 and clauses 4; 10-29; 32-35; 37-40 of Schedule 8 of *Planning, Development and Infrastructure Act* 2016 (inserted into that Act by section 10 of the Statutes Amendment Act):

1 April 2017 immediately after the commencement of *Planning, Development and Infrastructure Act* 2016.
Gazetted: 28 March 2017,
No. 18 of 2017

Acts Assented To

Statutes Amendment (Surrogacy Eligibility) Act 2017, No. 6 of 2017

(amends *Assisted Reproductive Treatment Act* 1988; *Equal Opportunity Act* 1984; and

Family Relationships Act 1975)

Gazetted: 15 March 2017,
No. 15 of 2017

Statutes Amendment and Repeal (Simplify) Act 2017, No. 7 of 2017

Gazetted: 15 March 2017,
No. 15 of 2017

Intervention Orders (Prevention of Abuse) (Recognition of National Domestic Violence Orders) Amendment Act 2017,

No. 8 of 2017
Gazetted: 15 March 2017,
No. 15 of 2017

Appointments

Master of the District Court of South Australia

on an auxiliary basis, for a period commencing on 15 March 2017 and expiring on 30 September 2017

Martin Keith

Gazetted: 15 March 2017,
No. 15 of 2017

REGULATIONS PROMULGATED (4 MARCH 2017 - 3 APRIL 2017)

REGULATION NAME	REGULATIONS NO.	DATE GAZETTED
<i>Housing Improvement Act</i> 2016	17 of 2017	7 March 2017, Gazette No. 13 of 2017
<i>Housing Improvement Act</i> 2016	18 of 2017	7 March 2017, Gazette No. 13 of 2017
<i>Construction Industry Training Fund Act</i> 1993	19 of 2017	15 March 2017, Gazette No. 15 of 2017
<i>Motor Vehicles Act</i> 1959	20 of 2017	21 March 2017, Gazette No. 16 of 2017
<i>Road Traffic Act</i> 1961	21 of 2017	21 March 2017, Gazette No. 16 of 2017
<i>Road Traffic Act</i> 1961	22 of 2017	21 March 2017, Gazette No. 16 of 2017
<i>Animal Welfare Act</i> 1985	23 of 2017	28 March 2017, Gazette No. 18 of 2017
<i>Planning, Development and Infrastructure Act</i> 2016	24 of 2017	28 March 2017, Gazette No. 18 of 2017
<i>Planning, Development and Infrastructure Act</i> 2016	25 of 2017	28 March 2017, Gazette No. 18 of 2017
<i>Electronic Transactions Act</i> 2000	26 of 2017	28 March 2017, Gazette No. 18 of 2017
<i>Passenger Transport Act</i> 1994	27 of 2017	28 March 2017, Gazette No. 18 of 2017
<i>Passenger Transport Act</i> 1994	28 of 2017	28 March 2017, Gazette No. 18 of 2017

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is a Principal at
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THE LAW SOCIETY OF SOUTH AUSTRALIA

LITIGATION ASSISTANCE FUND

The Litigation Assistance Fund (LAF) is a non-profit charitable trust for which the Law Society acts as trustee. Since 1992 it has provided funding assistance to approximately 1,500 civil claimants.

LAF receives applications for funding assistance from solicitors on behalf of civil claimants seeking compensation/damages who are unable to meet the fees and/or disbursements of prosecuting their claim. The applications are subjected to a means test and a merits test. Two different forms of funding exist – Disbursements Only Funding (DOF) and Full Funding.

LAF funds itself by receiving a relatively small portion of the monetary proceeds (usually damages) achieved by the claimants whom it assists. Claimants who received DOF funding repay the amount received, plus an uplift of 100% on that amount. Claimants who received Full Funding repay the amount received, plus 15% of their damages. This ensures LAF's ability to continue to provide assistance to claimants.

LAF recommends considering whether applying to LAF is the best course in the circumstances of the claim. There may be better methods of obtaining funding/representation. For example, all Funding Agreements with LAF give LAF certain rights including that funding can be withdrawn and/or varied.

For further information, please visit the Law Society's website or contact Annie MacRae on 8229 0263.

THE LAW SOCIETY OF SOUTH AUSTRALIA

LawCare

The LawCare Counselling Service is for members of the profession or members of their immediate family whose lives may be adversely affected by personal or professional problems.

If you have a problem, speak to the LawCare counsellor Dr Jill before it overwhelms you. Dr Jill is a medical practitioner highly qualified to treat social and psychological problems.

The Law Society is pleased to be able to cover the gap payments for two consultations with Dr Jill per patient per financial year.

All information divulged to the LawCare counsellor is totally confidential. Participation by the legal practitioner or family member is voluntary.

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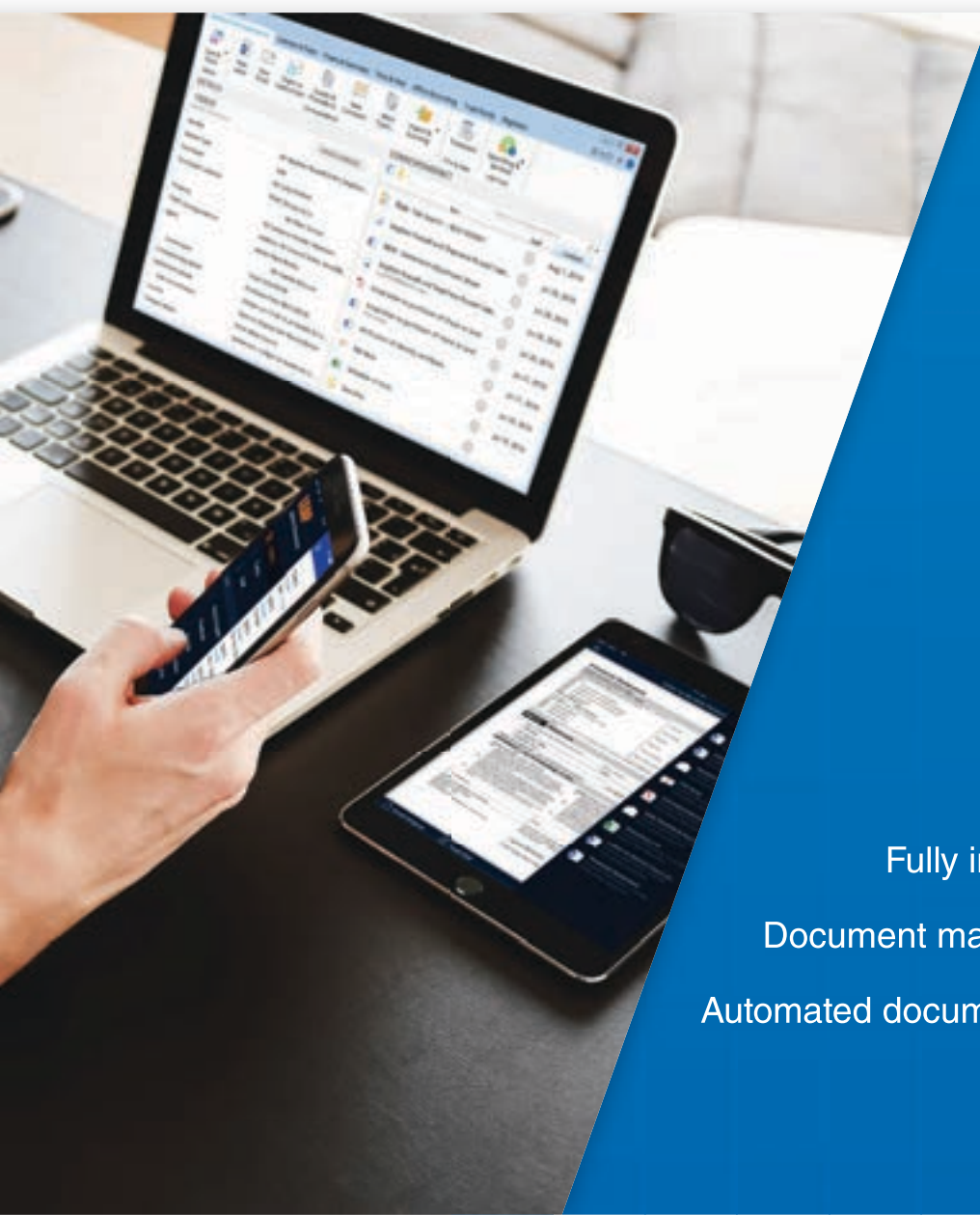


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