MENTAL HEALTH | SENTENCING | CLASS ACTIONS | REMOTE HEARINGS | FAMILY LAW | WORKPLACE LAW

LAW INSTITUTE JOURNAL

DECEMBER 2020

KEEPING MENTAL HEALTH FRONT AND CENTRE

DRIVING CULTURAL DIVERSITY

CHIEF MAGISTRATE LISA HANNAN: INTERVIEW

SENTENCING THE MENTALLY ILL

ONE LAWYER'S BRUSH WITH WES ANDERSON

+ LEGAL FEATURES 2020 INDEX

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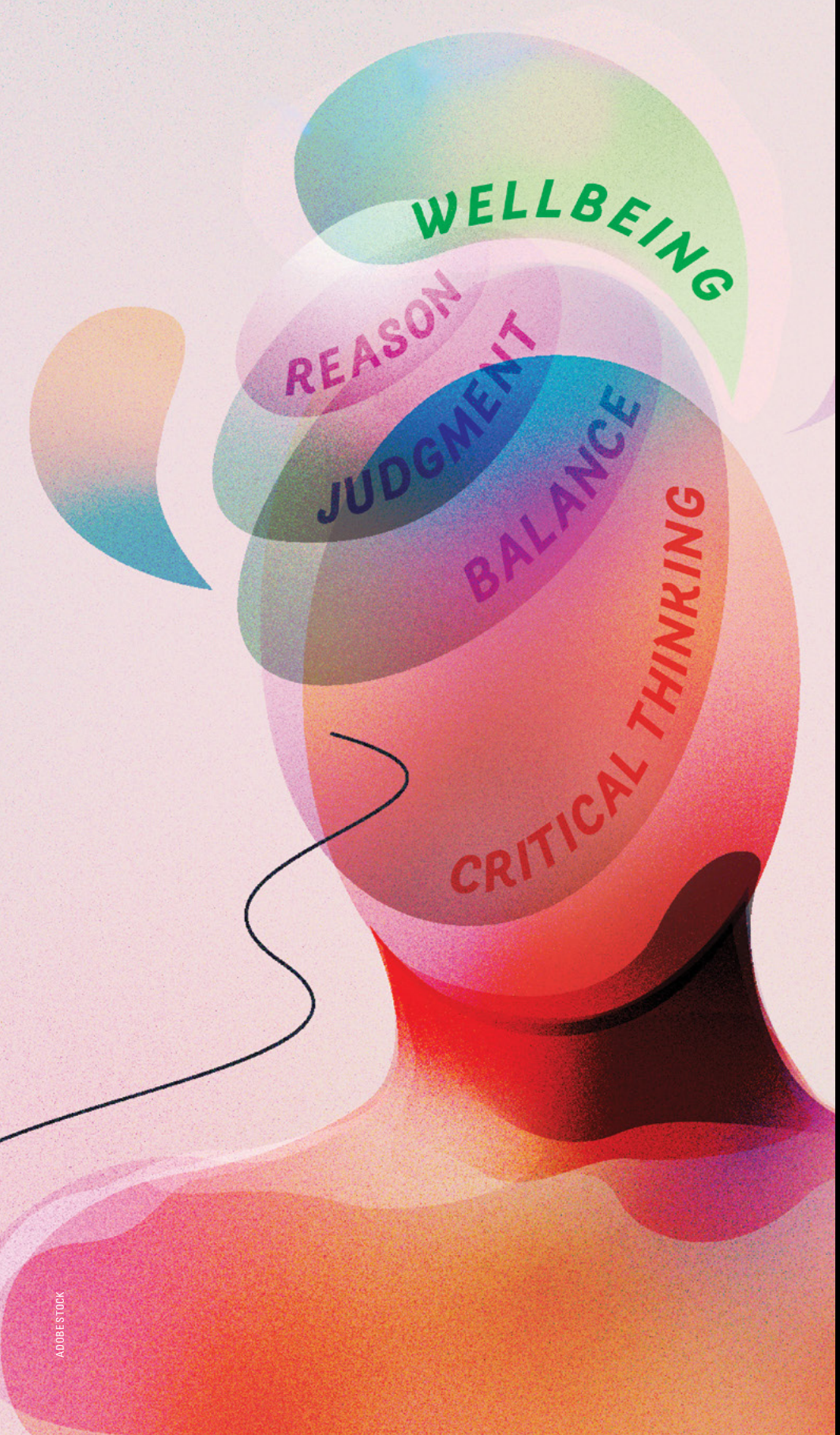

ADOBE STOCK

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ADOBESTOCK

List A celebrates the achievements of its members in 2020.

LIST A BARRISTERS

As Australia's leading list of commercial and public law barristers, arbitrators and mediators, despite the enormous challenges of 2020 our members have good reason to celebrate their significant achievements this year.

Those achievements include:

- the appointment of the Honourable Justice Simon Steward, as a Justice of the High Court of Australia. Justice Steward was first admitted to practice in 1992, signed the Bar Roll in 1999 and was appointed Queen's Counsel in 2009. He joined List A in 2001, and developed a substantial tax practice. By the time of his appointment to the Federal Court on 1 February 2018 he was recognised as one of the leaders of the Australian tax bar. His Honour's appointment to the High Court will commence from 1 December 2020;
- the appointments of Jennifer Batrouney AM QC and former member of the List the Honourable Justice Shane Raymond Marshall AM as Members in the General Division of the Order of Australia in the 2020 Queen's Birthday Honours List. Jennifer's award was for significant service to the law, to the legal profession, and to women lawyers, and His Honour's award was for significant service to the law, and to the judiciary, to industrial relations, and to mental health;
- the appointment of former Chair of the List Justice Michael Sifris to the Court of Appeal and the appointments of former Chair of the List Jim Delany QC and Katie Stynes to the Trial Division of the Supreme Court of Victoria. The Honourable Michael Sifris and the Honourable Jim Delany QC took up their roles on 2 June 2020, and the Honourable Kathryn Stynes commenced her term on 22 June 2020;
- the appointments of Justin Graham SC, Alistair Pound SC, Sandro Goubran SC, Daniel McInerney SC and Dr Paul Vout SC as Senior Counsel in Victoria on 1 October 2020: List A members comprise more than a quarter of Victorian appointments;
- the appointment of Jonathon Redwood SC as Senior Counsel of the New South Wales Bar on 30 September 2020;
- many of our members were recognized by their peers for inclusion in The Best Lawyers in Australia 2021; and
- Doyle's Guide has once again recognized the expertise and professional standing of a significant number of List A members in the areas of Competition, Insolvency and Restructuring, Arbitration, Dispute Resolution and Intellectual Property.

We now welcome:

Ben Bromberg

Ben practises primarily in employment and industrial relations law and public law.

Ben is a former Associate to the Hon Justice Richards of the Supreme Court of Victoria. Before coming to the Bar, Ben worked for 5 years as a solicitor, starting his career at Maurice Blackburn Lawyers in its employment and industrial team.

As a solicitor, Ben built up a broad practice in general civil litigation, employment and industrial relations law and public law (in particular, discrimination, human rights, merits and judicial review).

Ben's mentor is Liam Brown, Crown Counsel for the State of Victoria, and his senior mentor is Craig Dowling SC.

Alexander Di Stefano

Alexander practises in commercial law, with an emphasis on corporations and insolvency, class actions and consumer protection.

He is a Research Fellow (Hon) and Sessional Lecturer at Melbourne Law School. He has taught in the Juris Doctor programme in the Obligations, Contracts and Property courses.

Prior to coming to the Bar, Alexander was Associate to the Hon Justice Anastassiou QC in the Federal Court of Australia and a lawyer in the disputes team at Arnold Bloch Leibler.

Alexander's experience encompasses class actions, Royal Commissions, contracts and shareholder disputes, injunctions, and regulatory litigation. He also has experience in public law, in particular in judicial review applications and appeals.

Alexander holds a LLM from the University of Cambridge and a Bcom (Economics) and Juris Doctor from the University of Melbourne.

Alexander is reading with Mark Costello. His senior mentor is Wendy Harris QC.

Tessa Meyrick

Tessa has a broad practice in commercial and public law, including in constitutional and judicial review matters.

Before coming to the Bar, Tessa practised as a solicitor in both commercial litigation and public law. Most recently, she was a Principal Solicitor in the Constitutional and Advice team (formerly the Public Law team) at the Victorian Government Solicitor's Office, where she advised on all aspects of administrative decision-making, constitutional law and statutory interpretation. Prior to that, Tessa was a Senior Associate in the commercial litigation group at Allens, focusing on regulatory matters. She has also practised as a solicitor with Freshfields Bruckhaus Deringer in London and Tokyo.

Tessa is reading with Emrys Nekvapil. Her senior mentor is Rowena Orr QC.

Contributors

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Principal, PH Solicitor.
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Ines Perkovic
Lawyer, PH Solicitor.
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CEO at Moores and practice leader in the corporate advisory team.
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2020 challenges bring rewards

This year of uncertainty meant we had to be flexible, open-minded, resilient and compassionate.

Coming into 2020, I was excited about contributing to the advancement of the profession and engaging with members. Like most, my plans revolved around face-to-face meetings and events. On LIV Council since 2015, I had met and heard from many members with ideas and thoughts on how the LIV could better represent its membership. My 2020 focus was to promote value for members, highlight the importance of professionalism and to advance diversity, particularly cultural diversity.

In January, we saw dramatic scenes of holidaymakers stranded on the beach in Mallacoota waiting for boats to rescue them from rapidly approaching bushfires. In the aftermath of the bushfire emergency affecting East Gippsland, North East Victoria and surrounds, the legal profession supported regional communities with an inundation of offers from members following the LIV's call for support through Disaster Legal Help. The LIV was proud to donate proceeds from its State of the Profession event in February to the Bushfire appeal. This period was an opportunity for lawyers to show professionalism by supporting the community in a time of emergency. Many of us did so without hesitation.

Previous LIV presidents warned me that each president usually has to deal with one important issue or crisis during their year. I thought the bushfire emergency was mine. But in March it became clear the bushfires were just a precursor to a major health and economic crisis that would lead to profound changes to our profession and society. Since then we have lived with uncertainty and needed to be flexible, open-minded, resilient and compassionate as we managed health restrictions and the needs of clients and colleagues. Most of us are working differently to the way we did at the start of 2020 and it is a credit to our professionalism that we have moved so effectively to remote practice in such challenging circumstances. Our professionalism was exemplified by working collaboratively with courts, government, the Attorney-General and others to ensure practices continued and the profession maintained its commitment to access to justice for the community. The LIV's appearance at the Parliamentary Accounts and Estimates Committee in May demonstrated our strong reputation and standing in the community. More than 200 submissions and 60-plus media appearances ensured members' voices were heard and we successfully influenced COVID-19 emergency legislation and regulations around delivery of legal services during the pandemic. Our advocacy resulted in the implementation of 80 per cent of our recommendations into legislation, helping shape the law for the benefit of all.

In the midst of the crisis, I'm proud of the LIV board's unprecedented decision to reduce the LIV's annual membership fee for 2020-21 by around 80 per cent to $99. It gave crucial, timely support to members, while at the same time we maintained and expanded online services such as the COVID-19 hub, free webinars and seminars, FAQs to understand the ever-changing health directives and mental health support with the EAP.

My passion for advancing diversity, in particular cultural diversity, meant I ensured it remained a key focus in 2020. Among many lessons, the COVID-19 crisis taught us the importance of ensuring the profession responds to community needs, engages with and reflects it at all levels, and draws on the talents and experiences of our multicultural community. This inspired me to create the Network of Culturally Diverse Association Presidents, bringing together 13 groups to work together to create change. Working collaboratively with the Victorian Legal Services Board CEO and Commissioner Fiona McLeay, I championed the collection of cultural diversity data from legal practitioners for the first time in Victoria. The LIV also collected cultural diversity data from student and graduate members. We delivered cultural diversity panel events at our Conference of Council in February and put a spotlight on the issue with strong media coverage in October. This focus has culminated in the December publication of my paper, "Positive Action, Lasting Change" (see p11), which recommends law firms take ownership of advancing cultural diversity by collecting and reporting employee data every two years.

It has been a privilege to lead the profession through such a challenging year, and we should all be encouraged by the way we have worked together, sharing ideas, knowledge and resources to make us stronger. 2021 is likely to hold new challenges, but we should feel confident in our ability to work through them together for the benefit of clients and the community. Thank you to all members, directors, staff and our CEO for your support, your kind messages and efforts throughout the year. Wishing you all a happy and healthy 2021. ■

Sam Pandya
LIV PRESIDENT *president@liv.asn.au* *@LIVPresident*

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Unsolicited

In support of livestock farming

Attempting to conflate the sale of wildlife in Wuhan with livestock farming in Australia is absurd ("COVID-19: Rethinking the human-animal relationship", *LIJ* November 2020).

As a rural lawyer practising in dairy farming heartland, I can attest that farmers are well aware of the challenges their own industries face. Suggesting farmers switch from livestock farming to "planting and harvesting a variety of healthy crops and fruit trees" is akin to suggesting the writers of the article take up positions advising on space law.

The fact is that Australia has some of the highest standards of animal welfare and meat processing in the world. Put simply, if Australia abandoned its livestock industry, global demand for meat and produce would be met elsewhere without such stringent safeguards.

Moreover, I question the usefulness of articles like these to the profession. There are plenty of more appropriate platforms for lawyers to share their political opinions rather than in the *Law Institute Journal*.

Rebecca Alexander, director, SLM Law and LIV Council member

Enable jury trials

The Criminal Bar Association has objected to reducing the number of jurors from 12 to eight through COVID-19. This reduced number would apparently satisfy the distancing requirements and could enable jury trials to restart. The objection is principally based on the fact that it is a very longstanding practice. This is not progressive thinking – it is the antithesis of progressive thinking to assert that because of the length of a practice /law, it should be maintained. Jury trials need to restart – if this will get them going, let's adopt it tomorrow. ■

Michael Helman, Australian legal practitioner

LETTERS TO THE EDITOR

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Focus	Session Title	Date	Time	CPD Hours	CPD Type
Administrative	Administrative Law Symposium (3-part program)	Thursday 25 February, 4 & 11 March	12–1.30pm	4.5	SL PS PM EP
Commercial & Business	Commercial Litigation Symposium	Tuesday 16 March	10.30am–3.15pm	4	SL PS PM EP
	Commercial Law Conference	Thursday 25 March	9am–5pm	6	SL PS PM EP
Construction	Building & Construction Law Updates & Insights	Tuesday 2 March	1–4.15pm	3	SL PS
Costs	National Costs Law Conference	Friday 19 February	9am–5pm	6	SL PS PM EP
Elder	Retirement Village & Aged Care Contracts	Thursday 18 February	9.30–11am	1.5	SL PS
Family	Family Law Intensive	Friday 19 March	9am–5pm	6	SL PS PM EP
	Arbitration for Family Law Practitioners	Tuesday 30 March	12.30–3.45pm	3	PS PM
Health	The Rise & Rise of Telehealth: Legal issues and considerations for health lawyers	Monday 29 March	12–1pm	1	SL
Immigration	Immigration Law Updates & Insights	Monday 1 March	12–1.30pm	1.5	SL
Litigation	Alternative Dispute Resolution: Practice and procedure	Wednesday 3 March	9am–12.15pm	3	PS
	Commercial Litigation Symposium	Tuesday 16 March	10.30am–3.15pm	4	SL PS PM EP
Personal Injury	Personal Injury Breakfast with the Experts	Thursday 18 March	9–10.30am	1.5	SL
	Personal Injury Conference	Friday 26 March	9–5pm	6	SL PS PM EP
Practice Essentials	Costs in 2021: Cases, obligations and conversations	Thursday 25 February	9.30am–12.45pm	3	PS PM EP
	Key Skills for Navigating the New Normal	Tuesday 23 March	9.30am–12.45pm	3	PS PM EP
Practice Management	Succession Planning Workshop	Tuesday 16 February	9.30am–12.45pm	3	PM
Property	Subdivisions Unpacked (2-part program)	Tuesday 23 February & 2 March	9.30–12.45pm	6	SL PS PM
	Property Law Intensive	Friday 19 March	9am–5pm	6	SL PS PM EP
Succession	Wills & Estates: Issues in estate administration	Wednesday 3 March	9–10.30am	1.5	SL PS
	Succession Law Intensive	Friday 19 March	9am–5pm	6	SL PS PM EP
Tax	Legal Professional Privilege in Practice	Monday 22 February	12–1.30pm	1.5	SL EP
Workplace & Employment	Workplace Relations Conference	Friday 26 February	9am–5pm	6	SL PS PM EP

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CALL TO FIRMS TO PUSH FOR INCLUSION IN THE PROFESSION

LIV PRESIDENT **SAM PANDYA**'S NEW PAPER 'POSITIVE ACTION, LASTING CHANGE: ADVANCING CULTURAL DIVERSITY IN THE VICTORIAN LEGAL PROFESSION', EXTRACTED HERE, RECOMMENDS FIRMS DRIVE ETHNIC AND CULTURAL DIVERSITY AT ALL LEVELS.

Positive action: LIV president Sam Pandya

As 2020 LIV president, I believe it is time for the Victorian legal profession to take more proactive measures to promote ethnic diversity so that the profession reflects our multicultural society, better meets the diverse legal needs of the community and contributes to the talent pipeline into the senior echelons of the profession and the judiciary.

A positive duty on employers to take measures to eliminate race discrimination has existed in *Victoria's Equal Opportunity Act* for 10 years, but it appears to have resulted in little significant change in ethnic diversity in the profession.

This is concerning because ethnic diversity across the profession and judiciary is important for many reasons, including:

- ensuring that the most talented practitioners start and develop their careers as solicitors helps to maintain high standards and bolsters trust and confidence in the profession
- to understand and respond to the needs of the community
- monitoring and addressing discrimination against lawyers from minority ethnic communities improves the profession's effective representation of, and service on behalf of, multicultural Victoria
- the likelihood that some members of our community are more likely to seek legal assistance from solicitors with shared ethnic or cultural heritage, which improves access to justice,
- an effective justice system, where there is respect for the independence of the judiciary and the rule of law, relies on a diversity of thinking, experiences and perspectives.

The existing collection of data by the Victorian Legal Services Board and Commissioner (VLSB+C) and the LIV, commenced in 2020, is an excellent start. It gives snapshots of the ethnic background of people who hold practising certificates, graduates and law students in Victoria. But it does not assist in making significant progress towards cultural change and improved ethnic diversity outcomes for a number of important reasons, including:

- it does not help to understand the number and percentage of culturally diverse lawyers employed in private law firms, in what capacity and whether they are promoted in firms or represented at all levels of the profession
- it does not encourage law firm employers to audit or monitor their ethnic and cultural diversity profile, policies, practices or outcomes and make informed decisions about initiatives to address barriers to diversity to achieve cultural change
- it does not provide opportunities for law firms to compare themselves to industry benchmarks or standards across the profession or to celebrate their achievements over time or in comparison with other law firms.

To satisfy their positive duty, Victorian law firms should be asked to collect and report their organisation's ethnic composition to the VLSB+C or LIV every two years. This non-mandatory process would identify the cultural make

> *"Talking about the issue is easy, achieving lasting change is harder."*

up of law firms, highlight trends and encourage and advance ethnic diversity by informing measures to address any barriers to diversity and inclusion and create employer accountability for improvements.

I recommend all law firms provide (or incorporate into their recruitment processes) a questionnaire to all staff with three questions relating to their ethnic background and that law firms should be asked to report the data to the VLSB+C or LIV in aggregate form bi-annually so that a report on the legal sector can be published on the regulator's website. While individual employees can indicate they prefer not to answer (for privacy reasons), employers should be asked to report the data they do collect. No information identifying a practitioner would be reported or published. Firms which do not report the data would not be penalised but would be encouraged to do so by offering them further advice and assistance on its importance and benefits to the firm, profession and community.

QUESTIONNAIRE

a) *What is your ethnic group?*
b) *In which country were you born?*
c) *Do you speak languages other than English? If yes, what are they?*

Starting my career in London in the 1990s working for the UK Civil Service, I recall completing government application forms, employment, tax and others which asked for information on ethnic and cultural heritage and identity, as well as disability and socioeconomic background. It was routine and widespread. Disclosure of this kind of data was not considered out of the ordinary. The community seemed to accept that this information helped government understand the cultural makeup and diverse experiences and needs of its citizens and employees so it could recruit fairly and provide appropriate services. Often, providing this information was mandatory and people were generally comfortable with that. I worked for the government for five years and saw that civil servants came from all ethnic backgrounds and reflected the diverse London community I grew up in.

I then moved to Australia and, except for a short period back in the UK, I have worked as a private practitioner here ever since. Australia is a modern, developed country that prides itself on its multiculturalism, so I was surprised to learn that, with the exception of First Nations people, the UK-style diversity questions were not asked in job applications or when accessing public services.

When I first began working in Australian law firms, I was disappointed to see that the legal profession, particularly at the senior levels, did not reflect the rich diversity of the community. I was also concerned, when appearing in courts and tribunals, that members of the Bar and judiciary, those who appear and administer justice, were limited in the diversity of their backgrounds and experiences. It troubled me that an absence of ethnic and cultural diversity in the profession and judiciary, or the perception of that, could, if not addressed, threaten the reputation of the profession and system to properly administer justice.

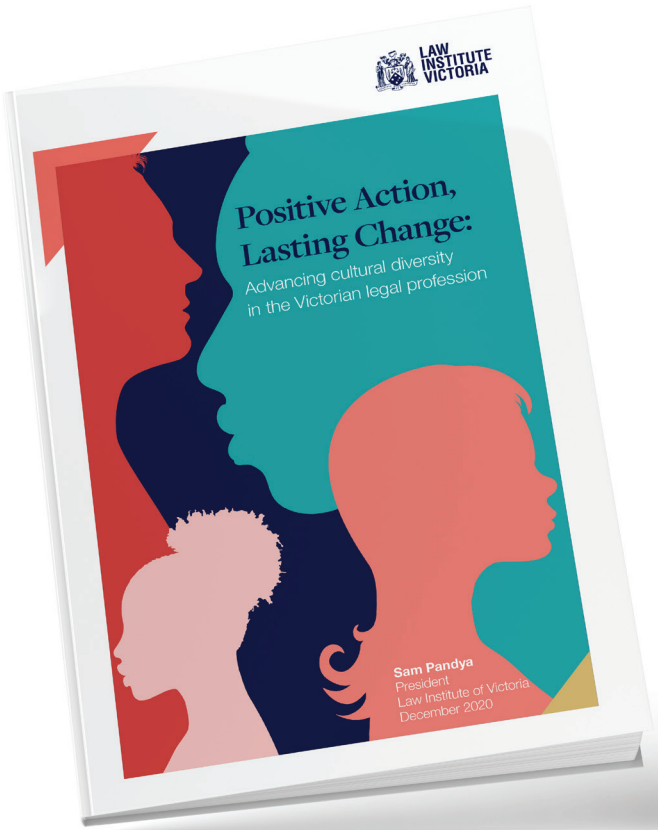
The Victorian legal profession is ready for change but it seems somewhat at a loss as to how to achieve it. I have had many discussions with leaders of the profession during my year as president of the LIV. They have commended the work that I, the LIV and other diverse cultural groups of legal practitioners are doing to promote greater diversity and clearly want to see change. However, my observation has been that many in the profession are searching for guidance on the best way to achieve change, particularly in the competitive environment that is modern legal practice. Talking about the issue is easy, achieving lasting change is harder. I see this report as one strand of the guidance required. It is asking all of us, from large multinational firms to sole regional practitioners, to invest a little at a time. The recommendation outlined here allows all of us to take ownership and be accountable for advancing ethnic and cultural diversity, by being transparent about our workforce and putting the onus on each employer to play their part so we can understand and respond to the diverse needs of our system, profession and clients.

I recognise the tremendous amount of work that has been done by many in the legal profession to raise awareness of the benefits of ethnic and cultural diversity via panel discussions, articles and commentary. This should of course continue but the time for action is now with this diversity data collection and reporting framework, with all sectors of the profession working in tandem for positive change. Together, we can work towards understanding and monitoring progress and target areas that require priority and cultural change.

Who is asked?

- Solicitor partner (sole practitioner, principal or director)
- solicitors (not partners)
- other fee earners (trainees, paralegal)
- fee earner support (legal secretaries and assistants, non-fee earning paralegals)
- managers (non-lawyer partners, directors, practice managers, finance or account managers)
- IT/HR/other corporate services
- costs lawyer
- conveyancer
- barrister.

This recommendation seeks to create a shift in the profession towards investing in, and taking ownership of, the importance of ethnic diversity at all levels of law firms. This ownership will encourage firms to regularly monitor their cultural diversity profile, policies and practices to address barriers to diversity and give firms opportunities to compare themselves with industry standards, celebrate their achievements and attract and retain



"By shining a light on the issue of cultural diversity in our profession and the commitment and determination required to achieve it, I hope to pave the way for lasting change . . ."

the best talent.

To successfully implement this recommendation, the VLSB+C and the LIV should ensure it works collaboratively with diverse groups such as the African Australian Lawyers Association, the Muslim Legal Network, the Asian Australian Lawyers Association, the Victorian Aboriginal Legal Service and others. These groups have strong links in the profession and the community and are well placed to advocate for the importance of the data and the benefits to our firms, profession and community. These groups are essential partners in supporting our profession and can highlight the commercial benefits that stem from increased ethnic and cultural diversity at all levels and help educate diverse sections of the community about the important work the profession is doing to address barriers to diversity and inclusion in the profession and the judiciary.

The VLSB+C, together with the LIV, should also consult widely with stakeholders, including representatives from the large law firms, regional and suburban law associations, government, LIV members, sections and committees seeking feedback, answering questions, providing information and guidance and highlighting the benefits of this recommendation to the profession, practices and the community.

As the first LIV president of Indian heritage in the 161-year LIV history, and as a leader and man of colour, I feel it is my duty to make this recommendation to government, the VLSB+C and the profession. By shining a light on the issue of cultural diversity in our profession and the commitment and determination required to achieve it, I hope to pave the way for lasting change for the profession, the community and all diverse lawyers into the future. ■

Sam Pandya, LIV president

'Positive Action, Lasting Change: Advancing cultural diversity in the Victorian legal profession' by Sam Pandya is published on the LIV website.

FIRMS TARGET STRUCTURAL BLOCKS TO ENTRY

LAW FIRMS ARE TRYING TO ADDRESS THE BARRIERS THAT ARE HOLDING BACK CULTURALLY DIVERSE LAWYERS FROM SENIOR ROLES. **BY KARIN DERKLEY**

Muslim Legal Network president Zahida Popal

Visit a law school or legal careers event such as the one the LIV holds every year and you'll be struck by the cultural diversity of law students and graduates from African, Middle Eastern, Asian and Indigenous backgrounds. The impression is supported by a recent survey of LIV Young Lawyer members that shows this group reflects the cultural diversity of the wider community, with 34 per cent saying they were born outside Australia and half speaking a language other than English.

But that diversity quickly starts to dissipate once you go up the ladder in the legal profession. Beyond the ranks of graduate and junior lawyers, the faces of those in more senior roles tend to become white and European – and at partnership level people of colour are a rarity.

That's something LIV president Sam Pandya is all too conscious of. Promoting cultural diversity across the profession has been a central concern during his year leading the LIV. And while he is pleased at the increased diversity in the recent data on younger LIV members, he says the lack of representation at senior levels needs to be addressed. "We need to support our young lawyers coming through the ranks who have different backgrounds and are culturally diverse to make sure they achieve their goals and have the opportunity to become magistrates or VCAT members or partners in law firms or senior associates or commissioners."

Mr Pandya's report, "Positive Action, Lasting Change: Advancing cultural diversity in the Victorian legal profession", has called for law firms to take ownership of the importance of ethnic diversity at all levels of law firms (see p11). As part of this he wants firms to regularly monitor their cultural diversity profile, policies and practices to address barriers to diversity and to give firms opportunities to compare themselves with industry standards, celebrate their achievements and attract and retain the best talent.

LIV Council member and Asian Australian Lawyers Association vice-president Molina Asthana is also frustrated. "Given that 25 per cent of our population is multicultural, why is it that we see so little cultural diversity in the higher echelons of the legal profession?"

Diversity Council CEO Lisa Annese says even though the legal profession seems to have a relatively culturally diverse pool feeding into it, those people still don't seem to be making it into more senior levels. "There's a pretty consistent pattern across all the industries in Australia that the more senior you go in an organisation and industry the more white Anglo Celtic it becomes."

That's borne out by data on cultural background that was collected for the first time by the VLSB+C this year which showed that across the profession generally, 80 per cent of practitioners were born in Australia and 22 per cent speak a different language. It's harder to pinpoint the exact proportion of partners who come from culturally diverse backgrounds, although a research study of Asian-Australians conducted by the Diversity Council in 2014 found they represented just over 3 per cent of partners in law firms and less than 1 per cent of the judiciary, even though they represent nearly 10 per cent of Australia's population.

Law firms are increasingly recognising the need to address the disparity between the makeup of the wider community and their own people, particularly at leadership levels.

Herbert Smith Freehills (HSF) head of diversity and inclusion Danielle Kelly says while the firm has been proactive at recruiting young lawyers from culturally diverse backgrounds, that entry level diversity is not yet being reflected in its senior levels. "If we look at our summer clerkship and graduate pool, I see a lot more ethnic diversity in that pool than I see in the partnership, which is still predominantly white and male."

Norton Rose Fulbright (NRF) managing partner Alison Deitz has noticed a similar mismatch. "A greater proportion of our graduates and lawyers coming through are not Anglo Celtic, which demonstrates that there has been a shift in the profession. But as people became more senior those numbers thin out."

A lack of cultural diversity at the higher echelons of the law is a problem for a number of reasons. "It is not reflecting the talent you're getting at the entry level into the profession," Ms Annese says. "You can't look at the diversity of graduates coming out of university and not think that's where the talent is. So you are narrowing your talent pool if you're only recruiting from a certain group."

In a multicultural society like Australia it also means the profession is still not reflecting the diversity of clients the profession is dealing with, Ms Asthana says. "If people of multicultural backgrounds do not feel adequately represented, or feel their issues are not being understood because of language, culture or social economic factors, then this is an issue of access to justice."

Just as importantly, it is depriving the profession of the benefits of a diverse workforce at leadership as well as entry levels. Research consistently shows that the best way to have high performing creative, engaged teams is to have people who think differently, Ms Annese says. "In law you're in the business of solving problems, you're in the business of thinking critically, you're in the business of responding to challenges and formulating a process or a way out."

Clayton Utz Cultural Diversity partner lead Ken Saurajen agrees that diversity makes good business sense. "There's a lot of research emerging that some of the most creative organisations in the world are the ones taking a very broad and holistic view of what it means to have diverse opinions."

So why aren't we seeing the diversity in entry levels flowing through to more senior roles?

There are parallels with gender diversity, where women lawyers make up 60 per cent of graduates but still represent only 25 per cent of partners. And as with women lawyers, culturally diverse people are being held back by twin barriers. One is the narrow preconception of what constitutes a leader in the profession, thereby excluding those who don't fit that mould. The other is the structural barriers that deter those outside a narrow group from aspiring to or progressing into those roles.

Ms Annese says there needs to be radical challenge to the notion of what leadership looks like. The problem with having a homogenous group of people at partnership level or in the judiciary is that they have narrow views about what it means to be a leader and what constitutes the talent required to make it to senior levels, she says. "Merit is always determined by the people in charge. And if people in charge all look the same then they're going to determine merit as being in their own image."

"There shouldn't be one stereotype for a leader, says Mr Saurajen. "There are many different ways to be effective." People don't set out to be overtly biased or prejudicial in their decisions, he says, "but it's about helping people to identify their own unconscious biases and how they perceive leadership rather than promoting people who look and feel like themselves".

That narrow view of who gets to be leader can make it difficult for culturally diverse people to aspire to leadership in an organisation, especially when they can't see anyone else like them in those roles, says Arnold Bloch Leibler (ABL) commercial lawyer Nyadol Nyuon. "There is that saying about 'you can't be what you can't see'."

Ms Nyuon says she saw no one who looked like her working in commercial law firms when she first started at ABL. The number of African-Australians in law firms is gradually increasing, but it's still easier for them to set up their own legal practice than to move ahead in an existing law firm, she says. "It's not just about getting people in but how we maintain them in that space so they can grow and progress within a firm. It's fine to have people come through, but if they're not staying because there are structural cultural issues within those organisations then we're not going to be really making significant change."

Ms Kelly acknowledges there can be a "real disconnect if people joining a firm at a junior level are looking at a partnership which doesn't look like them. When people from a minority ethnic background are looking to apply to a law firm, are they self-selecting out of city law firms because they don't see a lot of ethnic diversity in the partnerships?"

Personal injury lawyer and Muslim Legal Network president Zahida Popal says things have improved marginally since it took her two years to get a job after graduating. "Once you are able to get past that initial prejudice and secure a position within a firm, you can then show them that your work speaks for itself rather than the colour of your skin or your religion or what you're wearing." But she says that too often culturally diverse younger lawyers are not being given the kind of employee experiences, such as interaction with clients, that are crucial to advancing within a firm.

Clayton Utz Cultural Diversity partner Ken Saurajen

"There shouldn't be one stereotype for a leader . . . there are many different ways to be effective."

"It's ultimately about a fair and equal employee experience for all employees irrespective of their attributes."

"Many organisations show the number of graduates from minority groups they have hired and retained in the past year. But are (those graduates) being afforded the same opportunities and progressing at the same rate? It's ultimately about a fair and equal employee experience for all employees irrespective of their attributes."

What is becoming apparent is that it is not enough to wait for the situation to change with time. "You need to be proactive or you will just automatically repeat the same behaviour and keep making the same assumptions about people," Ms Annese says.

NRF's head of diversity and inclusion Amelia Britton says law firms need to be proactive in removing the barriers to culturally diverse people. "Many decades ago we started to pinpoint that women were not making it through to partnership at as great a rate as men. We looked into the changes that were required – things like flexible work, generous parental leave programs, and provisions so you could go and have a child when you were a partner and come back and your practice would still be there and people would support you.

"We are now trying to do the same for people of cultural diversity. That's about ensuring people make it through to the partnership if that's what they so desire and not having any barriers in place that mean a particular part of our talent pool doesn't make it."

Clayton Utz is putting in an effort to understand why people come to the firm "and just as importantly why they stay here," Mr Saurajen says. "We want to make sure people aren't self-selecting out because they feel there's not a place for someone who looks like they do."

To help inform its strategy, the firm brought in former race discrimination commissioner Tim Soutphommasane to provide them with guidance. "We did not want it to become a simple box ticking exercise," Mr Saurajen says. "It had to be an authentic program that was going to make a difference to the people that work here, to the clients that we work with and to the industry generally."

HSF's Ms Kelly says that as with gender, the firm realised it could not rely just on time to improve the statistics. "We have not been seeing the shift in numbers and ethnically diverse people in more senior roles in the same way that we hadn't with women. And we realised it would require some disruption to the status quo in order to start tackling that."

In September HSF issued a 10 point action plan for its offices across the world which includes the aim to improve the representation of people from minority ethnic groups in senior roles. As part of that it has introduced to its London office a 10 per cent target for partners of BAME (Black, Asian, minority and ethnic) background by 2025. Ms Kelly says the firm will monitor the success of the program to see if it could be applied in Australia.

ABL commercial lawyer Nyadol Nyuon

This is not a quota, she says. "This is simply ensuring we are paying attention to our full talent pool. We're not going to promote someone into the partnership unless they absolutely meet all the criteria. It's to ensure we're not overlooking aspects of merit we may not have valued through our own cultural lens."

To the concern this could mean that people are promoted on the basis of their ethnicity rather than on merit, Ms Kelly says the argument does not hold up. "When you look at the numbers of ethnic minority people joining the firm and at more senior levels it cannot be a meritocracy to have resulted in the very low numbers that we have at those senior levels."

Again the parallel with women partners is relevant, Ms Kelly says. "Before we had gender targets in 2014, we had 18 per cent women in the global partnership. Unless you actually think there is more merit in men than in women, how could we have ended up with that result when we had over 50 per cent women in the legal population for around a generation?"

Ms Asthana agrees targets can help redress structural barriers that have stood in the way of people from culturally diverse backgrounds. "Targets are worth having because not everyone starts out on the same plane, so it helps to get that extra push so you can reach the same level as other people." Targets don't force you to take on a person, she says, "but it requires you to at least consider them and give them the opportunity to demonstrate that they have the same capability as someone else."

Ms Nyuon is also in favour of targets as a way of nudging the way to structural change. "Targets force institutions to change, they force them to think differently because they have to deal with those people, which I think is more conducive to changing people's perceptions than the annual one hour of cultural training.

"What changes people's thinking is when they have a personal relationship with other people, interacting with them and seeing them struggle with issues of belonging and identity." ■

EMBRACING DIVERSITY

AT 17, AFTER A LONG JOURNEY FROM THE AFGHAN WARZONE, INCLUDING A STATELESS EXISTENCE IN PAKISTAN AND A CROSSING FROM INDONESIA IN A FISHING CANOE, **YASIN AZRA** ARRIVED IN AUSTRALIA READY TO CONTRIBUTE AND MAKE A DIFFERENCE.

Yasin Azra

Unlike most children with a cheerful memory of their childhood, I remember hiding in a basement and hearing bullets and rockets flying in the sky. Yet, I was among the lucky ones who safely escaped the Afghan warzone and sought shelter in Pakistan, where I spent the rest of my childhood as a stateless person.

In 2009, after a long journey from Indonesia by fishing canoe, I arrived in Australia as a refugee, aged 17. I had a new lease on life. I was able to call Australia – not just any country, but the most fortunate country – my home. Together with feelings of safety and peace, I had a great sense of gratitude. I felt it was time for me to contribute to society and help others in need.

I have strived to work at places where my contributions give back to society and change people's lives for the better. In my first year in Australia, I volunteered with the Migrant Resource Centre of South Australia while studying English foundation studies and working as a contract interpreter with Centrelink.

In 2012, I commenced a Bachelor of Aviation at UniSA, which unfortunately I was unable to complete as I moved from Adelaide to Melbourne. I gained employment with the Salvation Army in their disability employment program. I moved due to having sponsored my family to come to Australia on a humanitarian visa. This meant that further studies had to be put on hold while I attended to my family obligations.

In 2016, after settling well in Melbourne, I enrolled in a Bachelor of Laws at Victoria University. Pursuing a career in law supports my quest to contribute to society through my work. The extracurricular activities Victoria University provides gives students excellent opportunities to further their legal skills. I had the honour of participating in the criminal law moot, the Victoria Police moot training, the Victorian Bar shadow program and the Dandenong Family Court shadow program. I've also had the pleasure of meeting and gaining valuable insight from law giants such as the Hon Michael Kirby, the Hon Peter Lauritsen, the British High Commissioner Victoria Treadell and many other professionals.

I also volunteered at the Shamama Association of Victoria, assisting other refugees with settlement issues, as I understood the struggles that newcomers faced.

In my first career in the employment sector, my ability to understand cultural diversity, communicate effectively with people of all backgrounds and deliver specific services to businesses and job seekers gave me a significant advantage.

Undoubtedly, I had developed valuable skills due to my diverse cultural background, life experience, resilience and ability to learn from each new opportunity. These skills allowed me to work with clients and meet individual needs, and earn appreciation from my colleagues. I also had the pleasure of working with the LIV as a referral coordinator where our team was able to reduce referral service delivery times by half.

These are some of the important skills that people from diverse cultural backgrounds can bring to companies. These skills can help companies establish relationships and meet the needs of their clients (including those from culturally diverse backgrounds), as well as improve cultural awareness among all employees.

When I graduate at the end of 2020, I plan on pursuing a career in family and criminal law. My passion for this area is aligned with my desire to contribute positively to people's lives. It is extremely challenging and equally rewarding to be able to identify, understand and accommodate the needs of families – particularly children – from culturally diverse backgrounds involved in family proceedings.

Such proceedings can be very stressful for the family members involved. Where law firms are unable to convey messages in simple terms or clients are unable to comprehend complex legal terminology, a breakdown in communication can occur and it can be the tipping point for everyone involved. Having a culturally-diverse person on the team can turn an exhausting and stressful situation into a positive transfer of information.

Firms which have a culturally-diverse workforce benefit commercially, culturally and reputationally, which extends to their employees and clients, and contributes to their bottom line.■

SNAPSHOT

- Yasin embraced the opportunities provided by Victoria University in its Bachelor of Laws program to further his legal skills, including Victoria Police moot training and the Victorian Bar shadow program.
- He has used the skills and insights gained in his journey to inform and mould his career, leading him to volunteer for organisations that align with his experiences and to pursue a career in family and criminal law.
- Firms which have a culturally-diverse workforce benefit commercially, culturally and reputationally.

Yasin Azra is a Victoria University law student completing Honours.

LEVELLING THE PLAYING FIELD

MORE NEEDS TO BE DONE TO COMBAT UNCONSCIOUS BIAS IN REGARDS TO CANDIDATES FROM LOW SOCIO-ECONOMIC AND DIVERSE BACKGROUNDS.

Maluka Said

"Watch carefully the magic that occurs when you give a person just enough comfort to be themselves." – Atticus, *Love Her Wild*

In today's climate there is a willingness to embrace diversity and create a culture against exclusion. Law firms and legal employers must carry an unyielding commitment to provide opportunities to students from low socio-economic and diverse backgrounds. Law firms should pay attention to their entry hires to drive social change and improve the diversification of the legal profession.

Meeting diversity targets may serve as a beacon for acknowledgement but it does not encourage employers to confront deeply embedded biases against students of low socio-economic status and migrant backgrounds. Dialogue about diversity and inclusion needs to take place inside and outside of HR rooms to drive substantial change. More is needed to eradicate the prevailing culture within the legal profession.

SNAPSHOT

- Dialogue about diversity and inclusion needs to take place inside and outside HR to drive substantial change.
- There is an unvoiced stereotype of ineptitude in regards to law students from diverse backgrounds and the margin for error is constantly being narrowed.
- Students who identify with diverse backgrounds possess skills and qualities that are generally not taught in traditional law curriculums.

Growing up in the western suburbs of Melbourne, there was a cloak of invisibility around my African peers when accessing pathways to law. This extended to my years in tertiary education. African students were continually frustrated by the lack of opportunity to obtain internships and clerkships. Despite our growing numbers, graduates of African backgrounds with formidable legal skills and perseverance are not commonly seized on by legal employers. There is an overarching theme for us to work extensively to be noticed and strain to be impeccable in our everyday surroundings in the legal field. There is an unvoiced stereotype of ineptitude around law students from diverse backgrounds and the margin for error is constantly narrowed. We are forced to navigate this and an increasing concern over our employment prospects through the lens of tokenism.

As a first-generation law student from a migrant background, I often engage with intensity to conversations about challenges faced as an African Australian in the legal field.

Born in Djibouti, my parents migrated to Australia with the hopes of attaining opportunities for their two children. Settling in a new country was difficult, especially for my French-Arabic speaking father who was not able to gain employment with his Bachelor of Communication, which he obtained in Syria. I remember being 10 years old, watching my father clean bathrooms at a prestigious Melbourne private school, and making a conscious promise to uphold the integrity of his sacrifice. Fuelled by pain, frustration and daily encouragement by him to succeed, in those moments I realised that I wanted to be a lawyer.

University generated new possibilities for exposure in the field I wanted to pursue. With little experience and a rise in confidence, I began the daunting process of applying for internships to increase my marketability. The first piece of advice I was given was to lean into my challenging background and highlight my sense of grit and adaptability. Being a proud African I resisted the idea of being defined by my disadvantages, motivated by rigid ideals of wanting to gain certain positions based on merit. Sadly, the harsh reality of being a person of colour entering the legal field began to settle in, stoked with uncertainty and heightened awareness of unconscious bias across the legal sector.

There is a significant under-representation of diversity in the legal field. For instance, my first encounter of meeting a senior associate of similar appearance was Azmeena Hussain during my time with Maurice Blackburn Lawyers in 2018. It was refreshing to see a woman of colour with seniority, allowing me to accept that there is an attitude for optimal representation, even though it is a slow-moving narrative in the legal sphere.

Another defining moment was the launch of the African Australian Legal Network in 2018, which showcased the need to foster young legal talent of African descent and be given opportunities to engage and experience inclusivity in the legal community. These small series of events propel change and force the legal profession to diversify.

I learnt valuable lessons in this journey, namely to embrace challenges and to take pride in being a minority, unapologetically yearning to bridge the gap with my gravitas and perseverance. There is an importance in listening to and appreciating the unique perspective law students of low-socio economic and migrant backgrounds bring to the legal field. We provide a realistic curve to the industry and introducing diverse graduates to the field makes law more relatable to the wider community.

Students who identify with diverse backgrounds possess skills and qualities, which are generally not taught in traditional law curriculums. We are able to project a voice for equality and extend support to the next generation of law students. But we must enter the arena to assert such positive change. ■

Muluka Said is a Victoria University law student completing Honours.

YEAR OF POSITIVE CHANGE FOR COURT REFORMER

CHIEF MAGISTRATE LISA HANNAN FAST-TRACKED HER PLAN TO LEVERAGE TECHNOLOGY AND IMPROVE THE COURT'S ACCESS TO JUSTICE WITH THE COVID-19 LOCKDOWNS. **BY KARIN DERKLEY**

It's impossible to discuss the Chief Magistrate's first year at the Court without acknowledging the whirlwind that has been COVID-19. "I came with a reform agenda," she says, "and then COVID hit."

COVID-19 and the restrictions brought in to contain its spread have ended up shaping every aspect of the state's justice system – none more so than the normally bustling Magistrates' Court in the William Street precinct, but also courts in metropolitan and regional Victoria.

Before COVID-19 up to 2000 people walked through the door of the court every day. By the end of March that number had dropped by half, and since August it has been down at around 100 a day, mostly police and prosecutors, plus a small number of staff.

But none of the 51 courts across the state have ever closed, something the Chief Magistrate points out with pride. "We are an essential service so there was never a question that we would close even a single court," she says. "Everybody understood that we had to keep going regardless of what happened."

Judge Hannan was appointed to head up the Magistrates' Court just over a year ago. The former solicitor at Galbally & O'Bryan spent 10 years at the Victorian Bar before being appointed to the Magistrates' Court in 1998. There she carried out extensive work to streamline procedures for handling sexual offences and was responsible for implementing the specialist sexual offences list.

She knew she wanted to be a criminal lawyer since she was 12. "I genuinely love the law and most importantly what I like is people and their interaction with the law. Being a criminal lawyer is endlessly interesting. It is about people's stories. And you hear those stories every single day of your working life."

Appointed to the County Court in 2006, she was closely involved with the reform of the operations of the Court under former Chief Judge Michael Rozenes, working on projects including iManage, E-lodgement and the modernisation of case management.

After former Chief Magistrate Peter Lauritsen retired, she was regarded as a highly competent pair of hands to modernise the jurisdiction that is regarded as the people's court and the entry point for most cases in the state.

Judge Hannan came to the Court with a reform agenda that included a new governance structure, a community engagement program, adoption of the International Framework for Court Excellence (IFCE), a quality management system designed to help courts improve their performance, and a new court-wide wellbeing plan.

But COVID-19 forced the fast-tracking of her plan to introduce a new operational model to leverage technology that would improve the Court's access to justice when the first lockdown drastically reduced the number of people allowed in the courts.

Chief Magistrate Lisa Hannan

At the time, the Court was still almost entirely paper-based, Judge Hannan says. "We didn't even have electronic filing."

"Suddenly we had to reimagine how we were going to deliver justice in this state."

Within six weeks the Court had commenced implementation of the Online Magistrates' Court. "We had magistrates working from their lounge rooms, from their kitchen tables, from their chambers, and in some circumstances in courtrooms, and our staff were doing the same," she says.

Judge Hannan is grateful for government funding that supported the wholescale shift to online justice, with magistrates and staff provided with the equipment they needed to seamlessly operate the Court from their homes. "We made a request for a substantial amount of IT equipment to assist our magistrates to hear matters from home and we were provided with that equipment. We received support from Court Services Victoria but also from the wider justice sector."

The achievement was extraordinary given it came from what was essentially a standing start. "Virtually all hearings are now online and very few people are attending our court buildings."

Among the exceptions are family violence matters which are still able to be accommodated in in-person hearings. "Not everybody has access to a computer," she says. "It is not safe for everybody to make a telephone call from home. Some people just need to come in to speak to the registrar and our registrars have been standing there the whole way along."

The Court's applicant and respondent workers have been reaching out to speak to applicants to find out whether it's safe for them to conduct their hearing via WebEx. "If it's not, they come to a court building or we deal with it some other way."

Ensuring those held on remand would not have their time in custody unduly extended has been a priority, Judge Hannan says. The number of audiovisual links hearings with those in custody has surged.

With audiovisual links needing to be shared across all the courts, a cooperative process has allowed each court to prioritise hearing times. Corrections Victoria also built extra video suites and staffed the suites in ways that allowed the courts to have access over longer periods of time during the day. "Everybody worked together in that space," she says. "We have moved from having about 600 audiovisual links a week to 3500 a week by early November, using a combination of AVL and WebEx."

Judge Hannan is also proud of the fact the Court has also pursued therapeutic justice even during COVID-19. The Drug Court, the Assessment and Referral Court (ARC) and the Court Integrated Support Program (CISP) continued, with assessments being conducted with people in custody by telephone. "The question we asked ourselves was: how can we continue?"

In fact, the new mode of interaction has worked better for many who come into contact with the specialist courts, she says. "For instance, in the ARC, which deals with people who often have mental health or cognitive impairment issues, we reverted largely to phone contact. It was really interesting because the reports of the various judicial officers who sat in that list was that the engagement was in some circumstances better. People were more relaxed and happier to discuss the issues that had underpinned their offending."

> *". . . it's been a challenging year. The pace of change in this Court has been relentless."*

At a time of huge uncertainty, one of Judge Hannan's roles was to keep everyone working within the justice system informed of the multitude of changes. She issued 22 practice directions largely because of COVID-19, each of which represented a significant change within the Court.

"But you can't just send out a practice direction," she says. "You need to make sure you are explaining why the practice direction is required and what the expectations are.

"I have spoken more times than I care to count over the last few months in relation to practice directions to make sure they are well understood. I have spoken to the LIV, Victoria Legal Aid, to the Bar, to the police and prosecutions."

All the while Judge Hannan was well aware that the changes forced by COVID-19 were bringing additional pressures on to the Court's magistrates and staff already burdened by a heavy case load.

Improving the welfare of judicial officers and court workers was a priority when Judge Hannan was first appointed and the past year has put that objective to the test. "You could not possibly deny that it's been a challenging year. The pace of change in this Court has been relentless. So that has caused some stress." She says she and CEO Simon Hollingworth have made a point of encouraging magistrates and staff to access support programs and to take leave, even for short periods of time, given the few options for travel. The Court has set up activities such as the 10,000 steps challenge and implemented programs to keep otherwise isolated magistrates and staff connected.

"The ability to share the difficult days with your colleagues certainly makes things easier and I encourage the magistrates of this Court to do that, including with me, because it is a way of sharing what is sometimes a burden.

"I have sent a lot of emails and I have had a lot of conversations. I like to just pick up the phone and call my judicial colleagues, somebody who might be at a regional court or at a suburban court. Personal contact is important for all of us."

Her own mode of coping is to walk. "I walk endlessly. I walk my dog. I walk to and from work. I like the mental space that it creates. I just enjoy walking and I like to just have that piece of separation."

While the pandemic has been an extraordinarily challenging time for the Court, Judge Hannan has embraced the operational changes it forced, many of which are likely to be adopted long term in some form.

Before COVID-19, for instance, the Court relied on people to approach it to have their matters heard. "But the space we're in now has us reaching out," she says. "We send a large number of text messages to tell people to go to our website, not to come to our court building. We provide information in relation to the various sorts of matters that they might have before the court, and help them navigate the different processes depending on if they are regional or they are in Melbourne.

"And when we reach out we're able to triage. So in the criminal

space we reach out and ask people: have you got a lawyer, would you like legal advice?

"We ask them whether they have received legal advice, and if they'd like to plead guilty or not guilty. Sometimes they want to plead guilty on the papers, they would prefer to send us a short explanation for why they went through the red light or whatever may have occurred and they're happy to have it determined in their absence."

One example of improved processes is Practice Direction 17, which requires practitioners to register their criminal matters on EFAS (Electronic Filing Appearance System). The Court then collates that material and calls the firms in one by one to see which cases can be resolved, and what can be brought forward. "We had one firm in yesterday with about 40 matters," she says. "I think 32 of them turned into pleas that we listed between now and the end of the year in our Online Magistrates' Court."

Judge Hannan can't imagine ever returning to being a court that doesn't conduct online hearings. "What the nature of those hearings is, and where the parameters are, are still matters that need to be considered and discussed. But the Online Magistrates' Court is an innovation that provides greater access to justice for the Victorian community and I cannot imagine that we would be walking back from that."

The shift to technology-enabled interactions will also make possible changes recommended by the Royal Commission into Family Violence. "When you go back to the Royal Commission, technology was always envisaged but it wasn't possible. We simply didn't have the technology to facilitate the recommendations. But that is now possible."

She is grateful for the "tremendous cooperation" from the profession and the legal community in general and looks forward to the day when she can sit down with everyone to discuss what has worked and what still needs to be improved.

The judge is also looking forward to the day "when we are through the patch we're in now and we reach a stage where we can have sensible and ongoing conversations about what has worked for everybody. Because just working for the Court is not enough – it needs to work for the justice system as a whole. So I am very much looking forward to those conversations.

"There is never going to be total agreement, but I think it's important to hear all the perspectives before anybody makes decisions. That's certainly how I like to operate.

"Despite what has been a challenging year, I know I am where I am meant to be, and I am excited about the future of this Court." ■

AGE OLD PROBLEM NEEDS NEW RESPONSE

PERPETRATORS OF ELDER ABUSE, OFTEN THE ADULT CHILDREN OF VICTIMS, MUST BE HELD ACCOUNTABLE.

MELANIE JOOSTEN

Elder abuse is a recognised form of family violence, yet it remains difficult to manage the risk a perpetrator poses for the victim-survivor (often their parent), let alone hold the perpetrator truly accountable for their actions.

Perpetrators of intimate partner violence are increasingly held accountable through the justice system with the goal of managing their risk to the victim-survivor and restricting their future use of family violence. This accountability may take the form of direct punishment or referral to a Men's Behaviour Change Program (MBCP), as well as the denouncement of the abusive behaviour. This system is far from perfect and there are myriad challenges in expecting a single-term MBCP or criminal sentence to change entrenched behaviour, but there are avenues and appetite.

The same cannot be said of making perpetrators of elder abuse accountable.

In 67 per cent of advice given by Seniors Rights Victoria, the perpetrator of elder abuse was the adult son or daughter of the older person, and in 36 per cent of cases they were living with their parent. Forty six per cent of elder abuse perpetrators are women.

Personal and societal expectations of parental responsibility often result in ageing parents feeling compelled to provide a home and support for their child – particularly if the adult child is experiencing unemployment, mental distress, homelessness or ill health. Over the last seven years, victim-survivors in 35 per cent of Seniors Rights Victoria's advices reported that the perpetrator was experiencing drug and alcohol or gambling issues, and on average 31 per cent were experiencing mental illness – both figures are steadily climbing. The expectations placed on parents to provide care in these circumstances are heightened by housing stress and the often uneven intergenerational distribution of wealth and security within Australia – all of which is expected to be further exacerbated by the COVID-19 pandemic and the associated response.

People who have experienced elder abuse can be reluctant to seek assistance when they fear their own safety will come at too high a price for their whole family. A criminal conviction or intervention order that removes the perpetrator from the home may stop the abuse, but it may destroy the parent-child relationship (or that of other family members, such as grandchildren). It may also worsen the perpetrator's substance abuse, mental illness or employment prospects – a difficult sentence for an older person to feel they have conveyed on their child, even while acknowledging the perpetrator's actions are responsible for this outcome.

For this reason, there needs to be a better way of holding perpetrators of elder abuse to account. Recent research on improved accountability of perpetrators by Donna Chung and colleagues at Australia's research organisation for women's safety, ANROWS, highlights the very real difference between a perpetrator being held to account by the legal system (through a court-ordered intervention or criminal justice response) and being personally accountable for their actions in a way that engenders responsibility and sustained behaviour change. Important aspects of MBCPs could be appropriated to respond to elder abuse perpetration, including the monitoring of risk and the provision of partner support.

Rather than a group-based MBCP-type program, an individual case management and counselling program that supported respondents to address complex needs could be developed. The five Victorian Specialist Family Violence Courts that can impose counselling orders that require respondents to be assessed for participation in a MBCP could impose a similar requirement on perpetrators of elder abuse to be assessed for case management and support.

This would introduce a promising response in instances where the older person would be happy for a limited intervention order allowing their child to continue cohabiting with them if they were attending a support program. In line with the Royal Commission into Family Violence reforms, this could later be extended to all Magistrates' Court locations that hear elder abuse matters.

Considering the reluctance an ageing parent may feel to continually report abusive behaviour (and risk further damaging the relationship), having a perpetrator kept in view and the risk of violence being monitored would be a valuable feature of the program. In addition, the older person could continue to be supported (even if the perpetrator leaves the program) by an appropriate partner contact agency experienced in working with older people, that could support them to recover from the abuse and safeguard against future harms.

The burden of responsibility for staying safe has been on the older person for too long. There needs to be a shift in focus to increase the likelihood of perpetrators of elder abuse being held accountable and changing their behaviours.

(See Law Council of Australia column, p83) ■

Melanie Joosten is policy officer at Seniors Rights Victoria.

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State of mind

AS THE WORLD IS TURNED ON ITS HEAD BY THE COVID-19 PANDEMIC, IT IS TIMELY TO DISCUSS MENTAL HEALTH IN THE LEGAL PROFESSION.

BY PAUL HORVATH AND INES PERKOVIC

With the COVID-19 pandemic causing ripples of disruption to our ordinary routines, people are being urged more than ever to safeguard their mental health and wellbeing.

For many legal professionals working from home in isolation, adapting to court appearances conducted via Microsoft Teams and Zoom and meeting with clients remotely, there is a palpable loss of community, connection and closeness in the industry.

These unique and somewhat difficult circumstances add pressure to a profession which is already rife with high levels of stress. Adverse increases in stress and mental health deterioration are said to have impacts that require longer periods of recovery.

This is the perfect time to add to the discussion around mental health and wellbeing and why it is important to legal professionals.

What exactly are we talking about when we talk about "mental health" and how is it relevant to us as legal professionals?

As defined by the World Health Organisation, mental health is a "a state of wellbeing in which every individual realises his or her own potential, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to her or his community".[1] Mental health is not simply the absence of mental illness – stress, anxiety and depression may occur in an otherwise healthy population.

Mental health, therefore, can be characterised as having the tools, vocabulary and support to deal with the stressors of life in a way which empowers individuals and those around them.

Taking this definition, the concept of mental health (and relevantly, wellbeing) is crucial to our role as legal professionals. Although we are all members of the legal profession, practice areas and expertise touch all facets of society – from commercial and corporate law, to family and child protection, to employment and workplace safety, to criminal law, as well as countless variations of these.

Impacts of not being proactive about mental health in the workplace

The impacts of not being proactive about your employees' mental health in the workplace can be devastating.[2]

Legal obligations on employers to take reasonable steps to protect their employees from mental harm are now enshrined in legislation.[3] Chris Molnar's September 2015 *LIJ* feature "Eliminating mental health hazards" provides a valuable analysis of the legislative schemes which apply to employers to manage mental health in the workplace.[4]

ADOBESTOCK

A study by PricewaterhouseCoopers estimates the total baseline impact of untreated mental health conditions to Australian workplaces is approximately $11 billion per year.[5] WorkSafe Victoria further reports that every year two out of five Australians report leaving a job because of a poor workplace environment and that by 2030 mental health injuries will comprise 33 per cent of WorkSafe Victoria claims.[6]

The Victorian government has launched a royal commission into Victoria's mental health system and has committed a further $59.4 million package to help meet demands relating to mental health. This not only highlights the significance of mental health but, importantly, it sets a standard for employers. If you do not take steps to address mental health in your workplace, you risk exposing yourself to liability, or being left behind as this area develops further.

SNAPSHOT

- This article covers what mental health means, specifically for legal practitioners, the impacts of neglecting mental health, and tips to ensure wellness in the law.
- There are both "healthy' and "unhealthy" levels of stress and the profession needs to be aware of vicarious trauma.
- In order to create mentally healthier workplaces, we need acceptance of wellbeing as a priority and destigmatise mental health as a show of weakness from high performing lawyers.

What risk factors are relevant to legal professionals?

Mental health issues are particularly prevalent in the legal sector. The 2019 Meritas Wellness Survey found that 63 per cent of professionals have experienced, or observed in colleagues, depression, and 85 per cent of professionals have experienced, or observed in colleagues, anxiety.[7] Although alarming, it is unsurprising given the stressors we experience in our day to day professional lives.

Long hours, the pressure to meet billables and generate business for the firm, tight (and often unexpected) deadlines, an unbalanced workload, the pressure to deliver the best outcome to our clients no matter the circumstances and rapidly changing technologies (made evident by the pandemic) are all causes of stress.

Arguably, the power imbalance related to recent underpayment disclosures to junior lawyers may also underscore the vulnerability of some in the legal profession, as does the requirement to work long hours under considerable pressure in order to have the most sought-after job, be it now or in the future.

Working from home because of COVID-19 may also cause us to feel lonelier and more isolated. Some may work longer hours because their work is always at their fingertips.

As individuals, legal professionals are generally highly driven, motivated, competitive and perfectionist in nature. We have high expectations of ourselves. It is easy to take any perceived failure or criticism personally, even when those failures are caused by factors beyond our control.

Others, such as courts, bosses, colleagues and clients hold us to equally high standards. The constant pressure to perform, without an appropriate opportunity for rest and recovery (both in frequency and duration), can be a breeding ground for unhealthy stress.

Some professionals may have experienced trauma in their personal lives, and their experiences cause them to be more at risk of developing a mental health condition.

Finally, the stigma surrounding mental health is another major contributing factor. Poor mental health may be associated with perceived weakness, incompetence or laziness.[8] Others still believe that those suffering from mental health issues should – and can – "snap out of it". Stigma can lead to poor treatment in the workplace, including bullying, harassment and discrimination, which exposes firms to claims being brought against them by injured employees, and further leads to those suffering mental health conditions not to speak up. Stigma can cause us to self-stigmatise and increases negative perceptions towards oneself.[9]

It's prudent to note that while people may look like they are coping well on the outside, they may not be on the inside. The Black Dog Institute notes, concerningly, that 33 per cent of lawyers and 20 per cent of barristers self-medicate with alcohol, and that 11 per cent of lawyers contemplate suicide each month.[10]

When does stress become bad?

Practising law is stressful at the best of times, and although we should welcome healthy amounts of stress or pressure, there is often a fine line between being driven and inspired by stressors, and finding oneself dragged down by the high-pressure environment in which we work.

Not all stress is bad. Research shows that positive stress, or "eustress", can help us be better employees and more satisfied in our lives overall.[11] Eustress tends to occur in short and specific periods, particularly in situations which challenge us. Eustress can be triggered by events such as:

- giving a presentation to your peers on a topic that interests you
- starting work in a new practice area
- working towards and meeting tricky court deadlines
- successfully negotiating an outcome for your client in a difficult mediation.

Importantly, experiencing "positive stress" is also said to help us buffer the negative effects of "distress", or negative stress.[12]

Without pressure and challenges, we may become idle and bored in our work. However, prolonged stress can cause your mental health to suffer. Further, mental and physical health are intrinsically linked. When you become overloaded by stress (or become "distressed"), it begins to cause adverse physical reactions in your body, and feeds the cycle of mental unwellness.

In the legal profession, too much stress can be caused by:

- unrealistic and unmanageable workloads
- managing difficult clients and their often-unrealistic expectations
- long hours and excessive overtime
- a developed outlook of pessimism (so as to protect clients from perceived negative outcomes).[13]

Vicarious trauma

Vicarious trauma is an effect of empathy-based strain, and may occur in legal practitioners as a result of their empathetic

engagement with a client who is going through a traumatic life event. The effect can be more transitory in nature, but this will depend on how it is managed, what immediate support is provided both at the firm and at home, and checking in on a lawyer responding to a very challenging client's mental health condition.

Legal professionals, particularly those working in criminal, family and employment law, are vulnerable to experiencing vicarious trauma.

We have acted in criminal cases for individual clients who have taken their own lives – one who was jailed for serious child assault and another due to perceived paranoia towards authority due to a severe personality disorder. This can lead to self-blame for the outcome and questioning of "What could I have done differently so that did not happen?"

As many lawyers acting for a client with a mental health condition know, the battle is often how to deal with the frequent reference to the client feeling very despondent, and sometimes suicidal. We tend to carry that as our responsibility to manage the client's case and their expectations in a manner that does not contribute to or drive them "over the edge". Again, it makes our decisions in running an already pressured legal case all the more difficult. This creates stress for us as the lawyer. We have experienced this in bullying and discrimination cases where the employee has developed a psychological or psychiatric condition.

In these circumstances, a possibility arises for the legal practitioner to also experience their own empathy-based strain. When legal practitioners are repeatedly exposed to traumatic events, vicarious trauma may develop.

That is where having a good team around you to recognise this, and to have a second person in on interviews and conversations becomes important. It allows the lawyer to seek a second opinion, especially from someone with a clear, more objective opinion, and not carry the burden of assessing the gravity of the situation on their own.

Setting up buddy networks as well as mental health groups in a firm within which such matters can be raised, including experiences within a firm of bullying or discrimination, can be invaluable. This can take the form of "debrief" sessions, where peers are able to discuss how a case, event or client may have caused them to feel "burnout". Debriefing sessions can happen with your manager, co-workers or a mental health professional. We consider debriefing sessions to be critical in reducing the risk of experiencing vicarious trauma.

It may be that lawyers can be saddled with the mental health condition of their superiors, too, and this needs to be guarded against. Being a tough negotiator or litigator may make a person successful, but it may not leave much room for sensitivity to, among other things, a person with mental health challenges.

Ways to protect mental health in legal practice

If employers are reluctant to proactively address mental health in their workplaces, extreme situations such as the one in *Kozarov*[14] may become more common. In that case, the plaintiff was awarded $435,000 in compensation for prolonged exposure to child pornography as a prosecutor. The employer had failed in its duty to have an active occupational health and safety system, adequate training, welfare intervention flexibility regarding casework and rotations, which exacerbated the development of a major depressive disorder.

This sort of exposure of firms can be avoided or limited. The way forward is twofold: it requires action from firms, and from individuals.

As a starting point, look into the Minds Count Foundation (formerly Tristan Jepson Memorial Foundation). Its objective is to "decrease work related psychological ill-health in the legal community and to promote workplace psychological health and safety".[15] It is a foundation started by the Jepson family after their young lawyer son took his life.

The Minds Count Foundation recognises the needs of all legal professionals, from sole practitioners to large firms, to law schools and barristers' and judges' chambers. Many major law firms, courts and other organisations have subscribed to their recommendations. Presently, the Minds Count Foundation website lists more than 200 signatories.[16]

In addition to providing many useful links and resources, the Minds Count Foundation promotes 13 Workplace Factors to guide organisations to create a healthy and safe workplace for all. These include organisational culture, psychological protection and social support, civility and respect, and balance.

We encourage your firm to review the Workplace Factors and consider becoming a signatory to the Minds Count Foundation, which means committing to implementing and promoting the 13 Workplace Factors in your firm. It also invites you into a community of firms and organisations that have committed to the same principles.

We also recommend, if you do not already have one in place, creating a mental health and wellbeing policy to comprehensively outline your organisation's policy on mental health and make it available to all employees.

The most meaningful change needs to come from the top down. Employers and managers must be the drivers of cultural change within their workplace. Every organisation has different resources and limitations so there is no one approach that fits all.

We offer the following suggestions to employers to help support their employees' mental health and wellbeing:

- attend seminars and educational sessions, or take an online course on mental health to broaden your understanding of why mental health is relevant to your employees and workplace
- consider appointing a manager (such as an HR manager) as a mental health officer, including supporting them to complete a mental health first aid course. Mental Health First Aid Australia facilitates a mental health first aid course for legal professionals in which participants learn how to identify risk factors, signs and symptoms of mental health crises in employees and co-workers and how to respond and offer support using a mental health first aid action plan
- host mental wellness sessions or planning days by setting aside a few hours for your team to brainstorm together and set tasks and expectations in a more relaxed, informal setting
- consider implementing some variety into your employees' workday, such as walking meetings or a breakout room where employees can take 10 minutes to rest and debrief
- if resources allow, sign your firm up to an employee assistance program

(EAP) or consider making a counsellor available to your employees, as some top-tier firms have recently done
  - the aim of an EAP is to help employees resolve personal issues that may impact on the employee's performance at work. Ultimately, its aim is to enhance an employee's wellbeing and promote a positive workplace culture
  - an EAP is free for employees, and sessions are confidential and can be accessed 24/7
  - employees can book a session by booking online or via telephone or email
- if you have a dedicated HR team, ensure they maintain regular contact with your employees to check in on how they are dealing with their workload
- seek support from mentors, business advisers or colleagues. Educate yourself on what other organisations are doing in this space by connecting to your peer group.

Conclusion

Mental health is something that should be at the forefront of the minds of legal professionals.

We already know that legal professionals are disproportionately at risk of suffering from mental health conditions.[17] As well as it being the humane thing to do, to look out for our fellow colleagues' wellbeing and create a mentally healthy work environment is crucial for the livelihood of the legal industry.

We are confident changing attitudes towards mental health and wellbeing, including legislative schemes to prevent mental harm, and the efforts to destigmatise mental health and illness through discourse, will have positive effects for legal professionals and the industry generally. It is likely to lead to more balanced and connected employees and managers who look out for each other, a more satisfied and productive workforce, and overall improved outcomes. Those that ignore this issue face significant risks of breaching legislation, duty of care and company policies, and a demotivated workforce in the long term.

A note for individuals

If you are experiencing difficulties with your mental health, you are encouraged to speak to your general practitioner for support, or a referral to a mental health specialist.

For immediate assistance, consider contacting one of the following:

LIV EAP 1300 687 327
Beyond Blue 1300 22 4636; www.beyondblue.org.au
Lifeline 13 11 14; www.lifeline.org.au
SANE 1800 18 7263; www.sane.org. ■

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1. World Health Organisation, "Promoting Mental Health: concepts, emerging evidence, practice" (Summary Report, 2004), 10.
2. See the recent decision of *Kozarov v State of Victoria* [2020] VSC 78, in which a former public prosecutor was awarded damages due to her employer's failure to take reasonable steps to protect her from mental harm in her employment.
3. See *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic); *Occupational Health and Safety Act 2004* (Vic); *Fair Work Act 2009* (Vic); *Equal Opportunity Act 2010* (Vic); *Disability Discrimination Act 1992* (Vic).
4. Chris Molnar, "Eliminating mental health hazards", (2015) 89(9) *Law Institute Journal* 26.
5. PricewaterhouseCoopers, "Creating a mentally healthy workplace: return on investment analysis" (Final Report, March 2014), 10.
6. WorkSafe Victoria, Annual Report 2018-19 (Report, October 2019), 19.
7. Swaab, "Meritas Australia & New Zealand Wellness Survey 2019" (Report, July 2019), 4.
8. Beyond Blue, "Stigma and discrimination associated with depression and anxiety" (Information Paper, August 2015), 4.
9. Note 8 above, 3.
10. Black Dog Institute, "Resilience@Law Legal Profession Mental Health Toolkit" (Paper, 2016), 3-4.
11. G Brule and R Morgan, "Working with stress: can we turn distress into eustress?" (2018) 3 *Journal of Neuropsychology & Stress Management* 1, 2.
12. Note 11 above.
13. NJ Kelk, G Luscombe, S Medlow, IB Hickie, "Courting the blues: Attitudes towards depression in Australian law students and lawyers", (BMRI Monograph 2009-1) Sydney: Brain & Mind Research Institute, 1-2.
14. Note 2 above.
15. Minds Count Foundation, "TJMF Psychological Wellbeing: Best Practice Guidelines for the Legal Profession", 23.
16. Signatories include the LIV, Federal Court of Australia, Supreme Court of Victoria, Leo Cussen Institute, Victorian Bar, Attorney-General's Department, Legal Aid Victoria, and firms such as Allens, DLA Piper and MinterEllison. See the full online list at: https://mindscount.org/signatories-to-the-guidelines-2/.
17. Note 11 above, 3.

Resolving a controversy

A RECENT DECISION HAS BROUGHT CLARITY AND CERTAINTY TO THE RELEVANCE OF PERSONALITY DISORDERS TO SENTENCING.
BY TIM MARSH

ADOBESTOCK

Verdins and O'Neill

In 2007, a quiet revolution took place in Victorian criminal law. In a unanimous decision, a bench of three in the Victorian Court of Appeal handed down the landmark decision of *Verdins, Buckley and Vo (Verdins)*.[1] *Verdins* replaced a patchwork of earlier decisions, each of which had sought to codify the principles around how courts should sentence people with mental illnesses and cognitive impairments, either at the time of the offending or at the time of sentence.

At the risk of over-simplification, *Verdins* represented a shift away from a categorical or diagnosis-based approach to sentencing. Instead, courts were urged to look at the nature, severity and effect of symptoms of mental illness in order to decide how – if at all – they could be taken into account in sentencing.

"Where a diagnostic label is applied to an offender, as usually occurs in reports from psychiatrists and psychologists, this should be treated as the beginning, not the end, of the inquiry. As we have sought to emphasise, the sentencing court needs to direct its attention to how the particular condition (is likely to have) affected the mental functioning of the particular offender in the particular circumstances – that is, at the time of the offending or in the lead-up to it – or is likely to affect him/her in the future."[2]

Verdins did not directly consider the question of whether or not personality disorders were conditions that fell to be considered. Given the comments above, and the fact it may be that no specific condition could be identified, such an approach would have run counter to the move away from a diagnostic framework to a symptom based framework.

Although the Court in *Verdins* had intended that the phrase "mental disorder or abnormality or an impairment of mental function" be interpreted broadly to cover a wide range of conditions, there remained some uncertainty as to whether personality disorders were appropriately considered under the *Verdins* principles. Some sentencing courts took personality disorders into account, accepting that the disorders were a relevant consideration under *Verdins*.[3] Other courts excluded personality disorders from consideration although in some cases it is unclear if this was a position of principle, or the evidence simply failed to disclose the relevant connection.[4]

The 2015 case of *DPP v O'Neill (O'Neill)*[5] tackled the issue directly. In this case, the Director contended that *Verdins* had effectively lowered the bar to the extent that "any abnormality or psychological idiosyncrasy" could now be relied on to mitigate the Court's sentence. A bench of three – including the then Chief Justice – agreed.

". . . It is important to keep in mind that, in *Verdins*, and in this Court's subsequent application of *Verdins*, the Court has consistently stated that the principles in *Verdins* relate to offenders who suffered from 'mental impairment' or 'impaired mental functioning', whether at the time of the offending or at the time of sentence. While the Court in *Verdins* regarded the particular diagnostic label as not being determinative, the principles expressed have always been confined to cases in which the offender suffered an impairment of his or her mental functioning. They do not apply to personality disorders such as those from which the respondent suffered."[6]

From the paragraph above, it is clear that the Court did not consider that Mr O'Neill's diagnosed personality disorder was a matter which attracted the operation of the *Verdins* principles. However, it was far less clear if the Court's intention had been to exclude all personality disorders from consideration (the broad exclusionary interpretation) or whether the exclusion is confined to only those personality disorders such as those from which the respondent suffered (the narrow exclusionary interpretation).

SNAPSHOT

- How sentencing courts appropriately take into account mental illnesses and cognitive impairments has been a historically dynamic area, with constant change and evolution.
- Until recently, there was no consistency in Victorian courts with respect to how, if at all, courts could take into account personality disorders in sentencing.
- The decision of *Brown v The Queen* authoritatively resolves the controversy: offenders with personality disorders should be treated no differently to an offender relying on any other impairment of mental functioning.

In the years following *O'Neill*, superior courts diverged in how they interpreted *O'Neill*. Some favoured the broad exclusionary interpretation while others confined *O'Neill* to its own facts – the narrow interpretation. No clear pattern emerged in Victoria. For example, in *Herrmann*, Hollingworth J adopted the narrow exclusionary interpretation:

"In those circumstances, the Court of Appeal's brief observations that *Verdins* principles did not apply to personality disorders 'such as those relied upon in this case' should be understood only as referring to the particular personality disorders in that case, namely dependent personality disorder and adjustment disorder with depressed mood . . ."[7]

In The *Queen v Liao* and *The Queen v Price*,[8] Lasry J took the opposite approach, finding that *Verdins* principles do not apply to personality disorders, stating that such disorders do not constitute an "impairment of mental functioning". Support for the broad exclusionary interpretation grew with the decision of *Di Paolo v The Queen (Di Paolo)* in 2019, when a bench of three in the Court of Appeal endorsed the approach:

"Second, the applicant was diagnosed with a personality disorder, but not a mental illness. That distinction is critical for the application of *Verdins* following this Court's judgment in *O'Neill*. The Court in that case concluded that whilst diagnostic labels were not determinative, the principles are confined to cases where the offender suffered an impairment of their mental functioning and do not apply to personality disorders . . ."[9]

Although the Court in *Di Paolo* did not engage with the interpretive issues in their judgment, their re-statement of the principle in *O'Neill*, shorn of the qualifying words "such as those from which the applicant suffered", provides clear endorsement of the broad exclusionary interpretation.

Daylia Brown

Daylia Brown is a young woman with a diagnosis of severe personality disorder with detachment and borderline features. In the days after her 18th birthday, she committed a series of minor arsons in supermarkets and convenience stores in the Melbourne CBD. A few days later, she set a fourth – far more serious – fire at a vacant house in which she had been a resident. The house was destroyed. When arrested and questioned by police, Ms Brown told them that she had lit the fires in order to be returned to juvenile detention. Ms Brown had been remanded in juvenile detention earlier in the year, and in the months since being released had already attempted to break into the detention centre, in order to be reunited with her peers.

Ms Brown was assessed by forensic psychologist Associate Professor Andrew Carroll. He diagnosed Ms Brown as having a severe personality disorder, with pervasive and long-standing effects on her life and social functioning. In Dr Carroll's view, there was a strong connection between her diagnosis of personality disorder and the motivation for the offending.

Ms Brown pleaded guilty to the four charges of arson and some related summary offending before Taft J of the County Court. Evidence was adduced of Ms Brown's diagnosis and its effect on her both at the time of the offending and at the time of sentence. Unusually, defence adduced a large volume of evidence of the history of the development of the diagnosis of personality disorder, how it had evolved in psychiatric literature and whether or not it was a disorder capable of altering how a person perceived and reacted to the world around them. At the request of the Court, the prosecutor in the case made available forensic psychologist James Ogloff to give similar evidence of the broader phenomenon of personality disorder.

In sentencing Ms Brown,[10] Taft J accepted the diagnosis, its profound effect on her functioning and the close connection between the diagnosis and her offending. However, he considered that the broad exclusionary interpretation of *O'Neill* was the correct one, and therefore prohibited him from taking it into account in mitigation of Ms Brown's sentence.

The Court of Appeal hearing and decision

On appeal, defence argued that Taft J had erred in following *O'Neill*. The salient point, they submitted, was not which of the broad or narrow exclusionary interpretations should be preferred but whether *O'Neill* had been correctly decided at all. The submissions highlighted the tension between the Court in *O'Neill* endorsing the need for a "rigorous evaluation of the evidence" and the lack of apparent evidentiary basis for the Court coming to the conclusion that personality disorders – as a class of disorders or individually – were not "impairments of mental functioning".

On the contrary, it appeared as if the Court in *O'Neill* drew its authority from the Queensland decision of *Hayes*[11] in which Chesterman J had declared in general terms that personality disorders were not "illnesses which impact upon the capacity of the sufferer to perceive the world around her and respond to it". It remains unclear how Chesterman J reached that conclusion: the appellant in *Hayes* was unrepresented and no expert evidence is cited in the judgment.

The Court in *Brown* was constituted by a bench of five, led by Court of Appeal President Chris Maxwell. In a unanimous decision, they allowed the appeal, resentencing Ms Brown to a term of custody that would permit her early release into supported accommodation. Reasons followed on 25 August.[12] In a single judgment, the Court resolved the inconsistency between *Verdins* and *O'Neill* with simplicity and clarity:

". . . An offender diagnosed with a personality disorder should be treated as in no different position from any other offender who seeks to rely on an impairment of mental functioning as mitigating sentence in one or other of the ways identified in *Verdins*. Statements to the contrary in *O'Neill* should no longer be followed. Whether and to what extent the offender's mental functioning is (or was) relevantly impaired should be determined on the basis of expert evidence rigorously scrutinised by the sentencing court".[13]

Given its findings on the ultimate issue, the question of the broad and narrow interpretations did not fall to be resolved. In strong terms, the Court endorsed the evidence-based approach of *Verdins* and stressed that each case should turn on a rigorous evaluation of the evidence and expert opinions in that case alone. General statements about classes of disorders should be rejected:

"Accordingly, the statements in *O'Neill* about the inapplicability of *Verdins* to personality disorders should no longer be followed. As we have emphasised, this Court has had the benefit of evidence given by two of Victoria's foremost forensic mental health experts, assistance which was not available to the Court in *O'Neill*. Acceptance of that evidence also entails rejection of the statement in *Hayes*, referred to in *O'Neill*, that 'personality disorders . . . are not illnesses which impact upon the capacity of the sufferer to perceive the world around her and respond to it'".[14]

The decision in *Brown* represents a dramatic reversal in how Victorian courts will be able to view and respond to the presence of personality disorders. However, as the Court went on to note, for an accused to be able to rely on such a diagnosis in mitigation of penalty, the diagnosed disorder would likely need to be of some severity, and rigorous expert evidence would be needed to determine if the diagnosis was simply descriptive of maladaptive behaviour, or was instead driven by a clinically significant impairment of an offender's mental functioning.

Finally, the Court noted that even if an impairment of mental functioning was able to reduce an offender's moral culpability, the sentence may need to reflect a heightened need for community protection if the disorder were pervasive or likely to recur.

"Consideration of personality disorders, and of DB's case in particular, brings this issue into sharp focus. Precisely because of the enduring character of a personality disorder, the issue of community protection is likely to arise frequently. The risk of reoffending will fall to be considered whenever the expert evidence establishes to the court's satisfaction that the offender's mental functioning was impaired at the time of the offending and that the offending was attributable to the impairment."[15]


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Conclusion

Sentencing remains a complex task in Victorian courts. The decision in *Brown* has brought clarity and certainty to the relevance of personality disorders to sentencing. However, in doing so, it has laid down a challenge to practitioners – the Court will only act on cogent and detailed expert evidence. Given the diagnostic requirement for a personality disorder to be of long standing, expert reports will necessarily have to consider a significant quantity of collateral material in order to be satisfied of the diagnosis. Although some clinical disorders may be diagnosable on a point-in-time basis, such an approach is unlikely to meet with the approval of subsequent courts. Expert reports will require rigour and scholarship in order to satisfy the stringent requirements of *Brown*.

Brown represents a victory for individualised and evidence based sentencing. Irrespective of the conclusions that a court may draw from the presence of a personality disorder, to simply elide them from the sentencing process was an injustice. In correcting this error, *Brown* brings the focus back on the offender as a whole person, not as a legal fiction. ■

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1. [2007] VSCA 102.
2. Note 1 above, at [13].
3. See, eg, *R v Robazzini* [2010] VSCA 8, [38]–[51] (Neave JA, Buchanan JA agreeing); *R v Hamilton* [2011] VSC 77, [13], [20] (Curtain J); *R v Wallis* [2013] VSC 721, [32]–[34] (Curtain J); *R v West* [2013] VSC 737, [31], [42] (Curtain J); *R v Hollow* [2013] VSC 141, [20]–[21] (T Forrest J); *Stensholt v The Queen* [2014] VSCA 171, [15], [21]–[22] (Redlich JA).
4. See, eg, *R v Zhang* [2009] VSCA 236, [13] (Buchanan JA); *R v Bayley* [2013] VSC 313, [42]–[43] (Nettle JA); *DPP v Anderson* (2013) 228 A Crim R 128, 143 [59] (Maxwell P, Neave JA and Kaye AJA); *DPP v Hicks* [2014] VSC 266, [67]–[68] (Kaye J); *R v Perry* [2014] VSC 534, [53] (Hollingworth J).
5. [2015] VSCA 325.
6. Note 5 above, at [71].
7. [2019] VSC 694, at [81].
8. [2015] VSC 730, at [35]; [2016] VSC 105, at [78].
9. [2019] VSCA 194, at [110] (Priest, Niall JJA and Lasry AJA).
10. *DPP v Brown* [2020] VCC 196.
11. *R v Hayes* [2010] QCA 96
12. *Brown v The Queen* [2020] VSCA 212.
13. Note 12 above, at [6].
14. Note 12 above, at [29].
15. Note 12 above, at [72].
16. Jamie Walvisch and Andrew Carroll, "Sentencing offenders with personality disorders: a critical analysis of DPP (Vic) v O'Neill" [2017] MelbULawRw 29; (2017) 41 Melbourne University Law Review 417, 426–27.

Caught in a custody battle

THIS ARTICLE EXPLORES THE TENSION BETWEEN JUDGE-LED AND LEGISLATIVE REFORM OF THE CLASS ACTION MECHANISM – A JURISPRUDENTIAL DEBATE WITH DEEP HISTORICAL ROOTS.

BY ANDREW PAULL AND ELEANOR TOOHEY

Australia's class actions regime is now in its 28th year, by which age one might expect it to have moved beyond the turmoil of a custody battle. And yet, in 2020, the regime finds itself being pulled in almost diametrically opposed directions, by different parties each with their own distinctive vision of its future.

On the one hand, there is the judiciary. While far from a monolithic entity, and acknowledging the real differences of approach and opinion that may exist among judges, the judiciary has for some time been developing specialised case management tools intended to shape the way that class actions operate in Australia, and to bring their reality closer to that which was envisaged when the procedure was introduced into Australian law – that is, first, a mechanism which exists to provide access to justice by allowing for the collectivisation of claims as a means of overcoming obstacles such as the prohibitive cost of litigation and, second, a means to increase the efficiency of the justice system.[1]

This judge-led reform of class actions practice has predominantly occurred under the guise of s33ZF (or equivalent provisions) of the Federal Court and Supreme Court Acts – a flexible provision which empowers a presiding judge to make any order that is "appropriate or necessary to ensure that justice is done in the proceeding".

On the other, there is a growing number of independent expert groups that have been commissioned to opine on the operation of class actions in recent years, including the Australian Law Reform Commission (ALRC), the Victorian Law Reform Commission (VLRC) and the Productivity Commission.

Finally, there are the federal and Victorian governments, each of which have been making their own legislative amendments to the system. And here, again, another division. The federal government's reforms (both actual and mooted) have been directed towards shifting the regulation of class actions away from the judiciary and have at times directly conflicted with the recommendations of the various independent law reform commissions. In contrast, the Victorian reforms have, by introducing "group costs orders", enacted a consistent recommendation of the ALRC, VLRC and Productivity Commission and increased the power of Victorian courts to regulate class actions.

Judge-led reform

Class actions practice has been shaped by several key decisions under s33ZF of the *Federal Court Act*. The section, which is broadly drafted, equips judges with the power to make any order that is "appropriate or necessary to ensure that justice is done in the proceeding".

Some years after the federal regime commenced, Wilcox J, who had played a central role in drafting the proposed form of s33ZF, explained that:

"In enacting Pt IVA . . . Parliament was introducing into Australian law an entirely novel procedure. It was impossible

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SNAPSHOT

- The future of Australia's class action regime is being fiercely contested, revealing tensions between different arms of government.
- On the one hand, there has been ongoing judge-led reform, with a focus on active judicial management and court supervision.
- On the other, parts of the executive branch of government wish to diminish judicial management powers in favour of regulation.

to foresee all the issues that might arise in the operation of the Part. In order to avoid the necessity for frequent resort to Parliament for amendments to the legislation, it was obviously desirable to empower the Court to make the orders necessary to resolve unforeseen difficulties; the only limitation being that the Court must think the order appropriate or necessary to ensure 'that justice is done in the proceeding'".[2]

In other words, the provision empowers the judiciary to harness its legal expertise and interpret and apply the laws enacted by the legislature and enforced by the executive. It may almost be perceived as an extension of the constitutional role of judges in interpreting legislation, itself "an expression of common law constitutionalism".[3]

For many years, judges saw s33ZF as granting a wide mandate to develop new practices and procedures that refine the operation of the class actions mechanism in Australia. For example, s33ZF was relied on by judges as providing the power to regulate overlapping class actions,[4] make "funding equalisation orders" with the effect that the costs of a class action are borne by all group members,[5] require the production of a defendant's insurance policies to the plaintiff in advance of a mediation,[6] appoint "sample group members" and declare those persons immune to an order for adverse costs[7] and to found a "common fund order" (CFO), pursuant to which the costs of litigation funding for a class action may be determined by the court and applied to all group members[8] (see below). By these and other decisions, the judiciary gradually expanded the case management toolkit that was available in class actions and shaped the landscape for mass claims.

The evidence would suggest that this ongoing process of judicial reform was effective in allowing the class actions procedure to operate as the drafters had intended. The CFO mechanism in particular meant that consumer class actions were able to be commenced and supported by litigation funding in a way that had not previously been possible. Indeed, in the years following the *Money Max* decision, 30 per cent of filed class actions were consumer protection claims[9] – an increase from the 9 per cent seen over the first 25 years of the regime.[10] These types of consumer claims are precisely the sort that were envisaged when the regime was introduced.

The shake-up of s33ZF

As will be discussed below, the federal government may soon be taking steps to limit judicial discretion and diminish the court's role in regulating class actions. Such a situation highlights the inevitable tension which arises under Australia's fundamental "separation of powers" doctrine – in this instance, the competing powers and expertise of the judiciary, the legislature and the executive.

But, interestingly, the most recent challenge to the scope of judicial licence under s33ZF came from the judiciary itself. In December 2019 the High Court of Australia handed down a landmark decision in *Brewster v BMW Australia Ltd and Lenthall v Westpac Life Insurance Services Limited (Brewster)*.[11] The High Court overturned the 2016 *Money Max* decision (referred to earlier) and held that neither the Federal Court nor the Supreme Court had the power to impose a CFO under s33ZF. While the High Court reaffirmed that the power under s33ZF is broad, the majority held that the section does not empower a court to impose "an order in favour of a third party with a view to encouraging it to support the pursuit of the proceeding".[12] Therefore, the *Brewster* decision reduced the scope of s33ZF, limiting the judiciary's power to regulate relationships between group members and third-party litigation funders.

Time to step back, review and review again

As the class actions jurisprudence has matured, governments have appointed various independent bodies to review the operation of this legal procedure. Those reviews have also tended to focus on the involvement of litigation funding in class actions.

There have now been at least five government-sponsored reviews related to class actions,[13] the most recent of which have been the VLRC's report on "Litigation Funding and Group Proceedings" tabled in June 2018 and the ALRC's "Inquiry into Class Action Proceedings and Third-Party Litigation Funders" tabled in January 2019. Each report represented the culmination of more than 18 months of industry consultation and research, involving representatives from across the spectrum of class actions practice.

Both the VLRC and the ALRC recognised the essential role of the judiciary in regulating the class actions before Australian courts, describing this role as "crucial" to the regime, and in fact recommended measures intended to expand this role and strengthen the courts' powers of self-regulation. Both reports also endorsed increased judicial power and discretion with respect to the costs charged by litigation funders and plaintiff lawyers, with recommendations that:

- courts be empowered to make CFOs and then set and vary litigation funding charges according to their discretion
- plaintiff lawyers be permitted to charge on a contingency fee basis in class actions, again with the rate to be set by the court.

In terms of the question of whether power to regulate class actions should be vested in the judiciary or in government, these reports represented a very strong endorsement of the judiciary.

Political intervention

The federal government is yet to provide its response to the most recent ALRC report including whether it will take the recommended steps to increase judicial powers to supervise and manage class actions.

At present, all indications would suggest that it is moving in the opposite direction to that recommended by the ALRC and VLRC. To date, the federal government has taken two substantive legislative steps that affect class actions.

First, it has passed regulations under the *Corporations Act 2001* (Cth) which will require litigation funding to be regulated like a financial investment, with litigation funders required to hold financial services licences and the litigation treated as a managed investment scheme (with a public disclosure statement and related requirements). This regulation was passed despite having been expressly considered and rejected by the ALRC.

Second, in its suite of responses to the COVID-19 pandemic, the federal government has passed laws that, at least temporarily, lessen the continuous disclosure obligations of companies listed on the Australian Stock Exchange. Again, this move is contrary to the advice of the ALRC, which advocated for further consultation and a specific review of these laws before any changes were made.

In parallel with those changes, the federal government has established a Parliamentary Joint Committee to conduct an inquiry into "Litigation funding and the regulation of the class action industry". The Committee conducted public hearings in July and August of this year and is due to provide its report on 7 December 2020.

The tenor of the public hearings suggests the present government wishes to take the regulation of class actions even further out of the hands of the judiciary. The Liberal members of that committee have argued in the course of those hearings that "judicial oversight of [class actions], has failed again and again" and "the judiciary, no matter how experienced they are, can't possibly be expected to have regulatory oversight of [class actions]".[14] These types of comments send a strong signal that the federal government may seek to wrest power and responsibility for the management and regulation of class actions and litigation funders away from the judiciary and instead place it in the arms of bodies such as ASIC.

To shift power and responsibility away from the judiciary in this way would be to move things in the opposite direction to that recommended by the ALRC and VLRC. Further, it would be contrary to the wishes of ASIC, which has previously indicated that it does not consider itself well placed to regulate this area,[15] and to the expressed wishes of at least some members of the judiciary. For example, Beach J of the Federal Court recently commented extrajudicially on proposed legislative reform in the class actions space, noting that "less is more", that "too much regulation will impose unnecessary rigidity with unintended consequences" and that it may be "more desirable to let the dynamics flowing from the courts . . . play out over the next few years rather than to impose any so-called solution now, particularly one tailored only to the current short term exigencies".[16]

In contrast to their federal counterparts, to the extent the Victorian state government has engaged in reform of this area of law, those changes have been consistent with the recommendations of the various law reform bodies. Most notably, the legislation permitting "group costs orders"[17] in Victorian class actions was in line with recommendations made by each of the ALRC, VLRC and

the Productivity Commission. Moreover, the legislation was drafted in a manner that places control of those costs orders entirely in the hands of the Supreme Court judiciary.

Conclusion

In a country where the political system is founded on the separation of powers doctrine, it is not unusual for there to be some tension between the judiciary, the legislature and the executive, particularly in areas where their respective powers and responsibilities might overlap. Indeed, many might regard this tension "as indicating a healthy and well-oiled, working government".[18] Though, as noted by McHugh J, speaking extrajudicially on this tension as it arises in administrative law, "Occasional conflict may do no harm. But if tension persists . . . it damages the public interest".[19]

This dynamic is playing out in real time as the struggle for custody over Australia's class actions regime continues. On all sides of the contest, however, there seems to be agreement that class actions can and do serve a vital role in providing access to justice. For this reason, we must hope that any further changes to the current regime are evidence-based and informed by the views and advice of experts, including the experienced judiciaries of our state and federal courts.

Otherwise, as is often the case in custody contests, there is a real risk that the dispute could harm the very thing it is intended to protect. ■

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1. ALRC, Grouped Proceedings in the Federal Court, Report No 46 (1988) at [13] and [18]; Australia, House of Representatives, Parliamentary Debates (Hansard), 14 November 1991 at 3174-3175.
2. *McMullin v ICI Australia Operations Pty Ltd* (No 6) [1998] FCA 658; 84 FCR 1 at 4.
3. *Momcilovic v The Queen* (2011) 245 CLR 1, 48 [46].
4. *Kirby v Centro Properties Ltd* (2008) 253 ALR 65, 72 [31] and 74 [37].
5. *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd [No 4]* [2010] FCA 1029, [27]-[28].
6. *Simpson v Thorn Australia Pty Ltd trading as Radio Rentals (No 4)* [2019] FCA 1229, [21].
7. *Matthews v SPI Electricity and SPI Electricity Pty Ltd v Utility Services Corporation Ltd (Ruling No 5)* [2012] VSC 66, [41]-[44].
8. *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 194 [7]-[8] and 207 [66]-[67].
9. King & Wood Mallesons, "The Review: Class Actions in Australia 2018/2019", p4.
10. Vince Morabito, "An Empirical Study of Australia's Class Action Regime: The First Twenty-Five Years of Class Actions in Australia" (July 2017) 27.
11. [2019] HCA 45.
12. Note 11 above, 64 [47].
13. ALRC (1988), VLRC (2008), Productivity Commission (2014), VLRC (2018), ALRC (2019).
14. Evidence to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, Canberra, 24 July 2020, 31 (Mr Falinski) and 29 July 2020, 26 (Mr Falinski).
15. ALRC, Integrity, Fairness and Efficiency – Inquiry into Class Action Proceedings and Third-Party Litigation Funders, Report No 134 (2018) 162 [6.37].
16. Herbert Smith Freehills Class Action Fireside Podcast, Episode 6: Myer Shareholder Class Action, (13 August 2020) at 23:24-23:34 and 23:50-24:03.
17. A form of damages-based contingency fee.
18. The Hon Justice Michael McHugh, "Tensions between the Executive and the Judiciary" (Speech delivered at the Australian Bar Association Conference, Paris, 10 July 2002).
19. Note 18 above.

Remote hearings – the new normal?

IN THE WAKE OF COVID-19, THE COURTS HAVE BECOME ADEPT AT CONDUCTING HEARINGS ONLINE. HOWEVER, CHIRAG PATEL BELIEVES THEIR FUTURE USE SHOULD BE LIMITED TO ENSURE ACCESS TO JUSTICE IS NOT COMPROMISED.

Time for change?

There have been compelling arguments, well before the chaos of COVID-19, favouring a shift towards increased digitisation of courts, including online hearings, in keeping with modern times. Professor Richard Susskind, one of the most vocal advocates in this field, has long argued for this transformation and even argues all courts in the future ought to be completely digitised.[1]

An article in *The Guardian UK* in early 2017[2] applauded the Federal Court of Australia for being a global leader in its vision and management of digitised court documents. It advocated for a shift towards online justice, stating that it is faster, easier and more accessible, helping more people with reduced costs. It lamented that some jurisdictions were lagging behind the e-court revolution.

Legal database giant LexisNexis weighed up the pros and cons of online dispute resolution in Australia in the wake of COVID-19.[3] In favour is delivery of more efficient, safer, faster, affordable and continual access to justice. It can remove barriers like geographical isolation and lack of transport options or mobility. Many of these factors can reasonably apply to most types of online hearings too.

These examples present a strong argument that digital platforms provide access to justice for those plaintiffs who would otherwise be unable or reluctant to bring claims or defendants to defend claims. There are indeed many advantages of such a transition in favour of greater use of online models, convenience being one of them, especially to courts that otherwise face even bigger backlogs and greater delays due to COVID-19.

Before we overzealously accede to justice being seen to be done in the name of flexibility, forward-thinking and convenience, we must give the real-life impact of a completely online justice system careful consideration.

SNAPSHOT

- There has been a sharp increase in remote hearings due to COVID-19.
- While there are undoubtedly advantages, now and in the future online courts should be limited to administrative type hearings and not be extended to contested hearings.
- There is a risk of setting a dangerous precedent which could affect true access to justice through deterioration of quality of witnesses' evidence, especially when credibility is in issue, and for those who have communication difficulties, ultimately representing an erosion of rights.

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Are the digital scales of justice too blind?

As LexisNexis observes, there are potential disadvantages. One key problem is the risk to confidentiality when using digital applications. How do we reconcile issues surrounding privacy, especially during legally privileged online conversations between client and lawyer? It's all well and good conducting hearings remotely using platforms like Teams and Zoom, but what thought has been given to the risks of online hackers? Such concerns would never exist during contested hearings in traditional court buildings.

There are also the obvious disadvantages for those who either do not have access to, or do not know how to use a computer or the internet, let alone navigate online platforms. These factors must not be overlooked as they could risk erosion of access to justice.

Arguments in favour of asynchronous hearings take the risk further. This flexible approach may work for technical arguments on law, with parties emailing their arguments for a judge to consider "on the papers", but extending it to contested hearings could present a concerning shift from our revered adversarial system to a less favourable inquisitorial one.

Another argument in favour of online hearings is a higher likelihood of litigants in person (LIPs) who save costs instructing lawyers and are therefore more likely to pursue a claim they otherwise may not have been able to. While this may be true, we ought to consider the impact of unrepresented LIPs unwittingly causing greater delay in proceedings by raising incorrect causes or irrelevant issues. In contrast, lawyers narrow the issues and facilitate more streamlined hearings. Additionally, LIPs would not have the benefit of independent legal advice. So the question remains: would they really be getting proper access to justice?

Putting LIPs who are articulate enough to advance or defend their own cases to one side, what about those with language or communication barriers? How would they truly have greater access to justice through online forums? This would be exacerbated if there was a further shift towards written submissions and asynchronous proceedings.

Are we at risk of losing the human touch?

It's not just LIPs who stand to suffer from online contested hearings. Vulnerable witnesses, those with language or other communication difficulties, and individuals with limited access to the resources necessary to participate remotely, are prime examples providing judges with the difficult task of identifying and adjusting for parties' individual vulnerabilities or difficulties. The risk is we lose the human touch.

This has been observed within the family law context in the UK. The High Court of Justice (England and Wales) Family Division President Sir Andrew McFarlane asked the Nuffield Family Justice Observatory (NFJO) to conduct a rapid consultation of how court users were experiencing online family hearings to ensure only suitable cases would proceed remotely.

NFJO head Lisa Harker commented that most parents and children are being failed during remote hearings, stating they are not "just or humane".[4] Practitioners interviewed for this report also expressed concern. Two judges commented on the issues they perceived during remote hearings:

- "There is no opportunity to look them in the eye, to convey to them your own humanity, to either encourage or warn – all of which I consider to be a vital part of the initial stages of a care case."
- "Remote hearings are impersonal and transactional rather than humane."[5]

Generally, remote hearings can present difficulties for advocates and judges in building rapport with parties. There is less engagement, lack of proper eye contact, and more difficulty reading body language. Such absence of human insight and empathy cannot be overlooked.

In a recent ruling,[6] Perram J commented that there will be many cases where trials conducted over virtual platforms will not be feasible. For example, he doubted someone speaking no English and in immigration detention could have a fair trial.

How does a client properly instruct their lawyer during online contested hearings? Using chat functions or breakout rooms within online platforms is not ideal. How likely is counsel in

full flow through submissions to notice a small alert popping up on screen from their client? What if the instructions the client wishes to give cannot wait until set breakout periods? This only detracts from the fluidity of proceedings.

In an interview[7] with Wendy Harris QC, Supreme Court of Victoria Chief Justice Anne Ferguson gave an example of being able to appreciate counsel physically present pausing because they are thinking, yet when there is a pause online, it's not easy to tell if they are thinking or if there's another reason. Although the Chief Justice is an advocate for online hearings, she recognises there are limitations.

Larger hearings will be unworkable due to the sheer number of participants. Imagine a multi-party trial with four plaintiffs, four defendants, their lawyers, expert witnesses, interpreters, judge and court associate – all appearing remotely. What about jury trials – throwing another handful of lay individuals into the "online" mix. How will judges police jurors' attention and/or engagement? Do we reduce the number of jurors? How can that represent true access to justice?

Most significantly, the weight accorded to witnesses' credibility when giving evidence cannot properly be adjudicated through a screen. Many cases rest solely on credibility. Giving evidence over a link diminishes the quality of witnesses' evidence. A proper determination on the facts cannot faithfully be done via a screen or telephone.

When control-alt-delete just won't work

While there is appetite for a shift towards greater use of remote courts, the infrastructure within court buildings in Victoria (and worldwide) to enable seamless online resolutions to disputes isn't attuned to it yet. Chief Justice Ferguson, in the statement of 20 March, acknowledges "not all Courts have technical capability yet".[8]

Referring to the quality of advocates' submissions during the interview,[9] Chief Justice Ferguson stated "it's not the technology that wins or loses you cases. It's your core skill". However, technology can fail.

A rapid review examining the impact of remote hearings in the UK civil justice system reported, regarding the use of technology, nearly half of hearings experienced technical difficulties.[10] Can we really rely solely on technology to provide justice? Of course, the counter-argument is that things will improve with time and the odd glitch is no different to parties arriving late to court because of transport issues. However, this mustn't be viewed in isolation.

There are also concerns surrounding the amount of time parties spend in front of screens, especially during lengthy hearings, causing eye strain, headaches, and increased tiredness due to greater concentration. For lawyers, there's the added pressure of needing to communicate with clients, managing documents, and making submissions in a less natural way.

While these concerns can be allayed by regular breaks, the impact of screen time shouldn't be understated. Frequent breaks mean more disruption to the flow of a hearing and ultimately a lengthier hearing than if conducted in person. Similarly, people dropping out at crucial times due to technology failures causes disruptions and delays.

Vehicle for permanent change – the new normal

The *Civil Procedure Act 2010* (Vic) and the *Supreme Court (General Civil Procedure) Rules 2015* give courts flexibility to do what is necessary to "facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute"[11] including, where appropriate, dispensing with compliance with any of the requirements of the rules,[12] giving any direction or imposing any term or condition "for the conduct of the proceeding which it thinks conducive to its effective, complete, prompt and economical determination".[13]

The law, therefore, already inherently provides a window to bring about wholesale change in the way hearings can be conducted in future. While this hasn't happened yet, (for example, Magistrates' Courts are still adjourning contested hearings), the door appears to be firmly open.

The Magistrates' Court of Victoria (Civil Division) Practice Direction 1 2020, signed by the Chief Magistrate on 23 March 2020 stated they saw these measures as temporary and all contested hearings will be adjourned.[14] Yet, this was revoked and replaced by Practice Direction 12 on 8 May 2020[15] with no longer mention of "temporary measures". There was absence in any explicit statement that contested hearings would be adjourned. This indicates that change is about to, and in fact, has happened, I believe.

The risk is this could extend to contested hearings. Judges could apply an interests of justice test and determine that videoconferencing facilities are to be preferred, having regard to the overarching obligations[16] and need for minimising delay or costs savings. Those interests could change over time and become normalised.

In a statement on e-Court pilots,[17] Chief Justice Ferguson envisages technology will be "scaled up to meet the changing needs of the sector". Similarly, Chief Justice Tom Bathurst of the Supreme Court of New South Wales stated, "the shift to a remote system of justice was not without its technical challenges, yet I am confident we are getting better each day, and I see an innovative and flexible future ahead".[18]

However, court-wide implementation of robust, reliable and secure digital technology is likely in itself to be a very costly exercise – arguably more than adjourning for a month or two for parties to physically attend.

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Conclusion

These are clear signs of intent to expand these measures beyond the current COVID-19 restrictions. But, where do we draw the line? Should remote hearings proceed through every aspect of civil procedure? Even if the law allowed this and the technology had full capability, the more fundamental question is, should it?

Despite the move towards greater remote hearings during an unprecedented pandemic, there is a reason why these have not previously been extended to substantive matters – we risk sub-standard justice and should be wary about giving our express support for such measures initially being introduced on a temporary basis for reasons of practicality. These measures may well remain on the books post COVID-19 when we will have plenty of time to repent our enthusiasm for efficiency.

While there are benefits to online hearings, I believe they should only be used in procedural or case management type hearings and should not extend to contested hearings. The risk of prejudice to parties, deterioration to the quality of justice and erosion of the rule of law is just too high. ■

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1. See, eg, Susskind R, *Online Courts and the Future of Justice*, Oxford University Press 2019, p8 or Harvard Law School Centre on the Legal Profession Virtual Book talk with Richard Susskind, 24 April 2020, https://youtu.be/QOS4LRf-zes.
2. Louise Tickle, "Online Justice: why courts should explore emerging digital possibilities", *The Guardian* (online, 16 January 2017), https://www.theguardian.com/public-leaders-network/2017/jan/16/online-justice-courts-explore-digital-possibilities.
3. LexisNexis, "When You Can't Meet in Court: Pros and Cons of Online Dispute Resolution", https://www.lexisnexis.com.au/en/COVID19/blogs-and-articles/when-you-cant-meet-in-court-online-alternative-dispute-resolution-during-coronavirus-covid19.
4. Louise Tickle: "Lisa Harker: 'Remote family court hearings are not just or humane'", *The Guardian* (online, 2 June 2020), https://www.theguardian.com/society/2020/jun/02/lisa-harker-family-court-hearings-justice-failed-coronavirus-crisis?CMP=Share_iOSApp_Other.
5. Nuffield Family Justice Observatory, *Remote Hearings in the Family Justice System: A Rapid Response*, p10, https://www.nuffieldfjo.org.uk/app/nuffield/files-module/local/documents/nfjo_remote_hearings_20200507-2-.pdf.
6. *Capic v Ford Motor Company of Australia Limited* (Adjournment) [2020] FCA 486, https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2020/2020fca0486.
7. In Conversation with the Hon Anne Ferguson, Chief Justice of the Supreme Court of Victoria and Wendy Harris QC, 7 May 2020.
8. Statement from the Chief Justice of Victoria (COVID-19) Magistrates' Court of Victoria. 20 March 2020, https://www.mcv.vic.gov.au/news-and-resources/news/statement-chief-justice-victoria-covid-19-20-march.
9. Note 7 above.
10. Civil Justice Council/The Legal Education Foundation, "The Impact of COVID-19 measures on the Civil Justice System", May 2020, p36, https://www.judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f.pdf
11. *Civil Procedure Act 2010*, s1(1)(c).
12. *Supreme Court (General Civil Procedure) Rules 2015*, Rule 2.04.
13. Note 12 above, Rules 1.14 & 34.01.
14. The Magistrates' Court of Victoria (Civil Division), Practice Direction 1 2020, 23 March 2020, https://www.mcv.vic.gov.au/sites/default/files/2020-03/Practice%20Direction%20No.%201%20of%202020%20-%20COVID-19%20Civil%20Jurisdiction_0.pdf.
15. The Magistrates' Court of Victoria (Civil Division), Practice Direction 12 2020. 8 May 2020, https://www.mcv.vic.gov.au/sites/default/files/2020-05/Practice%20Direction%20No.%2012%20of%202020%20-%20Civil%20Jurisdiction.pdf.
16. Note 11 above, Part 2.3.
17. Statement from the Chief Justice of Victoria: Supreme Court of Victoria. 20 March 2020, https://www.supremecourt.vic.gov.au/news/statement-from-the-chief-justice-of-victoria-COVID-19-update-2.
18. New South Wales Bar Association COVID-19: Information for attending court, p4 (updated 16 June 2020), https://nswbar.asn.au/uploads/pdf-documents/COVID_Court_Guide.pdf.

A precedent for unprecedented times

HOW THE FAMILY LAW COURTS HAVE TREATED THE CONTINUED OPERATION OF, AND FREQUENT NON-COMPLIANCE WITH, PARENTING ORDERS IN THE WAKE OF COVID-19. BY RADU CATRINA

ADOBE STOCK

The applicable law

The purpose of punishment in family law proceedings is not, unlike in civil proceedings, for the primary goal of upholding the Court's authority, but rather enforcing the expectations that parties will obey orders made and that sanctions will be imposed if this does not occur.[1]

Part VII Division 13A of the *Family Law Act 1975* (Cth) (Act) deals with the consequences of a failure to comply with orders affecting children and pursuant to the major amendments to the Act which occurred in 2006,[2] now supersedes the general enforcement powers contained in Part XIIA.

Pursuant to Subdivisions B-F, a court exercising jurisdiction pursuant to the Act is imbued with powers that are broad and substantial, ranging from those designed to be educational or restorative in nature, to outright punitive. For example, a contravening party might be ordered to attend a parenting course, or the non-contravening party may be awarded compensatory time with a child, but in instances of subsequent or more serious breaches, the court may order the payment of a fine, the imposition of a community service order or a term of imprisonment for up to 12 months.

SNAPSHOT

- The Family Courts have dealt with a recent influx of contravention applications in light of the COVID-19 pandemic and consequent movement and travel restrictions.
- The Courts have shown lenience. However, successful cases have relied on specific evidence rather than broad or general concerns.
- Parties need to carefully consider why they seek to suspend time, whether their actions are reasonable and the effect of declining COVID-19 case numbers and easing of restrictions.

The meaning of 'contravened'

Pursuant to s70NAC of the Act, the term "contravened" is defined widely and includes a person intentionally failing to comply with an order, failing to make a reasonable attempt to comply with an order, intentionally preventing another person's compliance, or aiding or abetting in another person's contravention.

Parenting orders, even where there might be ambiguity as to their express obligations, impose implicit, positive obligations on the party with whom a child is living to take reasonable steps to comply. These include making a child available to the other party at the commencement of their time and making an effort to genuinely ensure compliance with the order and encourage a child to spend time with the other party.[3]

In a statement issued earlier this year by Chief Justice of the Family Court of Australia and Chief Judge of the Federal Circuit Court of Australia His Honour Alstergren, the Court made clear that despite the highly unusual circumstances of the COVID-19 pandemic, parties were "expected to comply with Court orders in relation to parenting arrangements".[4] Parties were encouraged to first attempt to communicate with each other and find a practical solution,[5] but the Court's expectation was nonetheless that "at all times, parents or carers must act reasonably".[6]

A 'reasonable excuse'

A party may "defend" non-compliance with parenting orders where they have a "reasonable excuse" to do so. Section 70NAE of the Act explores the term, although the provision is not exhaustive in its scope. There is a broad range of circumstances in which reasonable excuse can be made out, but most relevant to the cases discussed in this article and the times that we presently find ourselves in, are sub-ss(4)-(7). These provide that reasonable excuse is established where the respondent believes on reasonable grounds that the contravention was necessary to protect the health or safety of a party (including the contravening party or a child).

Recent cases

Three recent cases illuminate the approach(es) adopted by the Family Law Courts when considering these issues. In examining these cases, it is important to remain cognisant of the fact that border closures did not axiomatically render the implementation of orders which required interstate travel, for the purposes of a child spending time with a party, impossible. As the pandemic escalated, state governments quickly issued public health orders creating exemptions for parties to travel for the purpose of fulfilling legal obligations or to give effect to a court order.

Kardos & Harmon

Kardos & Harmon[7] concerned an application filed by Mr Kardos, the father, alleging that Ms Harmon, the mother, contravened final orders made by the Federal Circuit Court of Australia in 2018. The final orders provided that their child was to live with the mother in Adelaide and spend four days per month with the father.

The facts are briefly summarised as follows:

- pursuant to the final orders, the mother was required to either deliver the child to the father at Darwin airport or, if provided with 90 days written notice, to Brisbane airport
- on 21 March 2020, the mother contacted the father and suggested that he travel to Adelaide to spend time with the child in order to reduce the child's exposure to the COVID-19 virus while travelling through airports and on board a plane – the father was living in Brisbane at the time
- there was correspondence between the parties over the next few weeks as to proposed alternative arrangements but, ultimately, the mother did not travel in either March or April 2020 to effect changeover of the child to the father.

The father's case was unsuccessful on a technical point. The Court held that the father had failed to establish a breach by the mother because there was no evidence that he had given her the 90 days' written notice required for changeover to occur at Brisbane airport.

The Court, however, took the examination further. It determined that even if the appropriate notice had been provided by the father, the mother would nonetheless have had reasonable excuse for her non-compliance with the final orders.

Taking judicial notice pursuant to s144 of the *Evidence Act 1995* (Cth), the Court had regard to a document titled "Coronavirus disease (COVID-19) advice for the public", published by the World Health Organisation (WHO) earlier in the year, which provided, among other things, that during the pandemic people should stand at least one metre apart from each other and avoid going to crowded places. The Court considered that the principles underpinning the WHO document were reflected in the public health notices and orders issued by state governments in Australia. The Court also considered available public information as to the number of confirmed or probable COVID-19 cases in Adelaide and Brisbane.

Ultimately, the Court held that the mother's non-compliance was founded on reasonable grounds because of her inability to maintain safe social distancing during the period of necessary aircraft travel. That inability would have posed an unacceptable risk that the child might have come into close proximity with a person infected by the virus.

One further point that bolstered the mother's case arose due to the South Australian government's requirement for any returning traveller to self-quarantine for a period of 14 days. The mother was a casual worker who only worked 3.5 days per week, did not accrue leave entitlements and whose employer refused to grant her 14 days off work in both March and April 2020 when she made those requests. The Court found that the requirements to self-quarantine would have caused financial hardship to the mother, including the real possibility that she could have lost her job, and so these would have also been grounds to establish reasonable excuse.

Although not emphasised in some analyses of the case, it is also important to note that the Court had favourable regard to the mother facilitating additional time between the child and the father on FaceTime and attempting to facilitate the father spending time with the child in Adelaide.

Pandell & Walburg (No 2)

In *Pandell & Warburg (No 2)*[8] the father, Mr Pandell, brought an urgent application into the newly-established COVID-19 List, which was established by the Family Law Courts in late April to deal exclusively with urgent disputes that had arisen as a result of the pandemic.

The facts are summarised as follows:

- on 1 March 2019 the Court made interim orders that the child live with the mother and spend time with the father each week on Thursday evening and for several hours on Sunday. The father's time was later increased pursuant to further interim orders made on 24 October 2019
- as COVID-19 cases began occurring in Victoria in March 2020, the mother failed to facilitate the child spending time with the father. She maintained that she had a reasonable excuse for doing so, namely as a result of the child's specific health condition (which was not disclosed by the Court) that the immune suppressant nature of the treatment the child received for that condition made him more likely to be severely affected by the virus, and that the child spending time with the father would pose a health risk to the child
- the father last spent time with the child on 22 March 2020, before the matter returned before the Court on 29 June 2020.

Medical evidence obtained by the parties on 26 March 2020 provided that due to the child's condition, he was at severe risk if he contracted COVID-19 and it was recommended that he remain in social isolation with the mother. The same medical clinic would issue an updated report on 5 June 2020, which differed from the previous report, stating that children with that condition were no longer considered "high-risk" and that they could safely attend school and interact with family provided that social distancing was adhered to.

There was no question that the mother had contravened both sets of interim orders made in 2019; however, the question for the Court was whether she had a reasonable basis for not allowing the child to spend time with his father.

Pursuant to the medical evidence, it was held that the mother had a reasonable excuse up until 5 June 2020, when the updated medical report was obtained. Thereafter, and on the child no longer being considered to be at "high-risk" during the pandemic, "it was obvious that there was no reasonable basis for the Mother believing that it was necessary to withhold the Child . . . on health grounds".[9] The father did not spend any time with the child for 14 weeks, and the Court found it particularly regrettable that the mother's contravention resulted in the father being unable to spend either his or the child's birthday together with the child.

The Court was satisfied that both parties had the best interests of the child at heart and so imposed no penalty on the mother. The Court awarded the father make-up time, as well as slightly increasing his regular, ongoing time with the child. The parties were ordered to bear their own costs.

Biondi & Koen

Biondi & Koen[10] involved an interim application filed by the mother, Ms Biondi, to suspend the introduction of the father, Mr Koen's, overnight time with their child, which was due to occur pursuant to interim orders made by the Court in December 2019.

The facts are briefly summarised as follows:

- the mother was an international student who had a brief and casual relationship with the father in 2016 and subsequently fell pregnant with the parties' child. The parties lived together for a period thereafter, but separated in early 2017.
- the mother made an application to the Family Court to relocate with the child to Brazil and the matter came on for a five-day final hearing in December 2019. The Court's decision was reserved and interim orders were made that the child spend frequent time with the father, including overnight time
- while the parties awaited the Court's decision, the COVID-19 virus reached Australian shores and the mother, concerned by the virus, applied to have the father's time limited to two hours per day at her home and that the father wear gloves and a face mask during his time with the child
- the father opposed the variation and sought no change to the interim orders, stating that he would take all reasonable protective measures within his home to protect the child, including disinfecting the premises prior to each visit and not permitting visitors to his home while the child was present.

According to the family report writer, the parent's relationship was "characterised by high reciprocal mistrust and poor communication".[11] The Court likewise found that the parents were "ill-matched" and "the foundation of a respectful and trusting relationship was never at any time established".[12]

Despite the hostility displayed by each parent, the Court found the mother justified in her concerns about the transmission of the virus, given her lack of private health insurance or Medicare cover, lack of family in Australia and the child's young age. She adopted strict, but not overly vigilant, precautions in the wake of the pandemic and while presenting as anxious, was not held to be motivated to exclude the child from the father's life.

Nonetheless, her concerns, while genuine, were not found to be reasonably held. Her anxiety was a prolonged and significant issue for her and given the circumstances of the pandemic, would not have been reduced by the Court's refusal to introduce overnight time. Conversely, the father proceeding to overnight time would not have increased the mother's anxiety to such an extent that her ability to provide adequate care for the child would have been materially affected and nor would the delay in progressing to overnight time have made that outcome any easier for the mother to bear.

Conclusions

Ultimately, like most aspects of family law, what behaviours constitute "reasonableness" and "reasonable excuse" remain a matter for judicial discretion, but there are a few lessons that can be gleaned for practitioners and parents alike.

The courts have evidently shown leniency during the pandemic and understand that parents are generally motivated by a genuine desire to protect their children rather than use them as pawns in their own conflict. The cases in which parties have had success have involved arguments supported by specific evidence, such as the WHO document in *Kardos & Harmon* or the medical report in *Pandell & Walburg (No 2)* compared to the mother's own anxieties in *Biondi & Koen*. Indeed, the emerging jurisprudence, also supported in cases such as *Xiu & Hodges*[13] and *Santer & Santer*[14] is that there must be a genuine and specific posed risk to a child, rather than simply the general concerns surrounding the pandemic.

It would be prudent to bear in mind that as restrictions ease and confirmed COVID-19 cases decline, it is less likely that health concerns related to the virus will be considered a "reasonable excuse". In circumstances where they do breach orders, parents would also be wise to offer make-up time or propose alternative arrangements in the same spirit as the original orders.

Perhaps the most important lesson, and one that would help foster mutual trust, respect and better relationships between separated parties, is one that echoes the famous words of Lord Denning in *Combe v Combe*[15] – excuse can only be used as a shield, not as a sword. ■

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1. ALRC Report 35, *Contempt*, Australian Government Publishing Service, Canberra, 1987 at 623.
2. *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).
3. *Stavros and Stavros* (1984) FLC 91-562; *O'Brien and O'Brien* (1993) FLC 92-396; *Daly and Campbell* (2005) FLC 93-236.
4. Family Court of Australia and Federal Circuit Court of Australia, *Media Release*, 26 March 2020, at 2.
5. Note 4 above, at 4.
6. Note 4 above, at 11.
7. [2020] FamCA 201.
8. [2020] FCCA 1853.
9. Note 8 above, at [35].
10. [2020] FamCA 201.
11. Note 10 above, at [34].
12. Note 10 above, at [36].
13. [2020] FamCA 225.
14. [2020] FAMCA 445.
15. [1951] 2 KB 215.

Overzealous control or reasonable and lawful: workplace law in the digital age

RECENT HIGH PROFILE CASES TELL A CAUTIONARY TALE TO EMPLOYERS AND EMPLOYEES ABOUT PUBLIC COMMENT AND EXPRESSING PERSONAL VIEWS IN THE COURSE OF EMPLOYMENT.

BY TESSA VAN DUYN

ADOBESTOCK

With the increasing use and prevalence of social media, employers are taking steps to preserve and protect their reputation through control and monitoring of employees' private activities online.

The High Court's decision in *Comcare v Banerji* [2019] HCA 23 (*Banerji*) is a salient example of the fine line between employees' rights and employers' reputation in the context of public service employment. Ultimately, the High Court's findings may cast a shadow of doubt and silence on political debate by public servants. While the impacts of this case are limited to the public sector, private sector employers and employees take heed: the highest court in our land sees merit in employers regulating employees out of hours speech and conduct.

In this case, Ms Banerji, a public servant in the (former) Commonwealth Department of Immigration and Citizenship (Department), began broadcasting tweets using an anonymous twitter handle. The substance of the tweets included critical commentary on the government and opposition immigration policies. Some of them were "reasonably characterised as intemperate, even vituperative, in mounting personal attacks on government and opposition figures".[1] Ms Banerji made about 9000 tweets, at least one of which was broadcast during working hours.

The *Public Service Act 1999* (Cth) (PS Act) requires that Ms Banerji must "at all times behave in a way that upholds the APS [Australian Public Service] Values" (s13(11)). Central to this mandate is the declaration in the APS Values that "the APS is apolitical, performing its functions in an impartial and professional manner" (s10(1)), which is arguably a fundamental tenet of responsible government and functional democracy.

In March 2012, two separate complaints were made by an employee to the Workplace Relations and Conduct Section of the Department. The complaint alleged that Ms Banerji was inappropriately using social media in contravention of the APS Code of Conduct.[2]

The complaint and subsequent legal applications traversed a number of months and took a number of turns. A brief history of that journey follows.

SNAPSHOT

- Recent case law and public debate highlight the tension between employees' free speech and an employer's right to preserve their reputation.
- The High Court has reminded us that the freedom of implied political communication is not an individual right to free speech. It operates as a limit on legislative power which mustn't overreach the Constitution's boundaries.
- Employees might now think twice before engaging in political debate and commentary in public and on social media for fear of over-regulation or adverse action.

Alleged breach of Code of Conduct

Over the ensuing eight months, the complaints were investigated and a determination was ultimately made that Ms Banerji's conduct gave rise to possible breaches of the APS Code of Conduct. Ms Banerji was notified of the determination that she had breached the APS Code of Conduct and that the proposed sanction was termination of her employment.[3]

On 1 November 2012, Ms Banerji sought interim and final injunctions in the (then) Federal Magistrates' Court of Australia to restrain the Department from proceeding with the proposed sanction of termination.[4] Nine months later, on 9 August 2013, the (then) Federal Circuit Court rejected Ms Banerji's claim for interim injunction.

After some additional correspondence between Ms Banerji and the Department's delegate, the Department and Ms Banerji ultimately entered into a Deed of Agreement to settle the proceedings in the Federal Circuit Court.

Subsequent compensation claim

On 18 October 2013, Ms Banerji lodged a claim for compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (*Compensation Act*) for an injury, described as an underlying psychological condition that was aggravated by the termination of her employment.

On 24 February 2014, Ms Banerji's compensation claim was rejected by a delegate of Comcare. A Comcare review officer affirmed this determination on 1 August 2014 on the basis that the termination of Ms Banerji's employment was a reasonable administrative action taken in a reasonable manner in respect of her employment, within the meaning of s5A(1) of the *Compensation Act*.

Accordingly, the delegate determined that any injury alleged to have been suffered by Ms Banerji was not an "injury" for the purposes of s5A(1) of the *Compensation Act*. Section 5A(1) of the *Compensation Act* operates to exclude from compensation, relevantly, an aggravation of a mental injury that is suffered as a result of reasonable administrative action taken in a reasonable manner in respect of an employee's employment.

The Comcare decision of 1 August 2014 was challenged and reviewed by the Administrative Appeals Tribunal (AAT), with Deputy President Gary Humphries and Member Dr B Hughson presiding. On 16 April 2018, the AAT set aside Comcare's decision and instead found that ". . . Ms Banerji suffered an adjustment disorder characterised by depression and anxiety, being an injury pursuant to s14 of the [*Compensation*] *Act*"[5] and, importantly, that ". . . the use of the Code as the basis for the termination of Ms Banerji's employment impermissibly trespassed upon her implied freedom of political communication".[6] Accordingly, the AAT held that the termination decision was not reasonable administrative action in a reasonable manner in respect of her employment within the meaning of s5A(1) of the *Compensation Act*.

Were Ms Banerji's tweets an exercise of the implied freedom of political communication?

Importantly, it was agreed between the parties before the AAT that the termination of Ms Banerji's employment was reasonable administrative action taken in a reasonable manner in respect of her employment unless Ms Banerji could show that the termination falls outside the exclusion in s5A(1) because of the implied freedom of political communication identified by the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (*Lange*). Therefore, this question became the principal issue for determination by the AAT.

The High Court has long recognised that the implied freedom of political communication is "essential to the maintenance of the system of representative and responsible government for which the Constitution provides".[7] However, the critical question that the AAT had to ask was to what extent the freedom should operate as a limit on legislative power which impedes the free expression of political opinion. In this case, the AAT fixated on the fact that Ms Banerji's tweets were anonymous, which called into question the real risk of reputational damage to the public sector and responsible government at large.

After exploring the different limbs of the *Lange* test, the AAT found in favour of Ms Banerji because it held that her right to the implied freedom of political communication was impermissibly burdened by the termination of her employment for breach of the Code of Conduct. This result flowed from the AAT's conclusion that the overarching objective of an impartial public service was not undermined where there was no clear nexus between critical comments and a public sector employee. Any curtailment of anonymous expressions of political opinion ought be persuasively and robustly justified. It went on to say that the "stated purpose of the APS and Department Guidelines are not well served when the guidelines are applied to anonymous comment by public servants".[8] Indeed, the AAT went so far as to observe that "restrictions in such circumstances bear a discomforting resemblance to George Orwell's thoughtcrime".[9]

End of the road: the High Court

Comcare appealed the AAT's decision which, on application by the Commonwealth Attorney-General, was removed into the High Court of Australia pursuant to s40(1) of the *Judiciary Act 1903* (Cth).

The question for the High Court was whether the AAT was correct in holding that ss10(1), 13(11) and 15(1) of the PS Act ("the impugned provisions") imposed an unjustified burden on the implied freedom of political communication such that termination of Ms Banerji's employment was not reasonable administrative action taken in a reasonable manner with respect to Ms Banerji's employment within the exclusion in s5A(1) of the *Compensation Act*.

Before the High Court, Ms Banerji agitated the same argument made before the AAT, that on their proper construction, the impugned provisions imposed an unjustified burden on the implied freedom of political communication insofar as they purported to authorise sanctions on an APS employee for "anonymous" communications. Again, Ms Banerji argued that where there was no clear connection between the comments and a public sector employee, the impugned provisions of the PS Act did not apply.

A plurality of the Court (Kiefel CJ, Bell, Keane and Nettle JJ) held that the way in which the AAT determined the matter was misconceived – that is, the AAT was asking itself the wrong question and, therefore, was led into error. The High Court reiterated that the implied freedom of political communication is not a personal right of free speech. Rather, it is a restriction on legislative power which goes ". . . only so far as is necessary to preserve and protect the system of representative and responsible government mandated by the Constitution".[10] The inquiry should focus on whether the impugned provisions (or law) impose an unjustifiable burden on political communication as a whole, as compared to the effect on an individual's freedom.[11]

Having regard to the well-established two-part test in *Lange*, the plurality concluded that the burden on the implied freedom was not unjustified. In examining the purpose of the impugned provisions in the PS Act, which are directed at ensuring that APS employees uphold the values, integrity and reputation of the APS, the Court held that anything directed to ". . . the maintenance and protection of an apolitical and professional public service is a significant purpose consistent with the system of representative and responsible government mandated by the Constitution".[12]

In an effort to highlight that the APS Code of Conduct does not impose a gag on political free speech entirely, Justices Gageler, Gordon and Edelman all offered slightly more nuanced reasons for the decision to varying degrees. For example, Gageler J noted that the impugned provisions of the PS Act did not operate as a "blanket restraint on all civil servants from communicating to anyone any expression of view on any matter of political controversy".[13] But rather, what it demands of an APS employee is "a measure of restraint or moderation in the expression of a political opinion . . . [which] is highly situation-specific . . ."[14]

Justices Edelman and Gordon also explored other factors that would influence whether or not an APS employee crosses the boundary of what is acceptable or unacceptable political commentary. Despite this attempt to temper the real effect of the limitation on a public sector employee's implied freedoms, Edelman J did concede that the APS Code of Conduct "casts a powerful chill over political communication".[15]

After a protracted legal battle, the High Court ultimately decided that the implied freedom of political communication cannot be invoked as a shield in the face of internal policies and procedures (in this instance, the APS guidelines) which were created to protect the independence and impartiality of the public service.

The appeal was allowed and the AAT's decision was set aside. The reviewable decision of 1 August was affirmed and Ms Banerji was ordered to pay costs.

Against the backdrop of the current climate

Both the High Court's landmark decision in *Banerji* and the recent political and legal storm around Israel Folau's battle with Rugby Australia highlight the challenges faced by employers to get the balance right between protecting fundamental rights and freedoms and protecting the reputation of the organisation.

ADOBESTOCK

Indeed, even the federal government is coming under fire for its attempts to strike the appropriate balance between the competing rights and interests of individuals against organisations. After having consulted on a second exposure draft of the revised Religious Discrimination Bill 2019, the government has shelved the reforms in the wake of the COVID-19 pandemic. Notably, the Bill was not devoid of extensive criticism and commentary from both faith-based organisations, health care providers and LGBTI advocacy groups about the balance that was struck between the rights to freedom of religion and belief and the right to free speech against an employer's right to regulate their employees' conduct during the course of their employment.

As for the high profile case of Israel Folau and Rugby Australia, a confidential settlement agreement was reached in December 2019. In that case, Folau argued that he was unlawfully sacked by Rugby Australia because of his religion. In contrast, Rugby Australia maintained that Folau breached the professional players' code of conduct with two social media posts condemning homosexuals to hell and labelling as "evil" the legal recognition of transgender and intersex Australians. In light of the parties' settlement, the contentious legal issue of the parameters of the rights of freedom of speech and religion in the workplace will no longer see the light of day in a courtroom. However, this issue will continue to see the light of day in the people's court of the public domain and democracy through the government's legislative agenda.

Whatever the outcome of the Religious Discrimination Bill 2019, one can only hope for greater clarity on how an individual's right to hold and express religious views interacts with an employer's ability to "control" an employee's behaviour in the public arena and on social media. Legislative silence on the balance to be struck between individuals' freedoms and employers' rights is risky, particularly in these uncertain times where the power dynamic between employers and employees may have shifted.

Conclusion

As for an employee's right to free political speech in the digital age, Ms Banerji might argue that the push towards Orwell's dystopian vision of overzealous state control of citizens' behaviour is actually closer to reality than we might like to admit. A majority of the High Court has reminded us that the limits on government's power to infringe on our freedom of political expression must have a material unjustified effect on political communication as a whole. It's not enough to merely restrict the rights of an individual like Ms Banerji to engage freely in political communication.

Indeed, in the case of public servants the Court has effectively given the government carte blanche to intrude into their private lives in the name of an impartial apolitical public service. Employees everywhere might now think twice before engaging in political debate and commentary in a public forum, preferring silence over the risk of adverse action. ■

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1. *Banerji and Comcare (Compensation)* [2018] AATA 892 at 109.
2. Note 1 above, at 3(14).
3. Note 1 above, at 3(21).
4. Note 1 above, at 3(25).
5. Note 1 above, at 129.
6. Note 1 above, at 120.
7. See most recently, *Brown v Tasmania* [2017] HCA 43 per Kiefel CJ, Bell and Keane JJ at 88.
8. Note 1 above, at 116.
9. Note 1 above, at 116.
10. *Comcare v Banerji* [2019] HCA 23 at 20.
11. Note 10 above.
12. Note 10 above, at 31.
13. Note 10 above, at 89.
14. Note 10 above, at 93.
15. Note 10 above, at 164.

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HIGH COURT JUDGMENTS

DR MICHELLE SHARPE

Native title – delegation of functions

Delegation and agency – what's the difference? Quite a lot according to Nettle and Edelman JJ.

In *Northern Land Council & Anor v Quall & Anor* [2020] HCA 33 (7 October 2020) the High Court was required to consider whether the North Land Council (NLC) has the power to delegate to its CEO the function, conferred on it by s203BE(1)(b) of the *Native Title Act 1993* (Cth) (NT Act), of certifying applications for registration of Indigenous land use agreements (ILUAs).

ILUAs are voluntary agreements between a native title group and others on the use of land or waters. Future acts that affect native title rights and interests (such as, for example, the grant of a mining tenement or the compulsory acquisition of land) are invalid unless they are permitted under an ILUA that is registered on the Register of Indigenous Land Use Agreements. One requirement for the making of an application for registration of an ILUA concerns the identification of people who may hold native title rights, in respect of the area affected by the ILUA, and the authorisation, by those people, of the ILUA. Under the NT Act this requirement can be met in two ways. One way is by obtaining a certification of the application by all representative bodies for the area in the performance of their functions under s203(1)(b) of the NT Act (certification function). Under the NT Act a "representative body" is defined as a body corporate recognised by the minister to be a representative body for an area. Section 203BE(5) of the NT Act provides that a representative body must not certify an ILUA unless it is of the opinion that it has made all reasonable efforts to identify people who hold native title rights in relation to the area covered by the ILUA and that those people authorise the making of the ILUA. Relevant to the carrying out of the certification function, s203BK of the NT Act provides that a "representative body has power to do all things necessary or convenient to be done for or in connection with the performance of its functions". And s203FH provides that the state of mind of a Land Council is the state of mind of its employees or agents and the conduct of employees and agents will be deemed to be the conduct of the representative body.

The NLC is a representative body. The NLC is one of a number of Land Councils established under Part III of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALR Act). Each Land Council represents Aboriginal and/or Torres Strait Islander bodies in a particular area. The Land Council is a body corporate. The functions of the Land Council are set out in Part III of the ALR Act. The members of the Land Council consist of Aboriginal people who have been chosen in accordance with a method approved of by the Minister. Section 203BK of the NT Act is mirrored in s27(1) of the ALR Act which provides that a Land Council may "do all things necessary or convenient to be done for or in connection with the performance of its functions and, without limiting the generality of the foregoing may: (a) employ staff . . ." Sections 28(1) and (2) specifically provide that a Land Council may delegate to a member of its staff, among others, any of the Land Council's functions or powers under the ALR Act other than those specifically excluded under the provision (which does not include the certification function).

In 2016, the NLC made an ILUA in relation to land and waters at the Cox Peninsula near Darwin. In February 2017, the ILUA was varied (Kenbi ILUA). In March 2017, the CEO (employed by the NLC as a member of its staff) signed a certificate purporting to act as a delegate of the NLC (Kenbi Certificate). The Kenbi Certificate stated that the NLC had certified the application for registration of the Kenbi ILUA, pursuant to s203BR(1)(b) of the NT Act, and that the requirements set out in s203BE(5) had been met. Mr Quall and Mr Fejo commenced judicial review proceedings in the Federal Court challenging the Kenbi Certificate on two, alternative, grounds. First, they argued that the NLC could not delegate its certification function. Second, they argued that, if the certification function was delegable, it had not been validly delegated by the NLC to the CEO.

The primary judge rejected the first ground of review but accepted the second. Accordingly, the primary judge declared the Kenbi Certificate did not amount to certification pursuant to s203BE(1)(b) of the NT Act. The NLC and CEO appealed to the Full Court of the Federal Court in respect of the primary judge's finding that the NLC had not validly delegated its certification function to the CEO. Mr Quall and Mr Fejo brought a cross-appeal in which they challenged the primary judge's finding that the NLC's certification function was delegable. The Full Court allowed the cross-appeal making it unnecessary to consider the NLC and CEO's appeal. The NLC and CEO then appealed to the High Court. Given the importance of the issues to be determined in the appeal the Attorneys-General of the Commonwealth and the Northern Territory intervened.

The High Court unanimously allowed the appeal but was divided into two different camps in respect of its reasons: the "delegation camp" (Kiefel CJ and Gageler and Keane JJ) and the "agency camp" (Nettle and Edelman JJ).

The delegation camp noted at [65] the presumption of statutory interpretation that a statutory function is to be performed only by the statutory repository of the function, and no one else, unless otherwise indicated in the statute (being the maxim *delegatus non potest delegare*). The delegation camp considered at [66]-[69] that ss27 and 28 of the ALR Act and ss203BK and 203FH of the NT Act (and the fact that a representative body is a body corporate) indicated that a representative body had the power to delegate the certification function if it was objectively necessary or convenient to the performance of the function. The delegation camp remitted the matter to the Full

Court to determine whether the NLC had validly delegated its certification function to the CEO.

Conversely, the agency camp considered at [78] that the certification function was "almost a textbook example of functions that would be non-delegable by implication". The agency camp also considered at [78] that delegation of the certification function was expressly prohibited by s203B(3) of the NT Act which provided ". . . a representative body must not enter into an arrangement with another person under which the person is to perform the functions of the representative body". But the agency camp reasoned that the power to act personally through an agent was an entirely different matter to a delegation. Conceding that the terms "agency" and "delegation" were confusingly similar, and often used interchangeably, the agency camp noted at [77] that "they connote different sources of validity for acts". The agency camp points out at [77] and [81]-[85] that an "agent, in a strict or precise sense, acts on behalf of another and generally in the name of that other. The agent's acts are attributed to the other. A delegate, in a strict or precise sense, acts on their own behalf and generally in their own name". The agency camp notes at [93] that given the representative body's multitude of functions it is a matter of practical necessity that those functions be performed by agents and at [97] that there was no justification for treating the certification function any differently. The agency camp remitted the matter to the Full Court to determine whether NLC's constitutive statutes and instruments permitted the CEO to act as agent for the NLC in respect of its certification of the Kenbi ILUA and signing the Kenbi Certificate. ■

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FEDERAL COURT JUDGMENTS

ANTHONY LO SURDO SC
& THERESA POWER

Administrative law

Migration – cancellation of visa under s501(3A) of the *Migration Act* (Cth) on character grounds – judicial review – requirement for decision-maker to engage in an 'honest confrontation' with the consequences of removal

In *Swannick v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 165 (1 October 2020) the appellant (a 50-year-old man) was born in England but had lived in Western Australia since the age of three and never left. It was not disputed that everything of importance to him was also in Western Australia and that he knew no one in England.

Following a conviction for several counts of unlawful and indecent assault and one count of sexually based offending against a child under the age of 16, the appellant's permanent residence visa was cancelled by a delegate of the Minister under s501(3A) of the *Migration Act 1958* (Cth) on the basis that he did not satisfy the relevant character test.

On the appellant's release from prison on parole, the relevant parole board considered that his release "would not present an unacceptable risk to the safety of the community". He was transferred that same day into immigration detention awaiting deportation to the UK.

The Minister declined the appellant's request to revoke the visa cancellation and the appellant's application for judicial review to the Federal Court was also dismissed.

By a majority of 2:1, the Full Court dismissed the appellant's appeal.

The substance of the appellant's complaint was that the Minister did not give adequate consideration to the mental health difficulties he would face if removed from Australia (the appellant had a history of depression, anxiety and self-harm).

McKerracher and White JJ dismissed the appeal on the basis that, as no other jurisdictional error had been established, the appellant's central argument could only be accepted if the Full Court was to substitute its own conclusion on the merits (at [2] and [27]).

While struck by the evident harshness of the Minister's decision not to revoke the cancellation of the appellant's visa (at [27]), White J considered that the question of whether residual discretion should be exercised in the appellant's favour was a matter for the Minister (at [38]).

Stewart J dissented and would have allowed the appeal. In so holding, his Honour applied the principle first outlined in *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225; 267 FCR 628 at [3] to the effect that the exercise of character grounds visa cancellations under s501 carries with it an obligation of "real consideration" of the circumstances of the people affected, and that that obligation will not be satisfied by decisional checklists or formulaic expression.

Stewart J considered that the Minister's reasons glibly and compendiously described the appellant's claims and fears as "significant hardship" and failed to confront what was really being done to the appellant (at [89]). Stewart J would have set aside the Minister's decision and issued a mandamus for the Minister to consider the matter again according to law. While a lawful decision might still have the same outcome, the reality of the outcome on the visa holder must be confronted for the decision to be lawful (at [93]).

Corporations

Financial services and markets – whether defendants were carrying on a financial services business by issuing financial products – whether loan agreements were financial products

In *ASIC v Secure Investments Pty Ltd (No. 2)* [2020] FCA 1463 (14 October 2020) the Australian Securities and Investment Commission (ASIC) sought, among other relief, declarations that Secure Investments Pty Limited (company) and individuals associated with it carried on a financial services business without authorisation pursuant to an Australian Financial Services Licence (AFSL) in contravention of s911A of the *Corporations Act 2001* (Cth) *(Corporations Act)*. The company was not the holder of an AFSL. One of the issues was whether certain loan agreements entered into between the company and individuals were, in fact, in the nature of investments in a financial product.

Background

Loan agreements were entered into between the company and individuals or their superannuation funds over a period from 1 November 2014 to July 2019 (loan agreements). The loan agreements were in substantially the same terms. The amount of the loan, its repayment date and the applicable rate of interest were identified in a schedule to the agreements. The agreements otherwise contained standard terms and conditions which are ordinarily found in loan agreements.

The proceeds of the "loan funds" were used to invest in property development for which the "lenders" would receive varying rates of return in the form of "interest".

Under s765A of the *Corporations Act*, a "credit facility within the meaning of the regulations" is not a "financial product" for the purposes of Chapter 7. The expression "credit" for the purposes of r7.1.06 means a contract, arrangement or understanding under which one person incurs a deferred debt to another person and includes a financial benefit arising from or as a result of a loan (r7.1.06(3)).

ASIC contended that the loan agreements were not a "credit facility" as used in s765A because the definition in r7.1.06 excludes credit facilities if they are "financial products" (see ss763A and 763B of the *Corporations Act*). The arrangements between the investors and the company would be a facility through which a financial investment was made, and therefore

"financial products", if, in accordance with s763B:

a. the investors gave money or money's worth (the contribution) to the company (s763B(a)) and
b. the investors intended the company would use the contribution to generate a financial return, or other benefit, for them (even if no return or benefit was in fact generated) (s763B(a)(ii)) and
c. the investors had no day-to-day control over the use of the contribution to generate the return or benefit (s763B(b)).

Did the company contravene s911A of the Corporations Act?

Justice Derrington found that the facts supported the conclusion that the first and third elements identified above were satisfied. As to the second element, his Honour said that:

a. a mere loan agreement by which money is lent in return for its repayment together with interest is unlikely to satisfy the requirement that it was intended the contribution would be used by a borrower to generate a financial return for the lender;
b. the question of what was the intended use of the funds is to be answered in the context of all of the relevant circumstances, including what the investors were told about the transaction;
c. the following circumstances supported a conclusion that the arrangements between the parties was that the company would use the investors' funds to generate profits for them:
   i. public statements which the company made on its website and in brochures to the effect that it provided clients with investment options and profitable returns in respect of property development;
   ii. the rate of interest payable was identified as being between a range such as 7 to 10 per cent or 10 to 12 per cent. In the context of the terms of the loan agreements this lacked any rationality in a legal logical sense. However, if it was the expectation of the parties that the investor had directly invested in a project, the expressed range of percentages can be discerned as being the scope of the expected profit; and
   iii. from time to time the company sent correspondence to investors indicating that higher rates of return might be achieved in certain circumstances. This correspondence is consistent with the arrangement being in truth a managed investment rather that of only lender and borrower.

The Court concluded that the company was carrying on a financial services business by issuing financial products to investors. As the Company was not authorised pursuant to an AFSL to carry on that business, the Court found that it had contravened the prohibition in s911A of the *Corporations Act*.

Practice and procedure

Freezing order extending to assets overseas – whether enforcement of Australian judgment in foreign jurisdiction needs to be a 'realistic possibility' or 'not impossible'

Huang v Deputy Commissioner of Taxation [2020] FCAFC 141 (17 August 2020) concerned an appeal from Mr Huang against a decision in which the primary judge made freezing and asset disclosure orders which extended to assets outside of Australia in the People's Republic of China (PRC) and Hong Kong.

Background

Mr and Mrs Huang lived in Australia for several years. On 4 December 2018, Mr Huang left Australia for the PRC and his wife left nine months later. Following an audit of his tax affairs, the Deputy Commissioner issued to Mr Huang notices of amended assessment for several financial years and a notice of assessment of shortfall penalty assessing Mr Huang as liable for a total amount of approximately $140 million.

Having commenced proceedings for the recovery of the debt, the Deputy Commissioner subsequently applied for and was granted summary judgment against Mr Huang for the full amount as well as freezing orders and asset disclosure orders against both Mr Huang and his wife in relation to assets both in and outside of Australia.

In the appeal before the Full Court, Mr Huang challenged the freezing and asset disclosure orders insofar as they concerned his overseas assets. The primary judge had extended the freezing and asset disclosure orders to the overseas jurisdictions on the basis that enforcement of the Australian judgment overseas was "not impossible".

The Appeal

The Court (Besanko, Thawley and Stewart JJ) noted that the purpose of a freezing order as identified in r7.32 of the *Federal Court Rules 2011* is the prevention of the frustration or inhibition of the Court's process by seeking to meet a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied.

The Court determined that the appropriate test is whether there is a "realistic possibility that any judgment obtained by the plaintiff can be enforced against assets of the defendant in the place to which the proposed order relates". The Court said that such a test is consistent with the approach taken by the courts in determining what must be shown in terms of the risk of the removal of assets or the disposal of assets, matters to which a freezing order is directed. The test of "not impossible" used by the primary judge set the bar too low.

The Court held that there was no "realistic possibility" that the Deputy Commissioner's judgment debt would be enforceable in the PRC or Hong Kong.

Accordingly, leave to appeal was granted and the appeal allowed with the effect that the freezing and asset disclosure orders were confined to the assets held in Australia. ■

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FAMILY LAW JUDGMENTS

ROBERT GLADE-WRIGHT

Property

Treatment of deed of gift – Majority of High Court reaffirms wide discretion of trial judge

In *Hsiao v Fazarri* [2020] HCA 35 (14 October 2020) the High Court (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) upheld the Full Court's dismissal of a wife's appeal against property orders.

The parties' relationship began in August 2012. In 2014 the husband bought a property and gifted the wife a 10 per cent interest in it. In December 2014, the husband, under pressure from the wife, signed a transfer of land giving the wife a further 40 per cent interest.

The parties executed a deed of gift (deed) which provided for the husband to pay a sum to the wife's siblings in the event that she predeceased him while they remained joint tenants. The deed also provided that the payment should be taken into account if the parties separated or divorced (at [21]).

The parties married in August 2016. The marriage lasted 23 days. Each party subsequently sought property adjustment orders. The wife did not appear at the hearing. Cronin J severed the joint tenancy and ordered the wife to transfer her interest in the property to the husband in exchange for $100,000, finding that the husband's transfer was not a gift (at [36]).

The majority said at [53]:

"His Honour is not to be taken to task for not making a close examination of the facts to determine whether the transfer of the 40 per cent interest was voidable by reason of vitiating factors . . . His Honour made no such finding . . . The trial was the place to adduce such evidence and put such arguments as might favour a different finding as to the parties' respective financial contributions . . . The trial was not some preliminary skirmish which the appellant was at liberty to choose not to participate in without consequence. Her right of appeal was a right to have the Full Court review whether the primary judge's discretion . . . miscarried . . . It was not an opportunity for the appellant to make a case that she chose not to make at the trial. The Court is invested with a wide discretion . . . to make such order as it considers appropriate . . ."

Appeal

Consent orders cannot be appealed on the merits – Father sought to withdraw his consent

In *Melville & Melville (No. 3)* [2020] FamCAFC 231 (18 September 2020) Kent J, sitting in the appellate jurisdiction of the Family Court of Australia, dismissed with costs a father's appeal from final orders made by consent on the sixth day of trial.

The Court said (from [12]):

". . . In *Robinson & Willis* [[1982] FamCA 16] Fogarty J observed:

'. . . [A]s a consent order is made as a consequence of the consent of the parties to the Court making that order and not of an adjudication by the Court, the order may not be challenged by an appeal which is directed to the *correctness* of that order . . . it cannot be appealed against on the merits . . .' (at [12]).

". . . [T]he application of pressure upon a client to compromise litigation is recognised as a necessary and proper part of the function of legal representatives . . . (at [33]) .

". . . [I]f a client under no legal disability has been so overborne by his legal representative that such representative has breached the duty which he owes to the client, then the client's proper remedy lies elsewhere . . ." (at [34]).

As to the father's argument that he withdrew his consent by email to the Judge's chambers after the orders were made but before they were entered, the Court said at [71]:

". . . It would defy common sense and the practical realities of the demands upon the already over-burdened FCC . . . to impose some additional requirement upon its Judges to monitor, after orders are made in Court, the potential operation of r16.05(1) of the FCC Rules by reference to, not an application filed, but to informal communications that might be received . . . pending the entry of orders in the normal course . . ."

Children

Medical procedures – Gender dysphoria – Adolescent found to be *Gillick* competent

In *Re: Imogen (No. 6)* [2020] FamCA 761 (10 September 2020) Watts J granted a father's application for the court to authorise the commencement of stage 2 hormone treatment for his 16-year-old daughter Imogen (at [6]). The mother disputed the diagnosis by Imogen's doctors that she was *Gillick* competent and opposed hormone therapy.

The Court said (from [35]):

". . . a) If a parent or a medical practitioner of an adolescent disputes:

i. The *Gillick* competence of an adolescent; or
ii. A diagnosis of gender dysphoria; or
iii. Proposed treatment for gender dysphoria,

an application to this Court is mandatory;

b) . . . [O]nce an application is made, the court should make a finding about *Gillick* competence of an adolescent. If the only dispute is as to *Gillick* competence, the court should determine that dispute by way of a declaration, pursuant to s34(1) of the Act . . .;

c) Notwithstanding a finding of *Gillick* competence, if there is a dispute about diagnosis or treatment, the court should:

i. Determine the diagnosis;
ii. Determine whether treatment is appropriate . . .; and
iii. Make an order authorising or not authorising treatment pursuant to s67ZC of the Act . . .;

d) If a parent or . . . guardian does not consent to an adolescent's treatment for gender dysphoria, a medical practitioner . . . should not administer treatment to an adolescent . . . without court authorisation . . . (at [35]).

"In circumstances where there is a dispute about diagnosis, consent or the nature of treatment, an application to the court is mandatory (see *Re Jamie* [2013] FamCAFC 110 ('*Re Jamie*') . . . (at [38]).

"In this case, there is dispute about treatment and the form it should take. Whilst . . . what was said in *Re Jamie* was strictly *obiter dicta*, it was well considered . . . I conclude that I should follow the conclusions of Bryant CJ in *Re Jamie* . . . in respect of the approach to be taken when treatment is disputed. Given there is a dispute about what form treatment should take, this court should determine that dispute pursuant to s67ZC . . .. [T]he court should have regard to the best interests of the child as the paramount consideration and give significant weight to Imogen's views . . .") at [59]).

Children

Risk assessment at interim hearing – Mother could not cope with cost of professional supervision

In *Canfeld & Falkins* [2020] FCCA 2570 (9 September 2020) Altobelli J heard a parenting case in which a primary issue was the choice of supervisor for the mother's time with the children.

The three children of the relationship (aged 16, 11 and eight) lived with the father and spent time with their mother on a supervised basis. The mother sought that her time be supervised by "Mr L". The independent children's lawyer supported this position. The father sought a professional supervisor.

The Court said at [20]:

". . . [67] 'In *Deiter & Deiter* [2011] FamCAFC 82 . . . the Full Court suggested that s60K (now s67ZBB) . . . signalled a clear policy imperative of ensuring that allegations of family violence are treated seriously and dealt with expeditiously. In an ideal world, these allegations could be dealt with at a discreet issues hearing, or an expedited final hearing. In reality, in a registry of this court where almost all of the cases involve allegations of family violence, neglect, abuse, drugs or alcohol and mental health, neither a discreet issues hearing, nor expedition is possible . . .

"[70] The Full Court in *Enmore & Smoothe* [2014] FamCAFC 131 at [39] explained that a finding of risk of abuse may be reached on the basis of evidence which falls short of that required for a finding that abuse has occurred. However, that is not to suggest that evidence aimed at establishing a possible risk of abuse should not be subject to careful scrutiny, since serious consequences can also flow from a finding that a child is at risk of abuse."

The Court continued:

"For present purposes the real issue is under what circumstances should the children spend time with their mother. From the Court's perspective, a way of looking at this issue is to ask this question: what risk of harm to the children cannot be addressed by supervision by Mr L that could be addressed by supervision by a professional supervised contact service? . . . (at [23]).

"In terms of supervised time . . . there are practical issues that cannot be ignored. The Court accepts the mother's case that continuing to pay for private professional supervision is not sustainable. The Court appreciates that private non-professional supervision such as Mr L means that there is no professional objective person and no written report . . . It is ultimately a balancing exercise and one which the Court believes can be achieved by using Mr L" (at [31]).

The Court made orders for the mother to spend time with the children, supervised by Mr L. ■

Robert Glade-Wright, a former barrister and accredited family law specialist, is the founder of The *Family Law Book*, a looseleaf and online service: see www.thefamilylawbook.com.au. He is assisted by accredited family law specialist **Craig Nicol**. References to sections of an Act in the text refer to the *Family Law Act 1975* (Cth) unless otherwise specified. The full text of these judgments can be found at www.austlii.edu.au. The numbers in square brackets in the text refer to the paragraph numbers in the judgment.

SUPREME COURT JUDGMENTS

DR MICHAEL TAYLOR

Criminal law – bail pending appeal – exceptional circumstances

Zirilli v The Queen [2020] VSCA 261
(2 October 2020) No S EAPCR 2020 0053

This case concerns an application for bail pending appeal by Saverio Zirilli. The applicant's underlying appeal was against his conviction, on the grounds that a substantial miscarriage of justice had occurred from Victoria Police's use of defence counsel Nicola Gobbo as a police informer to secure his conviction (at [1]). This application for bail pending appeal was heard in September 2020, in circumstances where the applicant's appeal against conviction may not be heard for some considerable time (at [1]-[2]).

In 2011, the applicant pleaded guilty to three charges: conspiracy to traffic a commercial quantity of a controlled drug (MDMA); trafficking in a commercial quantity of a controlled drug (MDMA); and attempting to possess a commercial quantity of a controlled drug (cocaine) (at [2]). The applicant was sentenced to 26 years imprisonment with a non-parole period of 18 years (at [3]-[4]).[1] This sentence was subsequently upheld by the Court of Appeal[2] and the High Court of Australia.[3]

In considering this application for bail pending appeal, McLeish and Weinberg JJA set out the background facts concerning the applicant's offences and the involvement of Ms Gobbo in his convictions (at [6]-[32]). The applicant, and others, were key persons of interest in drug trafficking investigations (at [8]-[13]); these included the Australian Federal Police's (AFP) Operation Bootham Moko which concerned the 2007 importation of more than 15 million MDMA tablets (concealed in tomato tins) from Naples, Italy to Melbourne (at [10]).

In 2007, Rob Karam, one of the persons of interest in Operation Bootham Moko, was on trial on charges relating to a 2005 importation of MDMA (at [14]). Ms Gobbo appeared as junior counsel for Mr Karam, who was acquitted by the jury (at [14]). At one point during the trial, Ms Gobbo was provided with a number of documents for safekeeping. Included in these documents was a bill of lading for a forthcoming shipment of tinned tomatoes from Italy to Melbourne (at [15]). Ms Gobbo provided copies of these documents to her handlers at Victoria Police, and was instructed to obtain further information from Mr Karam and his associates (at [16]).

Evidence before the Royal Commission into the Management of Police Informants indicates that without Ms Gobbo's information, the tomato tins shipment would not have come under suspicion (at [20]). Further, it was not until Ms Gobbo provided her handlers with further information about Mr Karam and his associates that authorities were aware of the applicant's identity or involvement (at [21]). Ms Gobbo's information was shared with Victoria Police's Drug Taskforce and then with the AFP, with the shipment seized and surveillance conducted on persons of interest (including the applicant) (at [22]-[25]).

On 8 August 2008, the applicant (along with others) was arrested and charged with the offences that gave rise to the current appeal (at [28]). As above, the applicant was charged with three drug offences; the first charge related to the tomato tins importation, where the second and third charges stemmed from subsequent trafficking of MDMA and cocaine, the proceeds from which were intended to repay the applicant's debt to the Italian suppliers of the MDMA seized in the tomato tin importation (at [26]). The second and third charges arose from Operation Inca, a joint investigation by the AFP, Victoria Police, the Australian Crime Commission and the Australian Tax Office (at [10]).

In an audio recording of a conversation with Victoria Police in September 2008, Ms Gobbo told her handlers that she would be "morally, ethically and legally conflicted" in representing "everyone" arrested on 8 August 2008 (at [29]). Shortly thereafter, Ms Gobbo appeared on behalf of the applicant at a bail hearing but did not ultimately appear for the applicant on other occasions or his eventual plea (at [30]-[31]).

On this application for leave to appeal against conviction, the applicant sought production of documents by Victoria Police, the AFP and others under s317 of the *Criminal Procedure Act 2009* (Vic) (at [34]-[35]). In addition to information about Ms Gobbo, the applicant also sought documents relating to any involvement by Joseph Acquaro (the applicant's solicitor throughout the matter, including in the appeal against sentence in the High Court) (at [32] and [35]). In response, the Chief Commissioner of Victoria Police sought a ruling that documents pertaining to Mr Acquaro (and whether he had been an informer in relation to the applicant) were subject to public interest immunity (at [37]).

Victoria Police's public interest immunity claim, and the applicant's response, will be heard by a differently constituted Court in the near future. This application for bail pending appeal proceeded on the basis of Ms Gobbo's involvement giving rise to exceptional circumstances for the purposes of bail (at [38]).

On behalf of the applicant, it was submitted that the applicant should be granted bail based on the exceptional circumstances that arose from the strong prospects of his appeal, his acceptably low risk of absconding and the delay in hearing the appeal from the need to resolve the issues around Mr Acquaro (at [39]). It was conceded that if the Court was satisfied only of the appeal being reasonably arguable then bail must be refused (at [40]).

In the Court's view, the applicant's proposed appeal will advance a novel argument, making this provisional assessment of the likely strength of the argument more difficult (at [45]). This proposed appeal argument is based on the fundamental inconsistency between Ms Gobbo's duties as an officer of the Court

and her status as a registered human source for Victoria Police which gave rise to "an inescapable conflict of duty" that had been concealed from the Court (at [42]). The abuse of the Court's process that resulted was said to give rise to a substantial miscarriage of justice based on:

- an officer of the Court had provided the foundation for the case against the applicant, beginning from the first charge relating to the tomato tin importation and causally linked to the two subsequent charges
- if the situation regarding Ms Gobbo was known before trial, the applicant would have been granted a permanent stay of all charges (at [43]-[44]).

The Court was prepared to accept that the argument had reasonable prospects of success in respect of the first charge; however, whatever the strength of those prospects on the first charge, the position was different on the second and third charges (at [46]). It was the Court's view that the impact of Ms Gobbo's identified conflict on the second and third charges was remote, and while "it may be reasonably arguable that the position of conflict identified by the applicant infected his convictions on those charges as well, we do not think, on the present material, that the prospects can be placed any higher than that" (at [46]).

Given that the second and third charges represented 17 years of a total sentence of 26 years, even a successful appeal in relation to the first charge would likely leave a non-parole period of several years still to run (at [47]). In this regard, the current application for bail pending appeal was said to be very different to that in *Cvetanovski v The Queen*[4] where the non-parole period had almost expired (at [47]).

As a result, the applicant had not established that the prospects of the proposed appeal were so strong as to require bail, where grant of bail "would see the applicant released during a non-parole period being served on charges as to which the prospects of success on appeal are so far shown to be no more than reasonable," and so bail was refused (at [48]-[50]). ■

Dr Michael Taylor is a barrister at the Victorian Bar (email: michael.taylor@vicbar.com.au). The numbers in square brackets in the text refer to the paragraph numbers in the judgment. The full version of this judgment can be found at www.austlii.edu.au.

1. *Director of Public Prosecutions (Cth) v Barbaro* [2012] VSC 47.
2. *Barbaro v The Queen* [2012] VSCA 288.
3. *Barbaro v The Queen* [2014] HCA 2.
4. [2020] VSCA 126.

LEGISLATION UPDATE

New Victorian 2020 Assents

As at 20/10/2020

2020 No. 25 COVID-19 Commercial and Residential Tenancies Legislation Amendment (Extension) Act

2020 No. 26 Retail Leases Amendment Act

New Victorian 2020 Regulations

As at 20/10/2020

2020 No. 94 Magistrates' Court (Miscellaneous Civil Proceedings) (Arbitration Costs Amendment) Rules

2020 No. 95 Residential Tenancies (COVID-19 Emergency Measures) Amendment Regulations

2020 No. 96 Road Safety (Vehicles) Interim Regulations

2020 No. 97 Gender Equality Regulations

2020 No. 98 Supreme Court (Chapters I and II Judicial Registrars, Admission to Legal Profession and Public Notaries Amendment) Rules

2020 No. 99 Public Health and Wellbeing Further Amendment (Infringement Offences) Regulations

2020 No. 100 Local Government (Electoral) Further Amendment Regulations

2020 No. 101 Building Amendment (Social Housing Building Permit Levy Exemption and Other Matters) Regulations

2020 No. 102 Bus Safety Regulations

2020 No. 103 Transport (Compliance and Miscellaneous) (Ticketing) Further Amendment Regulations

2020 No. 104 Transport (Safety Schemes Compliance and Enforcement) (Infringements) Amendment Regulations

2020 No. 105 Road Safety (Drivers), (General) and (Vehicles) Interim Amendment Regulations

2020 No. 106 Occupational Health and Safety Amendment (Workplace Incidents Consultative Committee) Regulations

2020 No. 107 COVID-19 Omnibus (Emergency Measures) (Commercial Leasesand Licences) Miscellaneous Amendments Regulations

2020 No. 108 Port Management (Port of Melbourne Safety and Property) Regulations

2020 No. 109 Transport (Compliance and Miscellaneous) (Infringements) Amendment Regulations

2020 No. 110 Subordinate Legislation (Drugs, Poisons and Controlled Substances (Precursor Supply) Regulations 2010) Extension Regulations

2020 No. 111 Planning and Environment Amendment (Review Timing) Regulations

New Victorian 2020 Bills

As at 20/10/2020

Justice Legislation Amendment (Supporting Victims and Other Matters) Bill 2020

Marine Safety Amendment (Better Boating Fund) Bill 2020

New Commonwealth 2020 Assents

As at 20/10/2020

2020 No. 87 Aboriginal Land Rights (Northern Territory) Amendment (Jabiru) Act

2020 No. 88 Australian Citizenship Amendment (Citizenship Cessation) Act

2020 No. 89 Payment Times Reporting (Consequential Amendments) Act

2020 No. 90 Primary Industries (Customs) Charges Amendment (Dairy Cattle Export Charge) Act

2020 No. 91 Payment Times Reporting Act

2020 No. 92 Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Act

New Commonwealth 2020 Regulations

As at 20/10/2020

Civil Aviation Legislation Amendment (Flight Operations —Miscellaneous Amendments) Regulations 2020

Competition and Consumer (Industry Codes—Food and Grocery) Amendment Regulations 2020

Corporations and Bankruptcy Legislation Amendment (Extending Temporary Relief for Financially Distressed Businesses and Individuals) Regulations 2020

Corporations and Bankruptcy Legislation Amendment (Extending Temporary Relief for Financially Distressed Businesses and Individuals) Regulations 2020

Fair Work Amendment (Jobkeeper Payments) Regulations 2020

Family Law Amendment (Powers Delegated to Registrars) Rules 2020

Federal Circuit Court Amendment (Powers Delegated to Registrars) Rules 2020

Financial Framework (Supplementary Powers) Amendment (Agriculture, Water and the Environment Measures No. 6) Regulations 2020

Financial Framework (Supplementary Powers) Amendment (Health Measures No. 5) Regulations 2020

Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 4) Regulations 2020

Financial Framework (Supplementary Powers) Amendment (Education, Skills and Employment Measures No. 5) Regulations 2020

Financial Framework (Supplementary Powers) Amendment (Education, Skills and Employment Measures No. 6) Regulations 2020

Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers) (Mortgage Brokers) Regulations 2020

Health Insurance Legislation Amendment (Bulk-billing Incentive (No. 2)) Regulations 2020

Migration Amendment (COVID-19 Concessions) Regulations 2020

Mutual Recognition Amendment (WA Container Deposit Scheme) Regulations 2020

National Consumer Credit Protection Amendment (Responsible Lending Obligations) Regulations 2020

National Consumer Credit Protection Amendment (Responsible Lending Obligations) Regulations 2020

Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Cross-boundary Greenhouse Gas Storage) Regulations 2020

Ozone Protection and Synthetic Greenhouse Gas Management Amendment (HFC Quota Allocation—Grandfathered Quota) Regulations 2020

Ozone Protection and Synthetic Greenhouse Gas Management Amendment (HFC Quota Allocation—Grandfathered Quota) Regulations 2020

New Commonwealth 2020 Bills

As at 20/10/2020

Aged Care Legislation Amendment (Financial Transparency) Bill 2020 [No. 2]
Appropriation (Parliamentary Departments) Bill (No. 1) 2020-2021
Appropriation Bill (No. 1) 2020-2021
Appropriation Bill (No. 2) 2020-2021
Bankruptcy (Estate Charges) Amendment (Norfolk Island) Bill 2020
Economic Recovery Package (JobMaker Hiring Credit) Amendment Bill 2020
Export Market Development Grants Legislation Amendment Bill 2020
Judges' Pensions Amendment (Pension Not Payable for Misconduct) Bill 2020
National Redress Scheme for Institutional Child Sexual Abuse Amendment (Technical Amendments) Bill 2020
Native Title Amendment (Infrastructure and Public Facilities) Bill 2020
Royal Commissions Amendment (Confidentiality Protections) Bill 2020
Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020
Social Security Amendment (COVID-19 Supplement) Bill 2020
Territories Legislation Amendment Bill 2020 ■

This summary is prepared by the LIV Library to help practitioners keep informed of recent changes in legislation.

PRACTICE NOTES

Law Institute of Victoria

COVID-19 Hub – www.liv.asn.au/COVID19

The LIV has established a COVID-19 Hub for the profession to ensure support for members and the legal profession during the pandemic. It contains all actions the LIV is taking to deliver continuity of services, tools and guides for members including practice contingency planning, working from home advice, current information from the courts, the regulator and the broader legal sector, as well as other useful information and advice. It is updated regularly.

LIV FAQs

Information and advice from the courts

- Administrative Appeals Tribunal
- Children's Court
- County Court
- Court Services Victoria
- Family Court of Australia
- Federal Circuit Court of Australia
- Federal Court of Australia
- Magistrates' Court
- Supreme Court
- VCAT
- Other

Information for the profession

- COVID-19 State of Disaster - Key information for the profession
- Australian Registrars National Electronic Conveyancing Council (ARNECC)
- Corrections Victoria
- Department of Justice and Community Safety Victoria
- Fair Work Australia
- Fair Work Commission
- Foreign Investment Review Board
- JobWatch
- Judicial College of Victoria
- Law Institute Victoria
- Legal Practitioners' Liability Committee (LPLC)
- National COVID-19 Coordination Commission
- Safe Work Australia
- Victoria Legal Aid
- Victoria Police
- Victorian Bar
- Victorian DHHS
- Victorian Small Business Commission
- VLSB+C
- Other Resources

LIV services and support

- Quick Contacts
- Your Wellbeing
- Communications and LIV's response
- Access to Member Facilities
- LIV Activities and CPD
- Member Services & Support (including Practice Contingency Planning)
- Legal Referral Service

Government stimulus and support

- Commonwealth Support for Business
- Victorian Government Response
- Commonwealth Support for Individuals
- Victorian Government Support for Individuals

Family Court of Australia and Federal Circuit Court of Australia

Notice of child abuse, family violence or risk

Changes have arisen as a result of the *Family Law (Notice of Child Abuse, Family Violence or Risk) Rules 2020* and the *Federal Circuit Court (Notice of Child Abuse, Family Violence or Risk) Rules 2020*.

Initiating application kit and form
The instruction pages of the kit were updated to reflect changes to the notice of child abuse, family violence or risk.

The notice to respondent(s) on page 10 was updated to include references to the new notice and additional details added about attending hearings.

Application for consent orders kit and form
The instruction pages of the kit were updated to reflect changes to the notice of child abuse, family violence or risk.

The note on page 10 at Item 25 was changed to reflect the requirement to file the new notice when seeking parenting orders.

Annexure to proposed consent parenting order (current case) form
Instructions and note at Part B were amended to reflect change to the notice of child abuse, family violence or risk.

CASH RATE TARGET

From 6 December 2007 law practices whose matters are governed by the *Legal Profession Act 2004* cannot use the penalty interest rate for their accounts. The maximum rate is the cash rate target plus 2 per cent. The cash rate target is currently 0.10 per cent (from 4 November 2020). To monitor changes between editions of the *LIJ*, practitioners should check www.rba.gov.au/statistics/cash-rate.

PENALTY AND FEE UNITS

For the financial year commencing 1 July 2020, the value of a penalty unit is $165.22. The value of a fee unit is $14.81 (*Government Gazette* G16, 23 April 2020).

PENALTY INTEREST RATE

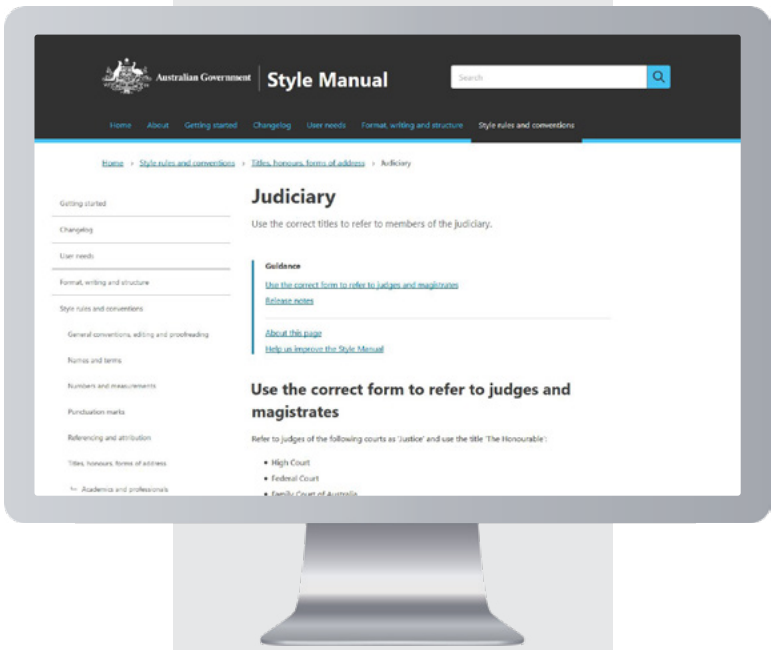
The penalty interest rate is 10 per cent per annum (from 1 February 2017). To monitor changes to this rate between editions of the *LIJ*, practitioners should check the Magistrates' Court of Victoria website.

Response to initiating application kit
Updates were made to the instructions pages of the kit but no changes to the form itself.

All the updated forms and kits are available on the Court websites. ■

National Communication, Federal Court of Australia, Family Court of Australia, Federal Circuit Court of Australia, 2 November 2020.

IN_SITES



Australian Government Style Manual, 7th edition

https://www.stylemanual.gov.au/

First published in print in 1966, this seventh edition of the Australian Government Style Manual is now available online and free. The manual provides all you need to create clear and consistent communications. Tabs include style rules and conventions, format writing and structure. Updated topics in this latest edition include inclusive language, gender and sexual diversity and age diversity. Of particular interest to the legal profession is the correct form of address for current and retired judiciary both in writing and in person.

Melbourne Law School – Centre for AI and Digital Ethics

https://law.unimelb.edu.au/centres/caide

Bringing together expertise from various faculties at the University of Melbourne, the Centre for AI and Digital Ethics looks at the ethical, regulatory and legal issues concerning the use of artificial intelligence and technologies to assist in holding governments and organisations to the appropriate ethical standards. There is a short video where co-director Professor Jeannie Paterson explains how interdisciplinary collaboration and digital technology can help us now and into the future. You can also subscribe to the mailing list for regular updates.

Sentencing Advisory Council: Children Held on Remand in Victoria report

https://www.sentencingcouncil.vic.gov.au/publications/children-held-on-remand-in-victoria

The Sentencing Advisory Council released a report at the end of September on the sentencing outcomes of children held on remand in Victoria. The report, "Children Held on Remand in Victoria: A Report on Sentencing Outcomes", looks at the demographics of the children, any previous criminal history, the charges laid and the case outcomes. For a quick overview and comparison of trends over the years, there is a two-page fact sheet. There is also a video of the launch where chair professor Arie Freiberg and the project team provide an overview of the key findings.

Upskill my business

https://upskill.business.vic.gov.au/

The Business Victoria website provides business owners with resources to develop, grow and successfully run their own enterprises. Business Victoria recognises the impact of COVID-19 on small businesses and created "Upskill my business" as a direct response; a webpage that connects business owners with free online courses that are relevant to their individual situations. Some of the topics covered include business resilience, running a business from home, cash flow management and marketing. The courses are available in various formats (webinars, short courses or online information) and are offered by experienced education providers.

House of Representatives Infosheets

https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets

The Parliament of Australia has published a series of 24 information sheets that discuss in detail various aspects and workings of the parliament. Located under the "Powers, practice and procedure" tab, the sheets cover a range of topics including parliamentary privilege, basic legal expressions and glossary of procedural terms. The series is update and each sheet includes a list of additional resources offering further and authoritative information on the same topic.

Legal Practitioners' Liability Committee website

https://lplc.com.au/

The Legal Practitioners' Liability Committee (LPLC) has redesigned and launched its website, improving functionality and accessibility for practitioners. The site allows for simple navigation and greater search capabilities. Practitioners can search by keywords or areas of law or browse through prompts and quick links, with an easy to use dropdown menu. The LPLC has also introduced online and fillable forms for convenience and efficiency. ■

IN_PRINT

This month's books cover war criminals, selected essays and speeches of the Hon Robert French, Mark Leibler's life, true crime, crime fiction, a lawyer's journey in Papua New Guinea and Victor Windeyer's legacy.

The Ratline: Love, lies and justice on the trail of a Nazi fugitive

Philippe Sands, 2020, Hachette Australia, pb $35

In writing about the Nuremberg trials and the human rights laws that evolved from them, Philippe Sands' *East West Street* discovered his grandparents, their life in Poland through the war years and the loss of many relatives in death camps. *The Ratline* is a sequel on the man responsible for the Polish genocide. As head of Galicia (now part of Ukraine) after the German invasion, Otto von Wächter oversaw three different arms of government involved in the mass killings.

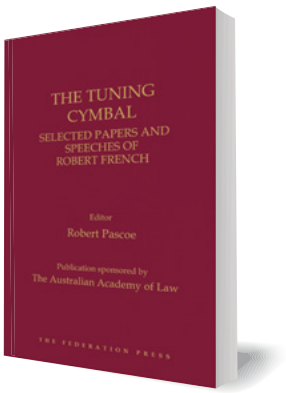
The Ratline refers to a loose network that helped war criminals escape. It included Nazi sympathizers in the Catholic church.

The heart of the book is a meticulous investigation into Wächter's life and post war attempt to escape using the Ratline, based on official records and wife Charlotte Wächter's letters and diaries. Sands' research is painstaking and if ever in doubt, he re-examines. His investigation into Wächter's death – murder or natural causes – is compelling.

Wächter is strangely elusive. Why did Otto become a youthful Nazi? What made him embrace the killing machine? What justified his terrible acts? There are no clear answers but there are clues. There was a yearning by Germans to recover territory lost after WWI and undisguised anti-semitism in Austria. At law school Wächter became politically engaged and was an early supporter of Adolf Hitler. Later he joined a plot to overthrow the Austrian government and was on the run until Germany marched into Austria. After that, Hitler rewarded him with high offices in Austria and Poland.

This is a fascinating and important history and I recommend reading this book.

Sharman Grant, Compliance & Risk Services



The Tuning Cymbal – Selected papers and speeches of Robert French

Robert Pascoe (ed), 2020, The Federation Press, hb $160

In the 120 years of Australian federation, there have been 13 chief justices presiding over the High Court. They have averaged almost a decade each in their tenure. Most have been reluctant to participate in general community discussions. This book deals with an exception to that rule.

The Hon Robert French is an extraordinary jurist. The only Western Australian to be appointed Chief Justice of the High Court, he served in that position for more than eight years. But he had already served on the Federal Court for 22 years.

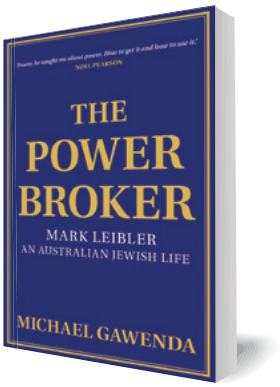
Even after his retirement from the High Court, he served on the Hong Kong Court of Final Appeal, the Singapore International Commercial Court and the Dubai International Financial Centre Court. He continued to deliver addresses to a number of distinguished international bodies.

On the High Court, he fostered collegiality. For example, half of the 48 decisions delivered in 2010 were unanimous.

This book collects a variety of essays and speeches delivered by French on numerous topics, including native title, recognition of Indigenous people, equal justice, cultural diversity, the rule of law and access to justice. It also covers identity in the administration of justice, advocacy, constitutional law and sovereignty, as well as citizenship, law reviews, statutory interpretation, comparative law, competition law, trade practices, commercial dispute resolution, arbitration, public policy, the judicial system, judicial exchange and legal education.

This book is a worthy testimonial to one of Australia's most distinguished jurists. It stimulates thought about the legal system and associated topics.

Graham Fricke, retired County Court judge



The Power Broker: Mark Leibler – an Australian Jewish life

Michael Gawenda, 2020 Monash University Publishing, hb $40

In the course of Australian history, the small Melbourne Jewish community has made a significant contribution to our public and philanthropic life. Among the many names which come readily to mind are Sir John Monash, Sir Isaac Isaacs and Sidney Myer.

To this list of names will surely be added that of Mark Leibler, for his passionate commitment to the cause of Indigenous Australians.

Leibler's deep commitment and involvement in the cause of Indigenous Australians is one of the highlights of this absorbing and superbly written biography.

The book traces Leibler's life as a member of Melbourne's Orthodox Jewish community, his commitment to Israel and his involvement and leadership of Jewish organisations such as The Zionist Federation of Australia and the Australia/Israel and Jewish Affairs Council. This involvement was not without controversy in Jewish circles and the author explores many of these.

Leibler also rose to prominence as one of Australia's leading tax lawyers in the firm that he became a partner and then principal of, Arnold Bloch Leibler.

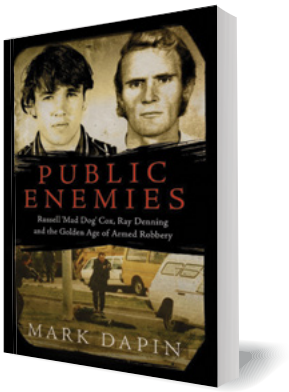
His prominence in Jewish organisations and as a tax lawyer brought him into contact with and gave him influence and friendships with prime ministers and politicians of all parties.

Leibler's deep commitment to and passion for the causes and advancement of Indigenous Australians came slowly, from an initial pro bono involvement in a native title claim by the Yorta Yorta people, but then developed rapidly. His commitment to Indigenous causes had its roots in, to quote Marcia Langton at p208: "that his own history, being Jewish, gave him a great understanding of the genocide of Indigenous Australians. When I was younger I thought nobody else could understand the Aboriginal predicament, but you know I've changed my mind about that. Mark understood".

And it was his influence with politicians which so aided the cause of Indigenous Australians. John Howard appointed him to Reconciliation Australia and Julia Gillard appointed him to chair the Expert Panel on Constitutional Recognition of Indigenous Australians. All agreed it was his political contacts which were crucial to the effective working of these bodies.

In *The Power Broker* Mark Leibler has found a biographer who does full justice to his life. The book is highly recommended.

Scott Whitechurch, adjunct lecturer, College of Law, Melbourne



Public Enemies

Mark Dapin, 2020, Allen & Unwin, pb $33

Another true crime book. Another subject covered ad nauseum – to the point that most who have even a fleeting interest in Australian criminal history can recall something of the tales of Russell Cox and Ray Denning, of the Great Bookie Robbery, of the counter jumping stick up artists of the 1960s, '70s and '80s.

In an age where ho-hum Australian podcasts (yes, the NYT-owned Serial still trumps our middling imitations) and infomercial quality television are king, it's admirable that there are still scribes out there making an essay of the exploits of, dare I say it, proper crooks.

So why bother with this one?

A number of features set Dapin's book apart. The thoroughness of his research is undeniable. He doesn't write with the breathless admiration for law enforcement, nor the smugness of others.

He understands that those to whom evil is done do evil in return. Take this observation: "Many of the crims had grown up getting f. . .'ed and flogged. Older, bigger, stronger men had been knocking them into shape almost since the day they were born".

But you can't help feel that Dapin is lacing his prose with profanity in an effort to be one of the boys. Without the machismo and wannabe attitude, he might actually have produced a compelling study of the men at the centre of his story. Perhaps, in an age of tough on crime political agendas, his exposition of the brutality and pointlessness of the Victorian penal system would have hit a higher target.

Adam Chernok, barrister

Electric Blue

Paul F Verhoeven, 2020, Viking, pb $35

This is a crime novel about a forensic investigator set in the northern beaches of Sydney in the 1980s.

Paul interviews his father John about his life as a policeman in the New South Wales Police Force, and how to look for clues at some of the worst crime scenes he attended.

John was born for service. What would have happened if he had decided to do something else? Paul asks. "Dad shakes his head. 'But I didn't do that. I was a police officer.'"

Things heat up. With bikies and dogs and crooks and police and sometimes all at the same time.

"John could see the muscles beneath the fur, coiled like pistons, paws ready to hit the ground running. Yes, John, thought. Paranoia aside, fear aside, it is coming right for me. It's still a way off, but it'll be here in seconds flat. John turned and ran.'

This is a compelling read, refreshing, in a time when it is so hard to know who to distrust. It delves into the father-son relationship and also looks at what life was like for his mother – one of the first female members of the force.

I look forward to a TV series.

Tasman Fleming, barrister.

The Chronicle of a Young Lawyer: A legal journey in the Territory of Papua and New Guinea

Kerry Dillon, 2020, Hybrid Publishers, pb $35

This is a chronicle of the author's two years as a young lawyer in TPNG in 1969-71 in the Crown Law Department and the Office of the Public Solicitor, travelling on circuit with the (then) Supreme Court, defending the "locals".

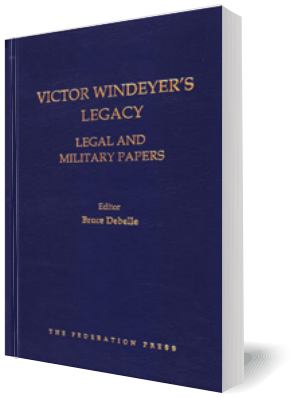
It was a time when Australian law (and a little UK law) applied in PNG, with the Queensland Criminal Code forming the basis of criminal law. Judges and lawyers came from Australia and New Zealand.

Dillon takes the reader on circuit with him, providing the background and some history for each circuit, describing many of the cases in which he was involved and assessing their resolution. In addition to descriptions of the linguistic, procedural and other challenges for both the young lawyer and the legal system, there are great insights into the customs, practices and relationships of the local people in different areas. Along the way there is plenty of local colour and some anecdotes about colleagues.

But this is much more than a diary. Always in the background are the politics of a developing nation moving towards independence and Australia's role in that process. The stories of unrest on the Gazelle Peninsula (Rabaul), arising from agitation for proper land rights and political representation by the Mataungan Association and some future leading politicians, and Dillon's role in representing those charged in 1969 and 1970, presage the murder of Jack Emanuel, District Commissioner, in August 1971. The manoeuvring behind the scenes by the Administrator, David Hay, with John Gorton and the later pressure also on Gough Whitlam to grant independence are described with new insights.

This is an important book, because the information it provides is not available elsewhere in convenient form. It is well-researched and illustrated with photographs. It is a riveting and enjoyable read for a general audience, particularly those with connections with PNG.

Nicholas Cowdery AO QC



Victor Windeyer's Legacy: Legal and Military Papers

Bruce Debelle (ed), 2019, The Federation Press, hb $120

This is a collection of papers and speeches by Sir Victor Windeyer, a justice of the High Court in the Dixon and Barwick courts from 1958-1972. It is edited by Bruce Debelle, Windeyer's associate in 1961 and a former judge.

Windeyer had a distinguished career in law and in the military with action in World War II at Tobruk, El Alamein, New Guinea and Borneo and rose to Brigadier and later Major-General. He made an unsuccessful bid for Senate pre-selection in 1949.

He graduated from Sydney Law School, and was also a legal historian with an MA in history and the author of *Essays on Legal History*. His historical research was outstanding and was based on original hard copy sources before the days of IT which sometimes enriched his judgments.

The 27 papers and speeches in this book are from 1934-1979 in five areas:

- military papers (including El Alamein, war memorials, Benghazi)
- universities (degree ceremony, Faculties of Arts)
- law and legal history (Privy Council appeals – which he did not want to cut, responsible government, contempt of court, federation)
- obituaries (Field Marshall Montgomery, Justices Roper and Riley)
- an after-dinner speech at the British Empire Association.

Some of the language has dated, with words like "malingerer" and "King's Service". Writing was not gender neutral in those days, and there are only two women in the index and at least three others are unnamed in the text as "wife".

There is an excellent bibliography, which indicates that Windeyer published inter alia seven articles in the *ALJ* from 1927-1974. (One is an article on why members of the High Court are justices and not judges.) There is an index of seven pages which helps to navigate the wide-ranging topics in this interesting book.

Windeyer is now also remembered for Windeyer Chambers in Sydney, named in his memory and opened by Windeyer a few years before his death in 1987. ■

Paul Latimer, adjunct professor, Swinburne Law School

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Online Resources

Anti-money laundering
Buchanan, Kelly, Australia: Agreement on Record Penalty for Breaches of Anti-Money Laundering Law, Law Library of Congress. Global Legal Monitor, 2020 (Online)

Asia – business structures
Doing Business in Asia Pacific guidebook, International Bar Association, 2020 (Online)

Citizenship – law reform
Buchanan, Kelly, Australia: Bill Creating New Process for Citizenship Cessation Based on Involvement in Terrorism Enacted, Law Library of Congress. Global Legal Monitor, 2020 (Online)

Disabled persons – law reform
Victorian bill to implement the National NDIS Worker check, TimeBase, 2020 (Online)

Elder abuse – finance – risk assessment
Best practice guide for legal practitioners in relation to elder financial abuse, Law Council of Australia, 2020 (Online)

Electronic communication – access to justice – communication
Introducing legal listening: A brave new world of legal audio & commentary, SLAW, 2020 (Online)

Innovation patents
Miller, Quinn, Discussion paper released for patents accessibility review, Pipers Intellectual Property, 2020 (Online)

Medical treatment – advance health directive
Future planning for decision-making and the law in Victoria – A resource for lawyers who practise in future planning, Office of the Public Advocate, 2020 (Online)

Patents – SMEs
Mortley, Raoul, Patents accessibility review discussion paper, Commonwealth of Australia, 2020 (Online)

Podcasting – electronic communication – law
Carrick, Damien, The Law Report with Damien Carrick [podcast], Australian Broadcasting Corporation, 2013- (Online)

Podcasting – parents – gender equity
English, Rosalind, Gilmartin, Charlotte, Law Pod UK - Ep 96: What is a 'mother', in law?, 1 Crown Office Row, 2019 (Online)

Podcasting – public law – civil law systems
English, Rosalind, Fenelon, Emma-Louise, Law Pod UK, 1 Crown Office Row, 2017 (Online)

Podcasting – rule of law – comparative law
Rule of Law Matters podcast, Law Society of British Columbia, 2020- (Online)

Power of attorney – medical treatment
Take control: your self-help guide to appointing a medical treatment decision maker, making an advance care directive, making an enduring power of attorney: includes links to forms, Office of the Public Advocate, 2020 (Online)

Retail lease – law reform – risk assessment
Legal Practitioners' Liability Committee, Retail leasing law changes, are your processes and precedents ready, Legal Practitioners' Liability Committee, 2020 (Online)

Technology – data protection
Blockchain: legal and regulatory guidance report, The Law Society of England & Wales, 2020 (Online)

Working remotely – data protection
Smith, Samantha, Data protection challenges of remote working, Local Government Lawyer, 2020 (Online)

Articles

Articles may be requested online and will be emailed to members.

Artificial intelligence law office automation
Schwarz, Kirrily, "Is it time to embrace automated decision-making?" in *LSJ* (NSW) no 71, October 2020, pp37-39 (ID 86019)

Australian consumer law
Wen, Wei, "Are Australian gift cards refundable after their expiry?" in *Alternative Law Journal*, vol 45 no 2, 2020, pp114-118 (ID 85964)

Australian consumer law
Strangio, Cheryl, "Enforcement powers and remedies under the Australian Consumer Law" in *Inhouse Counsel*, vol 24 no 4, August 2020, pp54-58 (ID 86012)

Australian consumer law – compensation
Stewart, Shane, "Enforcement and remedies: interest as compensation under the Australian Consumer Law" in *Australian Journal of Competition and Consumer Law*, vol 28 no 1, 2020, pp201-213 (ID 85900)

Bail – pandemics – comparative law
Murphy, Brendon, Ferrari, Tahlia, "Bail in the time of COVID-19" in *Criminal Law Journal*, vol 44 no 4, 2020, pp247-263 (ID 85938)

Building contracts – expert witnesses – fiduciary relationships
Gallina, Nicholas, "A Company v X, Y, Z" in *Australian Construction Law Bulletin*, vol 31 No 8, September 2020, pp86-87 (ID 85883)

Child custody – parental access
Smyth, Bruce, Behrens, Juliet, "Australian family law court decisions about relocation: parents experiences and some implications for policy." in *Federal Law Review*, vol 38 no 1, 2010, pp1-20 (ID 86005)

Consumer protection – dispute resolution – financial and banking services
Sourdin, Tania, Atherton, Mirella, "Treating vulnerable consumers fairly when they make a complaint about banking or finance in Australia " in *Bond Law Review*, vol 32 no 1, 2020, pp1-32 (ID 85974)

Consumer protection – financial products
McHattan, Corey, Gordon, Jonathan, Wood, Silvana et al, "ASIC's new product intervention powers" in *Inhouse Counsel*, vol 23 no 10, May 2020, pp115-117 (ID 86007)

Contract law – economic loss
Jackman, Alexander, "Vulnerability, autonomy and protection: the role of actual and hypothetical contracts in the duty of care to protect against pure economic loss" in *Australian Bar Review*, vol 49 no 1, 2020, pp82-116 (ID 85916)

Co-ownership
Pilkington, Timothy, "Some rights and liabilities of co-owners" in *Australian Law Journal*, vol 94, no 9, 2020, pp658-661 (ID 85905)

Employment – disciplinary proceedings – legal representation
Ebbs, Niamh, "Hear my train a-comin'" in *Law Society Gazette Ireland*, vol 114 no 8, October 2020, pp27-29, 31 (ID 86018)

Employment contracts – implied terms – notices
Munton, Joellen Riley, "Rescuing reasonable notice in indefinite employment contracts" in *Commercial Law Quarterly*, vol 34 no 2, August 2020, pp3-11 (ID 67223)

Fair work – adverse action
Goodwin, Emma, "When is a complaint of adverse action under the general protections 'able to' be made? Section 341(1)(c)(ii) of the Fair Work Act 2009 (Cth) and PIA Mortgage Services v King " in *Employment Law Bulletin*, vol 25 no 9, September 2020, pp98-103 (ID 85942)

Franchising code of conduct
Buchan, Jenny, "Australia's franchising code of conduct review – a continuation down the path of jamming a square peg into a round hole?" in *Australian Business Law Review*, vol 48 no 5, 2020, pp393-399 (ID 85902)

Health services – technology
Cooper, Cameron, "Digithealth: the benefits and risks" in *In the Black*, September 2020, pp28-32 (ID 85991)

High Court – administration of justice – court dress
Nielsen, Ingrid, Robinson, Zoe, Smyth, Russell, "Keep your (horse) hair on?: Experimental evidence on the effect of exposure to legitimising symbols on diffuse support for the High Court" in *Federal Law Review*, vol 48 no 3, September 2020, pp382-400 (ID 86008)

Insurance – codes of practice
Freeman, Iain, Madden, Lorraine, "The new General Insurance Code of Practice 2020 — a summary of the key changes" in *Australian Insurance Law Bulletin*, vol 36 no 5, September 2020, pp85-86 (ID 85885)

Internet – terrorism
Couzigou, Irene, "A necessary harmonised criminalisation of online acts precursor of terrorism" in *Internet Law Bulletin*, vol 23 no 3, August 2020, pp46-49 (ID 85993)

Legal education – technological change
Goldsworthy, Daniel, "The future of legal education in the 21st century " in *Adelaide Law Review*, vol 41 no 1, 2020, pp243-265 (ID 85962)

Matrimonial property
Alves-Perini, Nell, Harrison, Margaret, Rhoades, Helen et al, "Finding fault in marital property law: a little bit of history repeating?" in *Federal Law Review*, vol 34 no 3, 2006, pp377-398 (ID 86006)

Medical law – organ donation
Carolan, Sheri, Lin, Henry, "Parens patriae and terminating life support" in *Australian Health Law Bulletin*, vol 28 no 5&6, September 2020, pp86-90 (ID 85873)

Patent law – computer software
Couzigou, Irene, "Patentability of software in Australia - is the picture now clearer?" in *Internet Law Bulletin*, vol 23 no 3, August 2020, pp51-53 (ID 85994)

Patents – pharmaceutical industry
Pearce, Naomi, Enmon, Jennifer, Elcoat, Kadri, "New thinking for new science – biopharmaceutical patent disputes in Australia" in *Intellectual Property Forum Journal of the Intellectual Property Society of Australia and New Zealand*, no 120, June 2020, pp33-39 (ID 86009)

Privacy – torts – law reform
Witzleb, Normann, "Another push for an Australian privacy tort: Context, evaluation and prospects" in *Australian Law Journal*, vol 94, no 10, 2020, pp765-776 (ID 85907)

Records management – pandemics
Talbot, Briston, Saunders, Skye, "COVID-19 and electronic books and records – future options for liquidators when collecting electronic books and records" in *Australian Restructuring Insolvency & Turnaround Association Journal*, vol 32 no 2, 2020, pp30-32 (ID 85971)

Sexual harassment – vicarious liability
Easteal, Patricia, Saunders, Skye, "Revisiting vicarious liability in sexual harassment cases heard under the Sex Discrimination Act'" in *Alternative Law Journal*, vol 45 no 1, 2020, pp38-44 (ID 85963)

Tax agents – negligence – claims
Bevacqua, John, "Suing negligent Australian Tax Officials – Recent judicial developments and possible future directions " in *Australian Tax Forum*, vol 35 No 2, June 2020, pp191-212 (ID 85973)

Unconscionable conduct
Goldberger, Jeffrey, "Unconscionable conduct and unfair contract terms" in *Commercial Law Quarterly*, vol 30 no 2, July-August 2016, pp16-44 (ID 86003) ■

LIV LIBRARY

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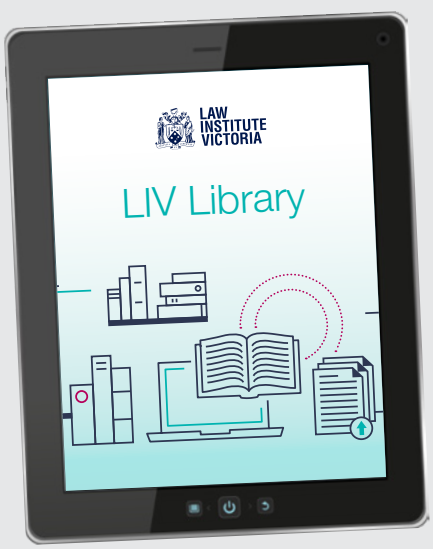

LIV LIBRARY

FEATURED EBOOK OF THE MONTH

Australian Master Superannuation Guide 2020/21 (24th edn)

With comprehensive authoritative commentary from CCH Wolters Kluwer, this ebook is an essential tool for those advising on superannuation, being up to date to 30 June 2020. The text includes commentary and legislation, with links to outside resources such as ASIC, APRA and the Federal Register of Legislation, as well as templates, tables and flowcharts. At the front of the book are highlights of the 2019/2020 changes with links to the relevant chapters for the changes. The ebook includes 18 chapters, with chapter 17 being a legislative review with a summary of proposed reforms. Chapter 18 has instant references – rates, thresholds and checklists. Last, there is a complete list of cases referred to in the guide, with linked reference to paragraph numbers.

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CLIENT DOCUMENTS

Ethical dilemmas are part of everyday practice for solicitors. The Ethics Committee is available to help.

Wills and estates

CLIENT DOCUMENTS
(R4987 – SEPTEMBER 2020)

In the absence of an effective lien, an executor of a will to whom probate has been granted is entitled to receive any client documents held on behalf of the deceased by the deceased's former solicitors.

A law firm acted for the executor of the deceased's will to whom probate had been granted. During the deceased's lifetime, the deceased had retained another firm of solicitors to act in several matters and had commenced action against those same solicitors (the former solicitors) for financial loss in respect of their conduct of those matters. The VCAT proceedings remained ongoing in the name of the executor.

The executor had sought relevant client files of the deceased from the former solicitors. This request was refused by the former solicitors on the basis that proper particulars of the VCAT claim had not yet been provided, and the deceased's former solicitors should not be obliged to hand over their files to the executor of the deceased client until that happened.

An Ethics Committee ruling was sought to determine whether the former solicitors for the deceased were obliged to hand over the deceased's client documents.

Ruling

In the opinion of the Ethics Committee and on the information presented:

1. As the executor of the last will of the deceased to whom probate has been granted, the executor stands in the shoes of the deceased and is entitled to receive from the former solicitors any client documents held by them on behalf of the deceased unless there is an effective lien. ■

The **ETHICS COMMITTEE** is drawn from experienced past and present LIV Council members, who serve in an honorary capacity. Ethics Committee rulings are non-binding. However, as the considered view of a respected group of experienced practitioners, the rulings carry substantial weight. It is considered prudent to follow them.

The LIV Ethics website, www.liv.asn.au/Professional-Practice/Ethics, is regularly updated and, among other services, offers a searchable database of the rulings, a "common ethical dilemmas" section and information about the Ethics Committee.

For further information, contact the Head of Ethics on 9607 9336.

SOLICITOR AS MATERIAL WITNESS – A DUTY TO THE COURT

Where a solicitor is to be called as a material witness in a matter in which they are currently on the record, it is imperative to consider carefully whether ethical obligations permit that solicitor to continue to act.

It is by no means unusual for a solicitor acting in a matter to be called as a material witness in a court or tribunal proceeding. Once it becomes apparent that this is to occur, what are the solicitor's ethical obligations? Is the solicitor conflicted and, if so, can the law firm remain as the solicitor on record and allocate another solicitor to take over the running of the proceeding? Is there a higher duty owed to the court?

Judicial guidance has been provided on this topic in recent years and the matter is also addressed by the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (ASCR) which provide:

27. Solicitor as material witness in client's case

27.2 In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court the solicitor, an associate of the solicitor or a law practice of which the solicitor is a member may act or continue to act for the client unless doing so would prejudice the administration of justice.

On its face, ASCR 27.2 would appear to suggest that the solicitor may continue to act unless doing so would prejudice the administration of justice. Decisions in Victoria and NSW make it clear that the rule must be read subject to the common law concerning a solicitor's paramount duty to the court and administration of justice in these circumstances.

In 2014 the rule was considered in reference to its predecessor in NSW (which was in identical terms in Victoria) when Adamson JA wrote:

"The effect of the amendment is to change the rule from a prohibition qualified where there are 'exceptional circumstances justifying the practitioner's continuing retainer by the . . . client' (Rule 19) with a qualified permission that allows a solicitor to continue to act for the client unless doing so would prejudice the administration of justice (Rule 27.2). I do not discern any change in the purpose of the provision, which is to protect the administration of justice by circumscribing the circumstances in which a solicitor who is, or may be, required to give evidence in proceedings is permitted to act".[1]

McMillan J considered the matter further in two decisions in the Supreme Court of Victoria.[2]

In *Bailey v Richardson* McMillan J made reference to a seminal article authored by Ipp J:

"It is undesirable for a lawyer to appear as a witness in the same case as he is instructing solicitor (and, a fortiori, counsel). Similarly, it is undesirable that, when an affidavit has been filed by a lawyer in support of an application by a client, the lawyer appear as solicitor or counsel. The reason for this is that the lawyer would be in a position of apparent conflict between the duty to advance the interests of the client and the duty to the court to give impartial evidence . . .

"Where a lawyer is guilty of a conflict of interest in representing a client he will have committed a breach of duty. That duty is usually expressed as a fiduciary obligation arising out of the relationship between solicitor and client. But there is a similar duty owed by a lawyer to the court (as well as an ethical duty). The duty to the court arises from the court's concern that it should have the assistance of independent legal representation for the litigating parties. The integrity of the adversarial system is dependent on lawyers acting with perfect good faith, untainted by divided loyalties of any kind. This is central to the preservation of public confidence in the administration of justice."[3]

Recently, the *Barrak* decision was cited with approval by the Victorian Court of Appeal:

"It is unarguable that it is most undesirable that a legal practitioner, who might be called as an important witness in a proceeding, should not act, or appear as counsel, in the proceeding. That proscription is particularly pertinent in the case of a legal practitioner who not only acts for a party in the proceeding, but also appears on behalf of that party at the trial of the proceeding. It is reflected in r27.02 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*".[4]

These decisions confirm that a solicitor (and their law firm) owes a duty to the court not to continue to act in a proceeding in which the solicitor is to be called as a material witness unless exceptional circumstances exist. A useful summary of the case law and solicitors' duties in this regard may be found in a leading Australian textbook on ethics and professional responsibility in legal practice.[5]

If you are in doubt about your own situation, seek guidance from the free confidential LIV Ethics Hotline on 9607 9336 or email: ethics@liv.asn.au. ■

TIPS

- ASCR 27.2 and the common law prohibit a solicitor and their law firm from acting in a matter where it becomes apparent the solicitor will be called as a material witness.
- In these circumstances, the solicitor owes a duty to the court to cease acting in the matter unless exceptional circumstances exist in the interests of upholding the administration of justice.
- ASCR 27.2 must be read subject to and in accordance with the common law.

Michael Dolan is special counsel, LIV Ethics, and **Carly Erwin** is a paralegal, LIV Ethics.

1. *Barrak Corporation Pty Ltd v The Kara Group of Companies Pty Ltd* [2014] NSWCA 395 [49].
2. See *Bailey v Richardson* [2015] VSC 255; *Brown v Guss* (No 2) [2015] VSC 57.
3. *Bailey v Richardson* [2015] VSC 255 [188] quoting Ipp J, 'Lawyers duties to the Court' (1998) 114 *Law Quarterly Review* 63, 92-93.
4. *The Queen v Silverstein* [2020] VSCA 233 [118].
5. Peter Macfarlan and Ysaiah Ross, *Ethics, Professional Responsibility and Legal Practice*, LexisNexis Australia, 2017, 368-372.

ADOBESTOCK

HOW SEXUAL OFFENCES ARE DEALT WITH

The VLRC wants to hear the views of practitioners on the best ways of responding to sexual offences, including alternatives to the justice system.

The Victorian Law Reform Commission (VLRC) has been asked to make recommendations to improve the response of the justice system to sexual offences. It is reviewing Victorian laws relating to rape, sexual assault and other adult and child sex offences.

The review is in its consultation phase, and the VLRC is interested in the current practice of lawyers in sexual offence cases. It also wants to hear from adults who have experienced sexual harm, including people with diverse needs and experiences.

The VLRC has been asked to focus on:

- barriers to reporting sexual offences
- why reports of sexual harm may not proceed through the justice system
- how to reduce the trauma of victim survivors in the justice system
- how to improve data collection and reporting
- the best ways of responding to sexual offences, including alternatives to the justice system
- how to build on previous reforms.

The VLRC has published eight short issues papers, with accompanying questions, to guide submissions. The papers can be found on the VLRC website. Respondents can answer as many or as few questions as they wish.

Over the past 20 years there have been numerous inquiries, reviews and royal commissions concerning sexual offences and substantial reforms have been enacted, such as the introduction of a communicative consent model, the rules placing limits on the cross-examination of complainants and greater support and information for people who have experienced sexual harm. However, it remains the case that, although almost one in five women have experienced sexual assault since the age of 15, 87 per cent of these assaults are never reported. Of those that are reported, many do not progress all the way to a conviction. The VLRC is interested in whether the reforms enacted so far have achieved what they set out to do and what further steps could be taken.

When reports to the police result in court cases, the process is often unsatisfactory for people who have experienced sexual harm, and can even be retraumatising. A specialist sexual offence court, discussed in Issues Paper B, might help address this concern. Issues Paper E discusses the trial process in sexual offence cases and asks for responses on matters such as how well the process is working for charging and prosecution decisions, whether the procedures for alternative ways of giving evidence are working well and if further reforms are needed in areas such as jury directions.

Restorative justice and alternative models to the justice system are discussed in Issues Paper G. The underlying principle of restorative justice models is that while a criminal trial may be an effective way to hold a person responsible to account and denounce their crime, the trial can make it difficult for a person who has experienced sexual harm to tell their story in full and have their experience heard and believed. Some alternative justice models may meet these needs better than the criminal justice system. They may also help people who are responsible for sexual harm take responsibility for their actions and get support to avoid offending again.

Restorative justice allows the people affected by or involved in a crime to come together to repair its harms and "to heal and put things as right as possible". Evaluations suggest that restorative justice can empower people and reduce the effects of trauma. A number of restorative justice programs are operating already around Australia. The Royal Commission into Family Violence supported restorative justice for family violence alongside the existing justice system, and the Centre for Innovative Justice has trialled restorative justice and supports its use for sexual offences.

The VLRC would like to hear the views of practitioners who have experience of restorative justice on how effective it has been, whether it should be more widely available, what forms it could take and whether there are cases in which it is unsuitable.

The VLRC is also considering how best to address gaps in offences, a question explored in Issues Paper C: Defining Sexual Offences. The VLRC wants to hear whether the communicative consent model is working well in practice or should be amended. Another question is whether new offences are required to counter advances in technology which make it easier to commit some sexual offences and have led to new forms of sexual harm, such as image-based abuse. Should the sending of unsolicited sexual images be criminalised? How is the law to deal with "deepfake porn"? And what about emerging forms of harm such as the non-consensual removal of a condom during sex ("stealthing")?

This column can only touch on a few of the issues under consideration in this review, which has the potential to bring significant, long-lasting change to the ways sexual offences are dealt with in Victoria. Readers are invited to make a submission by 23 December 2020. The issues papers to guide your submission can be downloaded from the VLRC website. ■

SNAPSHOT

- The VLRC is calling for submissions on the response of the justice system to sexual offences.
- Issues papers can be downloaded from the VLRC website.
- Submissions close 23 December 2020.

This column was provided by the **VLRC**. For further information ph 8608 7800 or see lawreform.vic.gov.au.

CHECKLIST FOR COVID-WEARY LAWYERS

Taking steps to relieve fatigue and pressure as the year rushes to a close is good risk management.

This year, more so than any other, many lawyers will be staggering to the finish line of 24 December. Most people in the legal profession are feeling mentally and physically exhausted. That fatigue, coupled with the pressure to get matters resolved and completed before the end of the year, is a recipe for simple but costly mistakes.

We know that when people are distracted, tired or unusually busy the things they would normally tick off get missed, like taking good file notes, sending a confirming letter of advice, picking up a mistake in a contract, filing documents in time or calling and confirming bank account details in an email. Being aware of your own state of mind and those of your colleagues at these times is the first step to avoiding these mistakes.

Some strategies for avoiding mistakes at this time are set out below.

- **Capacity awareness:** If you are the principal of the firm, don't take on new work that will put too much pressure on you or your staff in the lead up to the end of the year. You have a professional obligation to do the work for existing clients to a high standard. Taking on new work when everyone is tired and stretched may result in a failure to meet that standard.
- **Checklists and reminders:** Use checklists or workflows on your practice management system to make sure you don't miss steps or important actions. Checklists should include making sure letters of advice or documents are sent, file notes are made and people are followed up. Don't rely on your memory when you are tired or distracted.
- **Stay up to date:** Keep your records in your practice management system up to date so anyone can step in and help if things get busy.
- **Reset your mind:** Try to clear your mind before doing detailed work like drafting or reviewing documents. Give yourself the time to focus and concentrate on the work at hand. If you have tried mindfulness practices before, now is the time to rekindle the practice. There are lots of good apps to help you including *Smiling Mind, Headspace, Calm, Stop Breathe & Think* and *Simply Being*.
- **Another set of eyes:** For documents you have drafted, ask someone else to proofread and "road test" the provisions, particularly residuary clauses in wills, rent review provisions in leases, schedules and definitions in any contracts to make sure they do what you intend them to do.
- **Check and double check time limits:** Don't rely on your memory if you are doing something you don't do often, particularly in light of the changes made to time limits by temporary COVID-19 related legislation and expiry dates for COVID-19 relief legislation. Go to the source and check the time limits in the relevant legislation. Examples of time limits that were changed, as part of the temporary COVID-19 reforms, include responding to statutory demands or bankruptcy notices in six months instead of 21 days. These changes were initially going to expire on 15 October and were then extended to expire on 31 December. It is important to keep track of when the temporary legislative changes end.

As many firms are planning a longer than usual shutdown at the end of the year for a well-earned break, make sure:

- everyone does a thorough review of their current files to identify correct time limits and critical dates
- you communicate with clients early about end-of-year closures and manage clients' expectations about contacting staff over the break. With working from home for much of this year, many clients have had access to practitioners more than ever, so managing expectations around availability over that period is important.

With these simple steps in place we can safely get to the end of a long year and have a much needed stress-free rest. ■

This column is provided by the **Legal Practitioners' Liability Committee**. For further information ph 9672 3800 or visit www.lplc.com.au.

TIPS

- Don't take on new work your staff don't have capacity to do in the end of year rush.
- Use checklists and workflows to avoid simple oversights.
- Keep your practice management system updated.
- Give yourself space to focus when drafting and reviewing work.
- Ask someone else to proofread and road test your documents.
- Double check time limits, especially in the lead up to office closure and any changes arising from temporary COVID-19 related legislative amendments.
- Manage clients' expectations about office closure and staff availability over the break.

ADOBESTOCK

RENEWING A LEASE

The Retail Leases Amendment Act has substantially altered the process to be followed by landlords and tenants.

On 22 September 2020 the *Retail Leases Amendment Act 2020* (Amending Act) received royal assent and passed into law in Victoria, with most provisions taking effect from 1 October 2020. A summary of changes to the retail leasing framework was published in this column in the September *LIJ*.

Among the changes, the Amending Act has substantially altered the process to be followed under the *Retail Leases Act* (the Act) by landlords and tenants when it comes time to renew a lease.

Prior to the Amending Act, the Act required a landlord to notify a tenant in writing of the date after which the option could no longer be exercised at least six months and no more than 12 months before the relevant last date.

If a notice was not given in accordance with that requirement, a tenant would have until six months after a notice was provided to exercise its option and the term of the lease would be extended as necessary to allow the tenant that time (but reserving to the tenant the right to bring the lease to an end earlier if it chose to do so).

Amendments

The Amending Act has brought about a number of changes to the prior process.

It is important to note the amendments apply to new retail leases or retail leases already in place with a last date to exercise option of 1 January 2021 or later (meaning some landlords will find themselves having to serve new s28 notices notwithstanding the fact they had served compliant notices prior to 1 October 2020).

Contents of notice

A notice given by a landlord pursuant to s28 of the Act as amended must set out:

- the last date by which the option to renew the lease may be exercised by the tenant (the word last is not in the legislation but it can be reasonably implied that the section is not intended to allow the landlord to notify the tenant only of some other, earlier date)
- the rent to be payable (or, more accurately, proposed by the landlord to be payable – see below in this regard) for the first 12 months under any renewed term of the lease
- the availability of an early rent review
- the availability of a cooling off period
- any changes to the most recent disclosure statement provided to the tenant (other than changes in relation to rent).

The level of information to be provided is more onerous than under the Act prior to amendment. There would seem to be reasonably broad scope for landlords to fail to strictly comply with the requirements.

Time for delivery of notice

Where previously the notice of last date to exercise option had to be delivered no later than six months and no earlier than 12 months before the relevant last date, the Amending Act now sets the time limit only as "at least three months before the last date".

Removing the earliest time requirement invites the question of how early a landlord could provide a compliant notice (and, for instance, whether a notice could be provided at the time of or shortly after execution of the lease).

This question has been considered in the context of the corresponding provisions of the *Retail Tenancies Act 1986*, which similarly provided a final, but not earliest, date for service of a notice of this type. The authorities in that regard have determined that "[t]he notice in order to be effective must . . . be a timely notice given within a reasonable period before the date of the commencement of the three months period".[1]

What will be considered a reasonable period in that context will remain a question for consideration in each instance but would tend to indicate that providing a notice when the lease is executed will not be sufficient.

Under the Act prior to amendment a landlord was not required to provide a s28 notice where the tenant had already exercised, or purported to exercise, its option. The Amending Act has removed that exemption. This leaves a somewhat unusual obligation on the part of a landlord to provide notice under s28, even where the tenant has already renewed or purported to renew (the Court of Appeal having held, in the context of the corresponding provisions of the *Retail Tenancies Act 1986* that did not contain that exclusion, that renewal by a tenant will not alleviate the landlord of its obligations in this regard).[2]

Method of delivery

Section 28 of the Act prior to amendment required a landlord to notify a tenant of its last date to exercise option.

In 2008 the Supreme Court in *Xiao v Perpetual Trustee Company Ltd* determined that the word "notify" went further than merely requiring service of the document and instead required "making the prescribed information available to the tenant through physical supply of the written document containing the relevant information such that it is actually provided to and received by the tenant".[3]

The Amending Act has removed the word "notify" and instead requires a landlord to "give the tenant written notice". This amendment would seem to remove the high threshold read into the provision by the Court and allow ordinary service of the notice in accordance with s97 of the Act (and, consequently, any service provisions of the lease).

Disclosure

The obligation to set out "any changes to the most recent disclosure statement provided to the tenant" will require landlords to give careful consideration to what representations were included in prior disclosure and to ensure a tenant is given details of any variation to that position.

Depending on the scope and nature of variations it may ultimately be most simple for a landlord to provide a new and complete disclosure statement with any changes to the prior version shown.

ADOBE STOCK

The variations to the disclosure obligations pursuant to the Amending Act may ultimately require amendment to Schedules 1-4 of the *Retail Leases Regulations 2003* (or at least to Schedule 3 being the form of disclosure on renewal) but as at the date of writing no such amendments have been made.

Rent review

As noted above, a notice given by a landlord under s28 of the Act as amended must set out the "availability of an early rent review". Section 28A allows a tenant to request an early rent review in circumstances in which rent is to be reviewed to market on renewal.

The tenant may request an early review of rent within 28 days of receipt of the landlord's s28 notice. If a specialist retail valuer is then appointed the date by which the tenant must exercise its option is extended until 14 days after the rent determination issues (and the term of the lease extended so as not to expire in the intervening period).

If the tenant then does not exercise its option the term of the lease will be extended where necessary such that the end date of the lease will be not earlier than three months after that amended last date to exercise.

It is notable that the time for a tenant to exercise its option will not be extended unless the matter is referred for specialist valuation. This might see otherwise productive negotiations have to be brought to an end (and the often expensive process of obtaining specialist determinative valuation commenced) so that a tenant preserves its right to renew.

Where a tenant does not take advantage of the early review mechanism but subsequently renews there may be an argument that the tenant has, in renewing, agreed to the rent set out in the landlord's notice. This position would be supported by the wording of s28 which requires the landlord to set out "the rent payable" (and not, for instance, "the rent proposed by the landlord").

The author's preferred interpretation, however, is that the ordinary rent review provisions (as set out at s37 of the Act which is unchanged by the Amending Act) will continue to apply and that while it may be open to the tenant to agree to that rent, mere exercise of the option will not of itself amount to such an agreement.

Cooling off

A notice given by a landlord under s28 of the Act as amended must set out the "availability of a cooling off period". Section 28B allows a tenant 14 days after the date the tenant exercises its option within which to cool off by written notice.

If the tenant cools off the terms of the lease will be extended by 14 days but will be taken to have not been renewed. Further, the tenant's right to renewal will then be lost – a tenant cannot renew, cool off, then subsequently seek to renew again.

The right to cool off is only available to a tenant that has not requested an early rent review pursuant to s28A. ■

Paul Nunan is a member of the LIV Leases Committee and a director of EasternBridge Lawyers.

1. (2001) V ConvR 58-558, at [10]–[14], (Davey J).
2. *Seacrest Pty Ltd v Apriaden Pty Ltd* [2000] VSCA 75.
3. *Xiao v Perpetual Trustee Company Limited* [2008] VSC 412, at [65], (Vickery J).

MOVE TO E-SIGNING

One of few upshots from the COVID-19 pandemic is that, with a large part of the country being required to work from home, governments were forced to respond to concern about e-signatures.

In the April *LIJ* Technology and Innovation special edition ("Redesigning signing") this year I wrote that e-signatures are treated no differently from any other form of signature at common law. Provided signatories have the requisite intent, directors and secretaries could electronically sign documents, including deeds, under s127(1) of the *Corporations Act 2001* (Cth), and provided that appropriate precautions were observed and the common law formalities were understood, individuals could electronically sign deeds under the relevant state-based legislation.

A lot has changed since then. In April, Australia's response to the COVID-19 pandemic was reaching fever pitch. Victoria's stay at home directions had just come into effect and most law firms in Melbourne had begun working from home. Australia Post's delivery times were starting to blow out and clients were increasingly asking their lawyers how they could keep their business running, and sign day-to-day documents securely, while working remotely.

With a new way of working and demand for certainty regarding the use of e-signatures, legislatures were quick to respond with reforms that were long overdue but that until then, had lacked sufficient impetus.

NSW was already an e-signature friendly jurisdiction with express provision for deeds to be created in electronic form and electronically signed and witnessed.[1] Impliedly, however, a witness needed to be physically present to watch a signatory e-sign a deed. On 22 April 2020, NSW became the first jurisdiction to remove the logistical impediment for in-person witnessing and to allow for a witness to watch a signatory sign a document using an audio-visual link (remote witnessing).

On 5 May the federal government enacted the *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020*. The Determination modified s127(1) of *the Corporations Act* to clarify that:

- split execution is permitted (ie, so that two officeholders of one company can each sign a different counterpart, resolving the dispute arising from *Pickard*)[2]
- a company could also execute a document under s127 using electronic signatures.

To obtain the benefit of s127, the method of electronic execution needs to identify the signatory and indicate the signatory's intention in respect of the document. A digital signing platform can meet this standard.

The determination has been extended to expire on 22 March 2021.

On 12 May, Victoria followed suit but took a different tack to NSW. Victoria's regulations expressly permit the e-signing and remote witnessing of deeds and mortgages, statutory declarations, powers of attorney (POAs) and wills. For each class of document, relatively prescriptive criteria need to be followed to obtain the benefit (and safety net) of the regulations.[3]

The ACT also enacted legislation to allow remote witnessing on 14 May.

As at 15 May Queensland's regulations initially related to wills and POAs, but on 22 May they were extended to apply to deeds, statutory declarations and affidavits. Queensland's regulations are the most progressive, and helpfully, clarify that deeds do not need to be witnessed, made on paper or parchment, or expressed to be sealed.[4]

The legislation is only temporary?

Given the urgency required to enact the emergency legislation, the opportunity for input from the legal community was minimal, and while each jurisdictions' regulations address similar matters, they are significantly different in their operation and application. The need for harmonisation is obvious.

Despite the differing approach between jurisdictions, anecdotally the changes have been welcomed by clients and positively received by those in the profession who, before COVID-19, had viewed e-signatures as inherently riskier and therefore inferior to wet-ink signing.

The need to rapidly adapt to remote working, combined with the comfort of state and federal emergency reforms, has led to growing confidence within the profession regarding the use of e-signatures.

This momentum must be maintained. Since the emergency legislation was implemented, stakeholders, including the LIV, continue to work with government departments to make the changes permanent, encourage consistency across jurisdictions and broaden their scope.

The lessons and experiences of this year must be built on to ensure lasting reforms strike the right balance between pragmatism and risk management and keep up with the demands of modern commerce. ■

SNAPSHOT

- Section 127(1) of the *Corporations Act* has been modified. It now expressly permits companies to sign documents electronically (including deeds).
- NSW, Queensland, Victoria and the ACT now have temporary facilitative regulations which allow documents (including deeds) to be remotely witnessed.
- Currently, these changes are temporary, but stakeholders are lobbying government bodies to ensure that at least some of these changes become permanent.

Mark Burrows is a property lawyer in the real estate and projects team at Lander & Rogers and an executive committee member of the LIV Technology and Innovation Section.

1. *Conveyancing Act* 1919 (NSW), s38A.
2. Note 1 above – "a single, static document" and explanatory statement.
3. See for example reg 9(4) in relation to the remote witnessing of deeds and mortgages.
4. See regs 12N(2), 12O and 12S.

NEXL

Lawyers needing to manage their networks and refer and promote their work to other lawyers could benefit from this system.

PETER MORAN

Which practitioners would find this technology useful?

Any lawyers needing to manage their networks and refer and promote their work to other lawyers.

How does it work?

On creating an account in NEXL, the contact management software imports contacts from existing contact lists like Outlook or Gmail and other data sources (including LinkedIn via csv files). Contacts can be uploaded selectively or in one hit. Information about each contact is inserted automatically into a NEXL address book that also captures a range of other information such as position, qualifications etc. Individuals can then be categorised according to particular areas of expertise or groups and other searchable tags can be added.

With many of the data sources, syncing can occur on a continuous basis so that as information is updated or added in one source, (ie, a user's Outlook contacts) it automatically updates in NEXL.

Contact pages contain activity timelines which capture interactions with the contact (emails, meetings, NEXL network interactions including engagement on posts, details of referrals) enabling an easy snapshot of recent interactions before making any follow up. While it does not capture the content of the emails themselves, hyperlinks allow the user to click through to the emails provided they are still contained within the original source, such as Outlook.

Users are able to keep notes and other information about the contact in their contact page. When it is time to follow up, they can refer to notes regarding the previous interaction.

Users are able to set stay-in-touch reminders for monthly, quarterly, half yearly follow ups with address book contacts.

Each contact also has a referral section where the user can track referrals sent and received to the contact.

Another functionality is the map view, where users can view their network distribution globally, to see where relevant contacts in relevant areas and according to different types of expertise are situated.

Benefits

Although the core function of NEXL is for contact management, it contains two further highly beneficial elements. The first is the directory of users. Even if a practitioner is not part of a user's contacts, the details of NEXL registered lawyers according to their location and expertise can be searched via a directory. This can also allow the practitioner to target particular locations or areas of expertise that are missing from their network map in reaching out and establishing a new contact within the NEXL directory.

The second is the NEXL community platform. While similar in appearance to a social media platform like LinkedIn, the critical difference with the NEXL platform is the way the threads of posts can be organised and filtered by the user. Users get much more control over which posts they want to see and, likewise, can aim to be more targeted in who is likely to be seeing their posts. Additional functions, such as notifications when certain contacts or groups post, are particularly nifty. The NEXL community platform is therefore much more targeted and potentially beneficial than other social media platforms that rely on advertising payments and popularity algorithms for circulation.

For example, a big difference between, say, LinkedIn and NEXL is the ability to target post content based on areas of expertise. Posting content on NEXL is more likely to reach its target audience, compared to LinkedIn, where its complex algorithm means posts are more likely to reach audiences if they gather strong engagement early on. This is due to two main factors; NEXL has a no advertising model, and has a tagging tool which enables users to target audience more easily.

Costs

Professional package $9 monthly. Pro + Contact manager is $19 monthly.

Downsides

NEXL is a lawyer to lawyer network built primarily for lawyers in private practice (there may be expansion towards non legal practitioners in future). The public directory only includes private practice members (ie excludes in-house counsel), however there is no limitation to the types of contacts that can be held in the digital address book.

Risks

Cyberisk, as with any cloud offering, is present. NEXL's data is currently stored in the USA on AWS encrypted servers but is being moved to European based servers. ■

Peter Moran is managing principal at Peer Legal and founder of the Steward Guide, an online technology guide for lawyers (www.stewardguide.com.au).

SNAPSHOT

What is NEXL?
NEXL is a contact management software system as well as an international lawyer network and referral database and a social media community platform.

What type of technology?
Cloud software

Vendor
NEXL Pty Ltd

Country of origin
Australia

Similar tech products
Professional networking platforms like LinkedIn and Facebook.
Customer relationship management software like Hubspot and Salesforce.
Email contact functions such as in Outlook and Gmail.

Non-tech alternatives
Physical address book or Rolodex
Spreadsheets, emails, business cards
Networking events

More information
nexl.io

THE BENEFITS OF SLEM

Using technology for remote attendance and engaging a mediator listed on the Magistrates' Court Single List of External Mediators is a useful combination for parties and lawyers.

COVID-19 has caused much disruption in all aspects of our lives. The law and the courts have not been spared. Lawyers anticipate this disruption will cause some delay for final hearings and determinations in proceedings.

Parties and lawyers who have already filed proceedings will still be bound by their overarching obligations. These obligations endure and apply equally during the COVID-19 pandemic, including the duty of cooperation[1] to use reasonable endeavours to resolve disputes[2] and to minimise delay.[3]

We do not know when courts will resume face to face hearings in all matters. One potential impact of the adoption of virtual hearings is that this may lengthen the duration of hearings. This is to be expected anytime a new way of doing things is adopted; it will take some time for people to get used to a new way of doing things.

Lawyers should be focused on trying to resolve matters where possible, particularly in the current environment where there is less certainty about when the final hearing will be held and how long it will take.

Mediation using technology to participate remotely is one step parties can take to endeavour to fulfil their obligations.

Using technology for remote attendance and engaging a mediator listed on the Magistrates' Court Single List of External Mediators (SLEM) is a useful combination for parties and lawyers to mediate efficiently and in a cost-effective way, giving clients an opportunity to resolve their disputes at the earliest opportunity.

It is becoming more common for the Magistrates' Court to refer matters to a dispute resolution process, including mediation.

For defended proceedings issued out of Magistrates' Court registries other than Melbourne, where the amount in dispute is less than $40,000, the Court will usually refer these disputes to the Dispute Settlement Centre of Victoria.

For proceedings issued in the Melbourne Magistrates' Court, following the filing of a Notice of Defence, parties are issued with a Notice to Mediate. This is in the form of a court order and requires the parties to agree within 14 days:

- who they wish to appoint as mediator
- the date that mediation will take place (within 42 days from the date of the order)
- how the mediation fees will be shared between them.

Lawyers should be aware of the SLEM List. It is an extensive list of NMAS (National Mediator Accreditation System) accredited, well qualified and experienced mediators who have offered their services to mediate defended proceedings in the Melbourne Magistrates' Court for a fee of $1540, including GST. This is a significant saving on their normal fees for conducting private mediations, which is a real benefit to parties already burdened with litigation costs. The SLEM fee is payable per day, or part thereof.

The parties can each nominate a number of mediators from the SLEM List and will hopefully be able to agree on a suitable mediator and a date to mediate. If they cannot agree, the Court will appoint a mediator from the SLEM List and nominate a date for mediation, taking these matters out of the hands of the parties. It is therefore in the best interests of parties to cooperate, as they are required to do pursuant to their overarching obligations under the *Civil Procedure Act 2010* (Vic).

Parties must attend the mediation in person, together with their lawyer, unless they are self-represented. Companies must be represented by both a lawyer and an employee duly authorised to settle the proceeding. Failure to attend a mediation can result in the Complaint or Notice of Defence (as the case may be) being struck out with an adverse costs order being made at the Court's discretion.

The SLEM List can be found on the Magistrates' Court website (www.mcv.vic.gov.au/news-and-resources/publications/single-list-external-mediators-slem).

The authors commend the SLEM List to lawyers and their clients. Despite the discounted fees, in our experience there is no less effort made by mediators on the SLEM List to engage in the process and work actively with the parties to try to resolve their dispute and settle the proceeding the subject of the mediation. ■

Simon Crawford is a partner at HWL Ebsworth Layers and **Nussen Ainsworth** is a law lecturer at Victoria University and an LIV accredited specialist in mediation. They are members of the LIV Alternative Dispute Resolution Committee, Litigation Section.

1. *Civil Procedure Act 2010,* s19.
2. Note 1 above, s22.
3. Note 1 above, s25.

ADOBE STOCK

NO LONGER UNPRECEDENTED

At the end of a year of environmental calamity, now is not the time for lawyers to give up. It is time for rebirth and renewed energy.

What a bleak year we have had. Calamitous bushfires, unbreathable air, plague, contaminated water, wild winds, dust storms and vast loss of flora and fauna. The world yearns for rebirth. The festive season 2020 is like no other.

We move to another bushfire season, with experts warning of pyro calamity. Bushfires now are beginning to jump bush to target the timber of residential areas. The Natural Disasters Royal Commission's Interim Report stated that last year's bushfires are "no longer unprecedented".

We witnessed wanton destruction of ancient Australian heritage at Juukan caves. The federal government recently fast tracked the Roxby Downs uranium mine expansion, incorporating a tailings dam seven stories high and 200 times the size of the MCG for (half-life 10,000 years) uranium deposits. Graeme Samuel strongly critiqued national environmental law failure. Two Auditor-General's reports recorded catastrophic failure to protect federally listed grasslands in metropolitan Melbourne. Black Lives Matter raced around the world and into Australia. We still have no clear national climate change policy. Yet seas, oceans and earthly ice caps move in their might. They do not care. From deep time and cold galaxies come the stars.

Lawyers, including environmental, Indigenous and human rights lawyers step up to leadership – often flagging with despair at their powerlessness to effect change. Young lawyers begin righteous environmental litigation. Law students sign up for the Monash University Climate Justice Clinic, passionately skilling themselves for the work ahead.

Our professional bodies advocate law reform to better protect the environment, address bushfire danger, protect human rights and take action on climate change. Often this advocacy is highly successful. Many of our reforms are accepted by the inquiry, be it a royal commission, parliamentary review or government department. But nothing happens. Then, a year or so later, another inquiry begins – at yet further taxpayer expense – to canvas the same issues. Yet more worthy lawyers give up their time without fee to craft yet more submissions by their professional bodies. Again, this advocacy is often successful. Yet more recommendations and, yet again, no action. The pattern exists on the Barrier Reef, forest policy and waste management regulation – as only three of many environment examples. In some instances, this carousel has gone round six or seven times. Still no action, while the problem grows.

"What is the point?" these lawyers ask, with rising righteous anger. But we lawyers must not forget who we are. We are the advocates and the advice givers. We find paths through the thickets of the law. We are not politicians. Save the judiciary, we are not final decision-makers. We are the writers and the persuaders. Gifted with intelligence, education and knowledge of societies' laws, we must continue to take one red shoe step, then the next.

We must never allow ourselves to be silenced, let alone silence ourselves. We must always give voice, speaking out at injustice to advocate better law and policy.

In 2020, we cannot know how close we are. Those advocating the end of slavery in England had no knowing that the 1807 Reform Act lay ahead. It happened suddenly. Unexpectedly, the universe shifted. 2020 evidences that sudden seismic shift can be reality.

Investors, shareholders and directors lived a unique experience this year. They called large companies to account – and will continue to do so. Their children lived through 2020 as did those children's teachers. So did their family and friends. It is from utter destruction that transformative creation emerges. Now is not the time to give up. It is the time for rebirth and energy.

Let us savour the festive season with those we love – and rest. Then, let us approach the dawn of the new year with hope, trust and kindness.

Senior practitioners must model courage to their junior colleagues and urgently pass on knowledge as have Indigenous cultural elders since earliest time. Future challenges facing younger lawyers are truly enormous. The human rights and environmental dangers that seem almost inevitable may make COVID-19 as of nothing economically and socially. We must be ready for this new legal world. The dramatic legal issues we will meet are vast and new.

American poet Maya Angelou, at President Obama's inauguration, faced the dawn:

"Here on the pulse of this new day
You may have the grace to look up and out
And into your sister's eyes, into
Your brother's face, your country
And say simply
Very simply
With hope
Good morning.
Let us shine our light, star bright, into the new morn."

Season's greetings colleagues. ■

Dr Leonie Kelleher is the director of Kellehers Australia, LIV accredited specialist in environment and planning law and a member of the LIV's Environment Issues Committee.

AUSTRALIA'S ENVIRONMENTAL ISSUES

- Climate change inaction
- COVID-19 related climate change – biohazard impacts
- Bushfires – pyro catastrophe
- Water supply, groundwater as well as surface – Murray-Darling Basin
- Flora and fauna – loss of biodiversity
- Actioning recommendations of the *Environment Protection and Biodiversity Conservation Act 1999* review
- Resourcing enforcement and oversight of federal-state bilateral agreements
- Indigenous cultural heritage damage
- Coral bleaching in the Great Barrier Reef
- Land use and corporate interests.

ADOBESTOCK

SHIFTING THE BALANCE

Inclusion initiatives must not fall off the priority list during and post-COVID-19.

COVID-19 has impacted every industry, including the legal profession. Some developments have been positive – greater flexibility with working arrangements, international connectivity through online interaction and innovation in justice delivery.

But diversity and inclusion and associated initiatives have been put on the backburner. The Cultural Diversity Report by the Asian Australian Lawyers Association (AALA) in 2015[1] highlighted the lack of diversity in the senior ranks of the legal profession with Asians representing 5 per cent of senior roles. A 2019 poll of 11 of the large commercial firms found while 25 per cent of law graduates and non-partners had an Asian background, only 8 per cent of partners were Asian.

The bamboo ceiling is still in existence in 2020. Anecdotal evidence as well as experiences of lawyers of diverse backgrounds in leadership positions, including myself as national vice-president of AALA[2] and others, confirms this.

The benefits of cultural diversity are well known but diverse thought leadership becomes even more imperative in the COVID-19 recovery. Inclusion initiatives must not fall off the priority list during and post-COVID.

Just as a roadmap to recovery is needed for the economy, a roadmap for bringing cultural diversity to the forefront is equally important. Here's what it might look like.

Grassroots not top down

The top down approach has not achieved cultural diversity. The decision makers come to the table infrequently and the discourse is always among the converted. It is unrealistic to expect change to a long-standing status quo that gives preference. Shifting the balance can be done by:

- connecting lawyers facing similar challenges to create visibility and a collective voice and also provide support to lawyers who may individually not be in a position to challenge the system. AALA has an online blackboard allowing members to connect and share resources and experiences. An extension of this would be diverse associations connecting similarly
- seeing more role models and highlighting the great work they do. However, role modelling that recognises a select few that represent the "model minority" must be challenged. That perpetuates inequalities and reinforces that there are only a few who are capable, therefore justifying tokenism by the majority
- building value proposition – lawyers of diverse backgrounds need to be confident and proud of their background and heritage, and to talk about the positives they bring to the table. Cultural diversity is a practical intersection of commercial value for organisations.

Access to justice

Cultural diversity is not just about practitioners, it is equally about people trying to access the system. If people of multicultural backgrounds do not feel adequately represented or their issues understood because of language, cultural or socio-economic factors, or relief not granted due to these factors, then this is an issue of access to justice.

It is of fundamental importance that not only must justice be done, it must also be seen to be done.[3] Judicial appointments that foster diversity and borrowing on experiences of other countries, may alleviate access to justice concerns of the diverse community.

Education

Education is important for bringing about systemic changes. Compulsory CPD on diversity and surrounding issues should be introduced as a standalone or as part of practice management requirements. Institutional unconscious bias makes it difficult for genuine inclusion to take place. Unconscious bias training is useful in breaking down stereotypes and bringing objectivity to decision making.

Targets

Quotas are often criticised. Merit should be the decider, the critics say. But that argument fails to take into account that people from diverse backgrounds often don't come from the same playing field. To expect them to rise significantly in an inherently competitive profession without any support is almost impossible. They are often expected to work twice as hard to get the same recognition.

Targets may be a better approach. Without imposing mandatory requirements, targets may lead to changes in policies for longer term change, achieved more organically.

In the UK, it is mandatory in some industries to interview at least one person of black, Asian or minority ethnic background without making it obligatory to select one. This provides those candidates with the opportunity to prove their capabilities.

This proposed roadmap, if implemented along with more tailored approaches by individual organisations and firms, may assist with not only putting diversity back on track but galloping ahead post-pandemic. ■

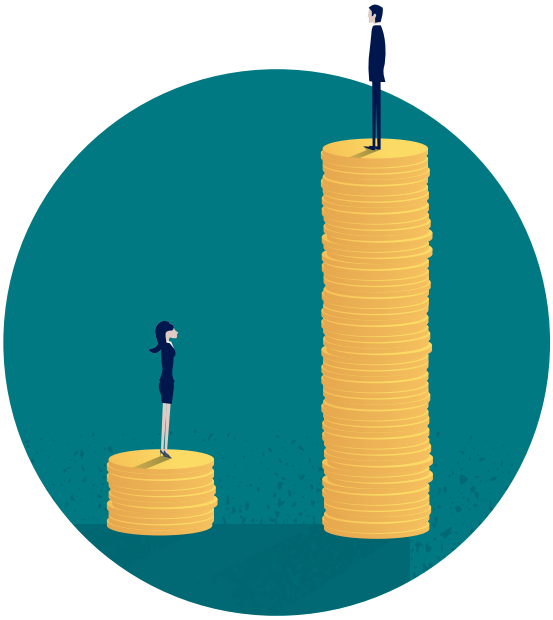
Molina Asthana is an LIV Council member and AALA vice-president.

1. http://aala.org.au/cultural-diversity-report-2015.
2. https://www.lawyersweekly.com.au/biglaw/29530-cultural-diversity-cannot-be-pushed-to-backburner?%20utm_source=LawyersWeekly&utm_campaign=25_09_20&utm_medium=email&utm_content=1&utm_emailID=804cb2b23aff22ade3ef0f28a2ded6044e9733c391738da367fb5e33deb59158.
3. *R v Sussex Justices, ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233).

ADOBE STOCK

NOT SO SUPER

Why superannuation for women is ripe for reform.



Australian women retire on average, with 35 per cent less superannuation than men. This is greater than the gender pay gap, which currently stands at 14 per cent. Although the gender pay gap arguably remains the major contributor to women's lower superannuation balances, other factors such as lack of accessibility to superannuation splitting in family law property settlements and the long term consequences of early access schemes also result in women retiring with less super than men.

More discussion and reform is needed to address the superannuation gap which prolongs the financial inequity experienced by women who retire with a smaller nest egg than their male counterparts.

With women living longer than men but retiring on less, this gap warrants much more attention.

The gender pay gap

The knock-on effects of the gender pay gap is a major issue for retiring women, urging a greater focus on the factors that contribute to it so we can understand and address them. On top of the general hiring and salary bias that sees women earning less than their male counterparts, women are also more likely to work in lower paid fields, to work casually or part-time, to experience greater job insecurity and to take extended periods away from the workforce to mind children or undertake other unpaid care work. The lower proportion of women in leadership and management roles also means fewer women are able to access higher paid employment.

These factors, and the societal and structural frameworks that underpin them, contribute to the gender pay gap and impact women's ability to accumulate superannuation savings for their retirement.

Superannuation splitting

It is commonly understood that when a de facto relationship or marriage breaks down, the assets and liabilities of the couple can be divided by way of a family law property settlement. What many don't know, however, is that for the purpose of family law, superannuation is treated as a relationship asset that is able to be divided between the parties, with the goal usually being to equalise superannuation so that each party walks away from the relationship on an equal footing.

While this framework operates to redress the superannuation gap faced by women, at least on the occasion of a separation, the current process is unnecessarily complex and often requires costly legal advice to navigate.

Many separated women simply do not know that their partner's superannuation is an asset they are entitled to, and even when this is known, the costs associated with engaging a lawyer to draft the complex documents required sometimes outweighs the benefit that would be received. Whatever the reason for not engaging in the superannuation splitting process, the result is that many women miss out on receiving the superannuation that they are entitled to. This is especially detrimental in circumstances where superannuation is the main relationship asset, which is often the case for low income families.

Early access schemes

People on lower incomes who have less superannuation savings – the majority of whom are women – stand to lose the most from accessing their superannuation under early access schemes. These schemes further entrench gender inequality and result in more women retiring with less.

Based on current average super balances, modelling has shown that by withdrawing the maximum $20,000 allowed under the recent COVID-19 early access scheme, women's superannuation savings will be reduced by roughly 50 per cent more than men's as a result of the loss of compounding interest.

Women's Legal Service Victoria has cautioned against dipping into superannuation savings early, warning that in order to avoid these devastating long-term consequences, this scheme should only be accessed as a last resort.[1]

Family violence experts have also been critical of early access schemes, understanding that women experiencing domestic violence are more likely to be under pressure to utilise these schemes and that such measures ". . . have a negative impact on . . . women's ability to be financially secure later in life".[2]

The conversation about the gender pay gap needs to be extended to a wider discussion about the long-term effects of pay inequity on women. The superannuation system, being the final frontier for restoring equity, needs to better account for the many different factors that leave women retiring with less superannuation than men.

VWL supports initiatives that aim to address the various biases and systems that result in women earning and saving less superannuation. These include introducing flexible working arrangements for both men and women, promoting a more balanced spread of unpaid care work, improving financial literacy and implementing urgent reform for superannuation splitting. With these changes, we can work towards a superannuation model that ensures a more financially secure future for everyone. ■

Eleanor Weir is an executive member and communications officer for Victorian Women Lawyers. **Rose Hunt** is a family lawyer and member of VWL.

1. Women's Legal Service Victoria, "5 steps to take before you access your superannuation early" (April 2020).
2. Note 1 above.

ADOBESTOCK

NEW ADMISSIONS

The following people were admitted to practice as Australian lawyers and as officers of the Supreme Court of Victoria on **25 September 2020**. The *LIJ* welcomes them to the legal profession.

AIDONOPOULOS, Mary
ALIZZI, Tara
ANTHONY, Conganige
ARGIROPOULOS, Avra
ARMSTRONG, Katerina
ASSAFIRI, Yasmine
ATCHESON, James
BAILES, Rachel
BALANCY, Jules
BARBOUR, Bethanie
BAROUDI, Yeasra
BEAZLEY, Katherine
BEH, Jonathan
BERK, Deniz
BI, Carol
BISS, Geordie
BIVIANO, Gabrielle
BOUTROS, Debbie
BRIDGE, Joshua
BRILLIANT, Kristy-lee
BROADWAY, Jayson
BRODIE, Sam
BRUMBY, Nicholas
CATO, Rebecca
CHAN, Kar Nang Sherman
CHAND, Aartika
CHO, Wells
CHONG, Andrew
CHOUBEY, Akanksha
CHRISTOU, Shannon
CHUAH, Tiong Hoe
COLLINS, Rachel
CONNOLLY, William
COSTELLO, Caitlin
DABAKAROV, Ilana
DAI, Suyu
D'ARCY, Nicholas
DE BIASE, Jonathan
DE ROOY, Martin
DINSDALE, Jacqueline
DREW, Anthony
EDGELL, Isobel
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MEMBER SURVEY RESULTS

Staying connected to colleagues and clients, adjusting to new ways of working and dealing with mental strain and stress have been the biggest challenges arising from the COVID-19 outbreak for LIV members, according to an August survey.

Members said they were looking to the LIV over coming months to help them stay on top of government updates and changes, for online provision of professional development programs and to lobby on their behalf on issues of importance to the profession.

Satisfaction with the LIV has risen significantly since the last member survey in 2018. Significant improvements were cited in the LIV's reputation, professional development, compliance and practice management support and resources. The *LIJ*, CPD programs and LawNews were the top three LIV resources used by members.

While more than half of respondents said their employment status had not changed, 20 per cent said they were working fewer hours per week, while nearly 15 per cent were working more hours.

More than 80 per cent said they expected a change in their working environment in coming months, 77 per cent expected more virtual contact with clients and 67 per cent said they expected to change from face-to-face to online consumption of business services. Just 2.5 per cent said they did not expect any long term effects.

LIV CEO Adam Awty said it was gratifying to see the increase in support for the LIV's products and services over the past two years. "We will use the responses to tailor further support for members, including COVID-19 practice resources and wellbeing and mental health advice, as they move to COVID normal," he said.

LIV education goes online

The LIV has been delivering its educational and professional development entirely online since March, providing members with education and training activities during the pandemic lockdown.

Five LIV conferences were held entirely via Zoom this year: Government Lawyers, Criminal Lawyers, Property Lawyers, Succession Lawyers and the Regional and Suburban Lawyers Conference.

Six practice management courses have been run online since the beginning of the pandemic restrictions. With the help of faculty members, the course was redesigned within a week to make it appropriate to an online setting. Participant numbers have stayed strong despite the online learning environment.

The CPD program started in early November, three months earlier than usual, giving members the chance to spread their compliance activities over a longer period of time. Sessions are available as webinars and also as videos after the VLSB+C permitted these as an eligible CPD activity this year due to the pandemic lockdown.

Specialist accreditation assessments across eight areas of law also went ahead, with the oral delivery simulation sessions conducted via Zoom rather than in person. The LIV partnered with e-learning provider Elumina to deliver a digital platform that enabled remote invigilation of the written exams. Numbers of participants were up by more than half on last year. ■

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To find out more about LIV governance and representation or to contact LIV Council members see www.liv.asn.au or phone the secretary to the Council on 9607 9513 or email secretariat@liv.asn.au.

ABOUT THE LIV: The LIV represents about 19,000 lawyers and people working in the law in Victoria, interstate and overseas. Our members offer their commitment, diversity and expertise to help shape the laws of Victoria and to ensure a strong legal profession for the future. The LIV promotes justice for all advancing social and public welfare in the operation of the courts and legal system as well as advancing education and public confidence both in the legal profession and in the processes by which the law is made and administered. As the peak body for the Victorian legal profession, the LIV initiates programs to support the needs of a changing profession, promotes an active law reform advocacy agenda, responds publicly to issues affecting the profession and broader community, delivers continuing legal education programs, and continues to provide expert services and resources to support our members.

IT'S TIME TO ERADICATE ELDER ABUSE

The LCA has released a guide for legal practitioners to help recognise and prevent financial and other abuse of older people.

PAULINE WRIGHT

There is rising concern over the incidence and extent of elder abuse in Australia. With no single satisfactory definition of elder abuse, it incorporates a range of physical, psychological, sexual and financial abuse and neglect.

In most cases elder abuse is invisible. It occurs within the trusted confines of family, friends, care facilities and neighbourhoods. As a result, statistics remain sketchy, and there is a belief that incident rates are vastly under-reported. Even where incidents are reported, the prospect of negotiating the court system is likely to be a major deterrent for complainants. Very few legal aid grants go to older Australians, who may not meet asset tests even though they may have little disposable cash, and specialist community legal centres are under-funded to meet rising demand.

Financial abuse of the elderly is disturbingly prevalent. Australians are living longer due to improvements in health and lifestyle outcomes. This, combined with many older people having considerable assets due to the rising value of real estate and the accumulation of superannuation over several decades, can lead to an "inheritance impatience" within families.

Legal practitioners are in a key position to recognise and prevent the financial and other abuse of older people. This why the LCA released a Best Practice Guide for Legal Practitioners in relation to Elder Financial Abuse (https://tinyurl.com/yytwossq) in September.

Developed by the LCA's specialist National Elder Law and Succession Law Committee in consultation with constituent bodies, the Guide is intended to assist legal practitioners to identify and address potential issues regarding elder financial abuse in the preparation and execution of wills and other advance planning documents. It includes topics such as setting up meetings effectively, taking instructions, ensuring appropriate support, communicating effectively with the client, checking for decision-making capacity and keeping records. Importantly, it guides lawyers to be alert to the warning signs of potential abuse.

While much of the lawmaking around elder abuse is being made at the state and territory level, the Guide provides overarching principles to complement more detailed guidance provided to practitioners by the LCA's constituent bodies.

Meanwhile the LCA has recently adopted an in-principle position to support the development of an International Convention on the Rights of Older Persons which has the potential to play an important role in improving the lives of older people globally and, in turn, to inform Australia's own domestic legal and policy frameworks.

Older people face specific human rights challenges including poverty, age-related discrimination and elder abuse. Despite this, there is currently no dedicated international instrument recognising and providing for the human rights of older persons and few references to older people in existing treaties.

In 2010, the UN General Assembly established an Open Ended Working Group on Ageing (OEWGA) for the purpose of strengthening the protection of the human rights of older people. While still ongoing, it has found that the particular nature of certain human rights challenges faced by older men and women has not been adequately addressed.

The COVID-19 pandemic has placed an emphasis on older people's specific needs, circumstances and vulnerabilities, and it is against this backdrop that the LCA is calling for a stronger legal framework at the international level to protect the human rights of older people – both in emergency settings, such as pandemics, and in everyday settings.

The LCA has provided input to OEWGA's upcoming 11th working session on access to justice and will continue to engage in international discussions concerning the content of the proposed convention.

One in every six Australians (15.9 per cent) is aged 65 and over, and these figures will continue to rise.

It is essential that Australia supports a stronger legal framework to protect the human rights of the older person at the international level and translate those obligations into our own domestic setting. ■

Pauline Wright is president of the Law Council of Australia.

SNAPSHOT

- The LCA has released a "Best Practice Guide for Legal Practitioners in relation to Elder Financial Abuse".
- Legal practitioners are in a key position to recognise and prevent elder abuse.
- An International Convention on the Rights of Older Persons is needed.

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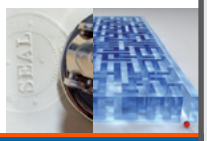

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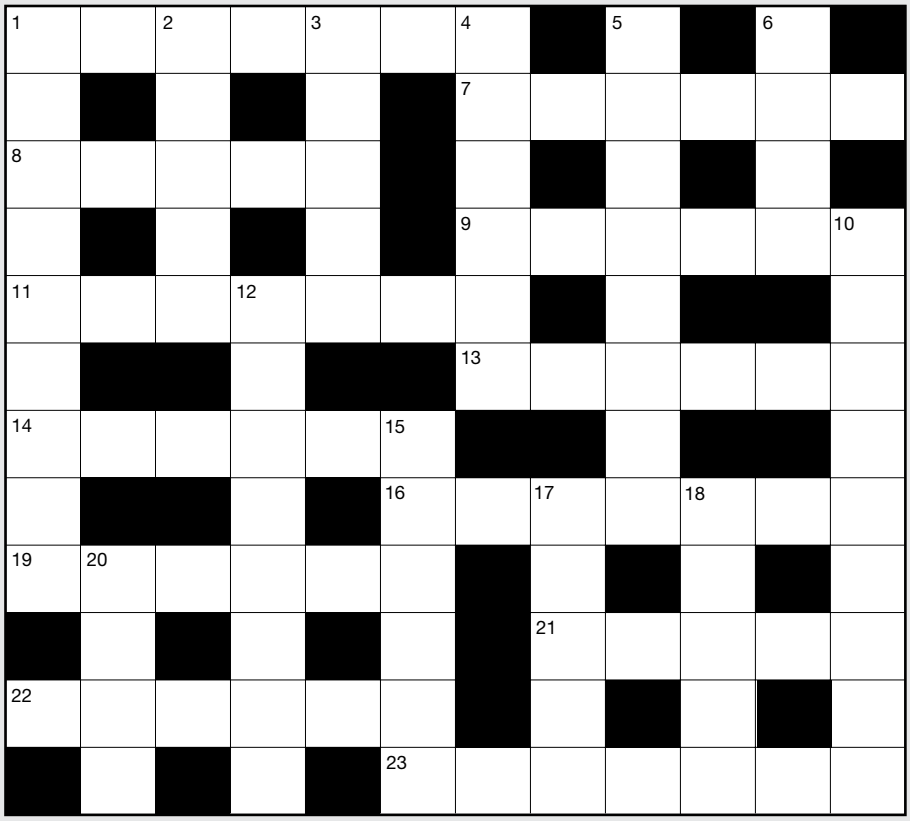
WILLS & ESTATES

JOSEPH JOHN BONELLO (also known as JOSEPH MARIO BONELLO) late of Unit 16, 50 Carlisle Street, St Kilda, Victoria. Deceased, who died on 22 September 2020. Would anyone holding or knowing the whereabouts of any Will of the deceased please contact Mills Oakley of Level 6, 530 Collins Street, Melbourne VIC 3000. Phone: 0438 157 097. Email: tpalmer@millsoakley.com.au.

LETTERS OF THE LAW NO. 232



Patrick Street is retiring from compiling Letters of the Law and this will be the last crossword by Stroz in the *LIJ*.

The *LIJ* team wishes to thank Mr Street for his cryptic contributions over 21 years, starting in the November 1999 edition, and we wish him all the best for the future.

Letters of the Law will continue in 2021.

Solution next edition
Compiled by Stroz

ACROSS

1 Walk ostentatiously and hit ibex (7)

7 Routes found in a wrongful dispossession (6)

8 An ecclesiastical council open Mondays but not AM (5)

9 Sat without databases then belittled as a bed (6)

11 Teresa left trace elements for mild weather (7)

13 Asbestos not at this haunt like a ghost (6)

14 Threepence lacked peer from that place (6)

16 Sharing about to take a debtor's wages on legal orders (7)

19 Challenger left cell out with a short sword (6)

21 Bread seller to break up (5)

22 Mastheads leave ads for the longest English river (6)

23 Tzar left Switzerland with a fraud (7)

DOWN

1 Not difficult to dismiss the yacht case (4,5)

2 From this place is without Chinese (5)

3 Emblem showing membership finds saddlebag not for lads (5)

4 Glossy red fruit is a motto (6)

5 Passive resistance lacks receptive person who for political reasons kills secretly (8)

6 Ron leaves foremen for a woman (4)

10 Dish with Grace to set free (9)

12 Having only one spouse with G-man and Moyo (8)

15 Governess left Nov for the way out (6)

17 Barb and I get a Jewish doctor of law (5)

18 Distressed without a darkie (5)

20 Each to feel physical pain (4)

Solution to Letters of the Law No.231

K	N	E	E	C	A	P	■	A	■	A	■
I	■	M	■	I	■	O	F	F	I	C	E
D	E	B	I	T	■	T	■	F	■	H	■
N	■	E	■	E	■	T	A	I	L	E	D
A	B	R	I	D	G	E	■	N	■	■	E
P	■	■	M	■	■	R	A	I	N	E	D
P	A	W	P	A	W	■	■	T	■	■	I
E	■	■	U	■	A	C	R	Y	L	I	C
D	I	N	N	E	R	■	U	■	I	■	A
■	R	■	I	■	D	■	L	E	G	I	T
J	O	S	T	L	E	■	E	■	H	■	E
■	N	■	Y	■	R	O	S	E	T	T	E

Crafting her future: Sahema Saberi

DAVID JOHNS

A PATH TO ADVOCACY

LAWYER **SAHEMA SABERI** WAS 13 WHEN SHE LEFT AFGHANISTAN – STARTING AS A HAZARA REFUGEE WITH NO ENGLISH, HER JOURNEY TO LEGAL ADMISSION WAS FAR FROM EASY.

I was recently admitted as an Australian lawyer in the Supreme Court of Victoria. It has been an absolute honour to be the first person and the first woman in my family to have the opportunity to craft my own future.

My journey to this point began when 20 years ago my father decided that Afghanistan and Pakistan, where most of our family members lived at the time, would no longer be safe for us. My family is originally from Ghazni in Afghanistan and while Dad sought asylum in Australia, my six siblings and mother waited for him in Quetta, Pakistan. For many years Ghazni was one of the safest areas in Afghanistan and Quetta one of the safest in Pakistan for Hazaras. Hazaras in both cities today continue to remain a target for the extremist groups and ISIS affiliates. Dad was particularly worried about the safety of his four daughters. He, like all Hazara fathers, wanted us not only to be safe but also to be able to get an education.

After saving up his money from his work as a shoemaker and a dairy producer, Dad made his way to Indonesia where he took a boat to Australia. Dad knew very little about Australia except that it was a safe place where you wouldn't be killed because of your religion, ethnicity or political opinion, where your daughters and sons could go to school freely, and where you could purchase a property or carry on a business without any discrimination.

At the time, there weren't many Hazara asylum seekers coming to Australia. The boat Dad was travelling in was in a terrible storm, twice he almost drowned but fortunately they were rescued by the Australian Navy once they entered Australian waters and shipped to Christmas Island. From there he was put into Woomera detention centre for about seven months. For seven months we had

"Finding work in the legal sector has been difficult. My family could not offer help. There were more rejections than I can remember. At one point I considered changing my name on my job application."

no idea if he was alive and well until my mother finally got a phone call to say that he was OK.

At Woomera Dad was found to be a genuine refugee and got a temporary protection visa. He went to live in Dandenong and worked as a dishwasher in a bakery. He'd ride his bicycle 14kms seven days a week from Dandenong to Clayton. He was paid $13 an hour and from that he sent us money to cover our expenses in Pakistan where we waited for him with hopes that we could one day join him in Australia.

It was six years before we saw Dad again. All that time Mum was looking after us by herself. When Dad was finally able to come and see us in 2005, he barely recognised us. Before he visited us he had applied for a subclass 200 visa for us to join him in Australia on a humanitarian basis. Within six months we had been accepted as genuine refugees. It's so different now. Now families can wait up to eight years for a visa.

When we first arrived in Melbourne, I was 13. My two high school age siblings and I had to attend English language school before we could start at Dandenong High School. But I was determined to start school as soon as I could, and within three months I convinced the high school that I was ready to start there. It was really hard for the first few months though, and Years 11 and 12 were particularly difficult. But I worked really hard and I ended up graduating in the top 15 per cent of the state.

I didn't have anyone to support or guide me in terms of my career. I thought I wanted to become a doctor but my careers teacher wasn't very encouraging about my chances of that. So I studied science at Monash, and I did really well. But I was not able to secure an interview for medical school, so I decided instead to do my own research into the mental health issues in the Hazara community at the University of Melbourne. After that I got an offer from St George's University of London to do postgraduate medicine, where I would study in Cyprus and the UK. But by that time, I had already realised that maybe medicine was not for me.

My research supervisor had noticed that during my research I would use any opportunity to advocate for my community and against their ongoing persecution. She sat me down one day and said, "I know you would make a great doctor, but I also think you'd make an excellent lawyer and I think you should consider law before you step into the medical world. Because your community needs people who can represent their interests".

Before this I hadn't ever thought of doing law but by this time a lot of people had told me I would make a good lawyer. My youngest sister was also considering law at the time and initially I thought we can't have two lawyers in the same family. But everyone said to me, you've got that fire in you, you would make a great lawyer.

I started the Juris Doctor mid-year at the University of New South Wales, and then I got scholarships to transfer to the University of Melbourne the following year. In 2018 I interned for four months in New York doing policy work on a range of human rights issues for the Social, Humanitarian and Cultural Issues Committee of the General Assembly at the Australian Permanent Mission to the United Nations. I finished my Juris Doctor in December 2019 with first-class honours in legal research. I then got the Kay Smith scholarship to do my PLT at the College of Law.

I have four languages: Hazaragi, Urdu, Dari and English, so I have been working for the past few years as a professional interpreter. I also worked as a project officer for the South Eastern Primary Health Network. And for the past couple of years I've worked at Refugee Legal, recently on a fellowship. Next year, I will be commencing a trainee lawyer role at Fitzroy Legal Service.

Finding work in the legal sector has been difficult. My family could not offer help. There were more rejections than I can remember. At one point I considered changing my name on my job application. I consistently applied, but the pandemic only made things worse. My parents have given us opportunities and supported me every step of the way.

Dad has been a community leader serving a large Hazara community in Dandenong. Australia has been home for him for 20 years now. His journey and that of others like him today who leave everything behind to seek a safe haven for their children is a challenge to our current world. Dad has not been able to work for 12 years now following an injury at a car parts factory. He was made redundant following the injury. We only realised years later this was an unfair dismissal because he had been disabled at work. I always wonder how many more people like him are taken advantage of everyday because they speak languages other than English and cannot defend themselves against precarious and exploitative situations. Had I had the skills that I have now, we would have been able to get damages for his injuries. As his daughter, I am proud to have been able to support my family here in Australia and overseas. ■

FOOD

18½/20

Embla
122 Russell Street

After bursting onto the scene in 2016, Embla wine bar took out the *Good Food* Best New Restaurant in its inaugural year. Its modern European cuisine is served in a chic space fitted out with comforting solid wood and exposed brickwork.

Embla has reopened to limited numbers and a $100 per person minimum spend.

We start with oysters and a wonderfully soft but piquante chardonnay vinegar ice (granita) ($6 ea). Yellowfin tuna ($19) is a spectacularly plated carpaccio in which a layer of a caper-studded buttermilk ricotta is topped with a sheet of rich-pink fish and brushed with a film of olive oil. The delicious marriage of creamy and savoury flavours is a highly successful, running theme on the menu. Preserved chicken ($18) is a delightful composed salad featuring nuggets of poached and lightly pickled chicken nestled in vibrantly green broad beans and their leaves, cultured cream, and accented with slivers of aromatic yuzu rind. Fearful of leaving traces of creamy juices from these dishes on plates, we grab a serve of the seeded sourdough ($7) which is expertly baked and accompanied by an addictive Kalamata butter.

Main dishes begin with squid ($25), which comes as deftly scored, umami-rich pieces of fried meat, paired beautifully with spring pea shoots, charred fennel and ginger. This simple but lovely offering epitomises Embla's casual yet super-tasty and fresh approach to their food. Koji aged lamb leg ($38) is slices of a medium-rare, beautifully moist and flavourful cut of lamb, topped with a scoop of garlic ricotta. This dish is perfectly paired with baked celeriac ($18), in which delicately thin scallops of celery-root with caramelised edges are topped with a heavenly mix of roasted peanuts, thyme and a hint of melted aged cheddar.

We choose a splendid Yarra Valley 2019 Salo Chardonnay ($90), with a solid measure of wood, mineral and fruit characteristics that pairs well across our somewhat diverse menu.

Desserts hold up their end of the bargain. Chocolate ripple-misu ($17) is a welcome tweak of the often-mushy genre, with richly flavoured and just firm to the bite biscuits layered between boozy marscapone. The frozen milk ($17) is a dainty combination of ice, compressed rhubarb slices and rose geranium.

Embla's casual yet refined approach to dining is an almost unbeatable choice for a lunch venue that is fit for a special lunch with valued clients. ■

Shaun Ginsbourg is a hungry barrister.

HOW WE RATE IT

18 to 20: Would take my best client here

15 to 17: A safe bet for client entertainment

12 to 14: Best for a lunch with colleagues

<12: Life's too short, try somewhere else

COFFEE

Florentino's Cellar Bar
80 Bourke Street

If you are part of the trickle back into the CBD, having a morning coffee/tea/Italian hot chocolate at the Cellar Bar will ease the re-entry. Part of the Florentino empire at the top of Bourke Street, it's all carved wood, soft lighting and Italian frescoes, a cafe firmly in the European tradition. A hot, strong, creamy coffee – roasted by Territory Melbourne Coffee, which produces small seasonal batches hand-crafted to bring out nut, caramel, nougat and marzipan flavours – paired with a freshly squeezed OJ and fruit toast, pastries, crumpets or granola – make this spot a treat for breakfast, inside or out under the canopy of the London plane trees. Open 7.30am-late. **CF**

WINE *By Jeni Port*

Kilikanoon Skilly Valley Pinot Gris 2020
RRP $25

For a great all-rounder white wine that can comfortably fit into almost any Christmas celebration, think pinot gris.

Kilikanoon sources gris from the Skillogalee district of the Clare Valley. Note the rosè-like tinge, a good sign, which indicates that the pink blush of the grape's skin (with accompanying flavour and textural components) has not been removed during winemaking. Lively spiced apple and citrus to the fore, joined by dried pear, a trace of ginger on the palate with trademark umani mouthfeel. Open with seafood cocktail.
Stockist: www.kilikanoon.com.au

Yangarra Estate Vineyard Rose 2020
RRP $27

Eye-catching, Provençal blush colour sets the scene for this McLaren Vale Grenache rose. Apple blossom joins wild strawberry and cherry in the energetic youngster. Grenache florals are a big part of its charm, together with a solid appley, strawberry flavour core. A ping of acidity caps it all off cleanly. Bright and beautiful. Enjoy with smoked salmon.
Stockists: Primrose & Vine, Essendon, Wine Republic stores, Port Melbourne IGA, Naughtons Parkville Hotel, www.yangarra.com

Merindoc Willoughby Bridge Heathcote Shiraz 2018
RRP $35

Heathcote shiraz is rightly famous for astounding deep colour and complex flavours, but it is a big region with a number of styles at play. Merindoc Vintners' Willoughby Bridge vineyard is to the north producing this fine and super elegant shiraz. Brilliant deep red-garnet colour. Subtle aromas with black berries, cassis, cinnamon and earth. Generous in flavour, medium in body with a light savouriness, this young red is approachable and more than ready for the Christmas table. Open with roast turkey.
Stockist: www.merindoc.com.au ■

Jeni Port is a Melbourne wine writer, author and judge.

STRANGE DAYS

DON'T FORGET THE FESTIVE SANITISER.

As we approach the end of the strangest year most of us have ever experienced we face a festive season very different from what we might have imagined at the start of 2020.

Despite our best efforts Christmas will not be the same. Santa certainly won't have to ask if we've been naughty or nice since we've had little choice in the matter. Children will leave out milk, biscuits and hand sanitiser for the big fella.

Christmas day might feel similar to other events this year where our routines and expectations were disrupted. Grand Final week and the Spring Carnival left us feeling like bewildered bystanders to events that are normally central to life in Melbourne.

Staging the climax of the footy season in Queensland just didn't feel right – like Sylvester Stallone playing Hamlet, or being forced to watch a party through a window. And as for Melbourne Cup Day, the "people's race" wasn't the same, due to the presence of a race and the absence of people.

Often during the darkest days a trip to the supermarket became one of the highlights of the week, although at times it forced us to confront quite serious questions such as why people at the checkout wait until they have unloaded their over-filled trolleys, have the items scanned, and then frantically search in their bags for their bank card.

With our usual festive season activities curtailed some might argue that missing out on the annual office party is a blessing. Mistletoe sales have plummeted and bottle shop owners in Melbourne's legal precinct have gone into a deep depression.

Apparently more careers are ruined at the office Christmas party than any other workplace event with the possible exception of telling your colleague what you really feel about the boss and accidentally adding it to a group email.

It has been a strange year in the law. Office life all but disappeared for months, courts were shuttered and Zoom sessions in our PJs became a daily novelty we very quickly got over.

And haven't we all enjoyed communing with technology, especially those like your correspondent who treat a computer not so much as a tool but as a temperamental nemesis.

Your correspondent is the kind of person who finds out his software isn't communicating with his hardware and wonders whether to call IT or a relationship counsellor. Many years ago I worked out the laptop operating system is called Windows because it breaks so easily.

Much of the fallout from COVID-19 still has to play out but lawyers will certainly be central to fixing much of the trauma caused by the disruption to business and family life.

In times like these it has been difficult to tune in to our normal behaviours. Our natural equilibrium has been compromised, our routines disrupted to the point where our old lives seem almost dream-like.

If we are looking for silver linings in the COVID-19 playbook, it has shown us that we live in a remarkably resilient community. And with a little bit of luck we will bounce back bigger and better in 2021. ■

DO YOU EVER COME ACROSS AMUSING INCIDENTS RELATED TO THE LAW?

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ADOBESTOCK

REST AND REFLECT

MANY LAWYERS HAVE SPENT A LOT OF TIME IN THE SURVIVAL ZONE THIS YEAR SO IT'S IMPORTANT TO TAKE STOCK AND RECHARGE.

BY EMILY KNOWLES

Polarising. That seems to be an accurate description for 2020. For some of us there's been a slowing down – for others, a speeding up. You may have had more on your plate than ever before – or more time with your own thoughts to focus on just being. Whether it's in the professional or personal spheres of your life, you're likely to have been impacted. So how do we digest the year that was and prepare for the year to come?

Here are some ways to reflect, make the most of the moment, and focus on the future.

Looking back

Neuroscience scholarship says our brain craves certainty, and for most of 2020 we haven't had much of that. So, if certainty isn't available to ease our brain, what else is?

Reflection is an opportunity for "cognitive reappraisal" – a kind of reframing. The research tells us reflection can calm the activation of our limbic system – the part of the brain that houses emotion and memory and where we encode and store events. Typically, this process involves certain stages: reinterpreting an event, normalising the event, and repositioning the event in your mind (where you look at the event from another person's position, or from your own perspective at another point in time).

If you've been "on the field" during 2020, what about stepping up to the metaphorical balcony and looking down on the field? The vantage point of perspective and psychological distance can be useful in guiding reflection. Reflecting with a framework is generally encouraged. (Harvard Business School published its recommendations on this earlier this year.)

Here are some structured questions you can ask yourself.

Reflection tips

- What behaviour from 2020 can I stop/start/continue to better align myself with my goals or my values?
- What went well? What didn't go well? What could have gone even better?
- What are the lessons I learned from 2020?

Reflection can also promote metacognition – that is, thinking about thinking – which has been linked to psychological wellbeing, and also what it is to think like a lawyer.

When used deliberately, reflection is a powerful tool. It's a way to make sense of the past to increase our strategic self-awareness. Being able to reflect with purpose also provides a gateway to deeper zones of rest, recovery and reset.

To make the most of the holiday ahead we'll need to switch gears. Making that switch requires a deliberate pause. Rest and recovery practices allow us to do just that. Getting the most out of time in the pause is the best preparation we can have for our next intentional role or environment.

TIPS

- Use the upcoming break as a time to build up your personal war chest for meeting future demands.
- Think about what's worked this year – and what hasn't.
- Be sure to implement the rest practices you know work for you and consider which new ones you'd like to start.
- Acknowledge your personal triggers and thresholds for dipping in and out of the performance zone.
- Build in more opportunities for rest in 2021 so you can steer clear of any long stay in the survival zone and minimise any visit to the burnout zone.

The impact on performance

We know that performance and wellbeing are intertwined. This connection is best summarised by four wellbeing zones: performance, survival, rest and burnout. Many of us have spent a lot of time in the survival zone this year (and the burnout zone too perhaps) so the rest zone is a vital space to visit and spend some time in over the break. But this vacation-based rest and recover strategy is not enough. Evidence tells us taking vacations should not be a person's main restorative energy management strategy. Studies show that going on vacation does not have enduring effects on wellbeing. We also need to have rest practices that are an integral part of our regular lives.

The importance of recharge is also acknowledged in the law. And the rest practice of your choice is more about the psychological experience during recovery, rather than the activity itself. The psychological literature tells us that pursuing relaxation, mastery and/or detachment are what will create the optimum experience. A balance of movement, stillness and mindfulness is also recommended.

The positive psychology research shows that those practising in the legal profession have a natural tendency for pessimistic thinking that can be reinforced during a crisis. While this may have a professional advantage, as it's linked to high prudence, it operates as a double-edged sword because it's also a well-documented risk factor for both unhappiness and depression. Learned optimism has been offered as an approach to address the downside of this thinking style. Flexible optimism can be taught and studies have explored what this looks like in a legal environment. ■

Emily Knowles is a practising psychologist at The Human Link with a passion for lawyer wellbeing, having worked in the legal profession earlier in her career. For references contact emily@humanlink.co.

ADOBE STOCK

ACCIDENTAL BRUSH WITH WES ANDERSON

Crawley Edge boatshed (above) and Melbourne's Government House ballroom

LAWYER JAMES WONG'S PASSION FOR TAKING PICTURES LED HIM TO AN UNUSUAL ARTISTIC PROJECT. **BY KARIN DERKLEY**

Mills Oakley digital lawyer James Wong says a camera has rarely been out of his hands since he first picked up some old Nikon gear at the age of 12. "I was a bit fidgety as a kid and I always needed something to do with my hands when I went on walks with my family. The camera was perfect for that."

Now one of his photos has been featured in *Accidentally Wes Anderson* a book of photographs of real world places that are reminiscent of the fantastical visual style of the cult filmmaker in films such as *The Grand Budapest Hotel, Moonrise Kingdom* and *The Darjeeling Limited*.

Mr Wong took the photo of the iconic blue Crawley Edge Boatshed on Perth's Swan River while he was there for work. The boatshed is hugely popular with selfie-taking tourists. Mr Wong's perfectly symmetrical and whimsical photo of the boatshed floating under a stormy sky happened to fit the artistic vision of the book's curator, he says.

"I'm really glad Australia is featured among the 200 or so locations in the book. I've seen a couple of comments from Perth residents excited to see their city featured in the book," he says.

Over the years Mr Wong believes he may have taken up to 50,000 photos, either on his (later model) Nikon or his Google Pixel phone, which he says takes photos nearly as well as his SLR. "They say the best camera is the one that you have on you."

Less keen on pointing cameras at individuals, Mr Wong says he is drawn instead to urban photography where people are almost incidental to the scene. "I love walking around cities and trying to capture something of their character and energy in my photographs."

There's a stillness to his images that defies the activity within the frame. His strikingly composed photos of London and New York turn away from the crowds to focus on the architectural drama. The serene order in his photo of the interior of the United Nations complex in Nairobi belies the fact that at the time the Kenyan capital was coming to terms with a series of tragic terrorist attacks. In a stunning image of the ballroom inside Melbourne's Government House, it's the diagonals, pastel blues and gilded details that draw the eye rather than the audience gathered in the seats.

His photo of Southern Cross station was taken not long into the first lockdown in April allowing him to focus on the cavernous space with its dramatically undulating roof in what would normally be one of the busiest railway stations in Melbourne. "I was going home late one night from the CBD and I was at Southern Cross station and looking down over the empty platforms, and there was such a quietness there. I thought I'd try to capture that as a way to anchor something about 2020 and this incredibly unusual stillness."

Regularly posting his photos on Instagram, in late 2017 Mr Wong came across the Accidentally Wes Anderson account and recognised in those photos something of his own aesthetic and started adding the #accidentallywesanderson hashtag to some of his own posts.

"The Wes Anderson theme appealed to me because I like those scene-setting shots in the films which have a slightly manufactured kind of aesthetic and a focus on symmetries and a way of representing the emotions behind a scene through colour and form," he says.

Photography complements his work as a lawyer "where you need to capture key details that fit into a bigger picture", he says. "I credit some of my skills in that vein to practising the process of composing photos – of taking in the scene around me and choosing which elements are important or that I want to draw attention to, and then developing an angle.

"I'm a really visual person, and I find that as a digital lawyer it helps to present legal advice in a visual format," he says. "People working in the tech space don't really think in words, they usually think and communicate ideas through pictures or diagrams." ■

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