QLS PROCTOR

DECEMBER 2019

FRONT AND CENTRE

Queensland's first Human Rights Commissioner Scott McDougall

SYMPOSIUM 2020
Ethics was never like this

TECHNOLOGY AND ACCESS TO JUSTICE
Will it provide the answers?

EARLY CAREER LAWYERS
Sea law, do law

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Vol. 39 No. 11 | ISSN 1321-8794

Victories and challenges in the year that was

My 2019 wrap-up

Well, it turns out that roaring sound I had in my ears was not the ocean, but rather the end of my presidency rushing towards me at what seems like the speed of light!

A point that seemed a long way off when I wrote my first column for 2019 is suddenly here.

To say it has been an interesting year would be an understatement of significant proportions. We have had a barrister informing on her clients in the Lawyer X scandal, some high-profile legal people charged with serious offences up here, and a seemingly endless attack on the judiciary by sections of our media. Never a dull moment, to be sure!

One of the things of which I am most proud when I look back across 2019 is that Queensland Law Society has been the voice of reason on all these, and many other, vital issues. Not only that, it has been a voice that was heard. I am pleased to be able to note that the Society has become once again the go-to for media pundits when seeking a view on the legal issues of the day.

I have noted in the past that it is the legal profession's role to guide public discussion on the big issues of justice and the rule of law, and we have excelled in that space this year. I have spent a lot of time on radio, TV and in other media being interviewed on those important issues, and the profile of our Society – and the weight our voice carries in these debates – has never been higher.

This year has also seen the successful launch of our Aspire lecture series, a project near and dear to my heart. It is wonderful to see our members embrace this series, and their willingness to think outside the box on leadership and look to take opportunities to broaden their skillset in many different ways.

Our Solicitor Advocates Course has come fully into its own in 2019, with the basic course again being offered, but also a family law-specific course, and two higher level courses for those who want to double down on that advocacy skillset. With solicitors now doing the bulk of our state's courtwork, these skills certainly increase the employability of our members. Given the popularity of the course, which sells out fairly quickly, I am confident we are on the right track here.

Those skills also feed into one of my deepest passions, the need for more solicitors on our Bench. Simply put, the ranks of judges, magistrates and tribunal members need the diversity that only solicitor candidates bring. I am very happy to note that I have welcomed many solicitors and former solicitors to those ranks this year, and that the Attorney has listened to my call for more solicitor appointments. I can assure her and any who follow in her footsteps that my advocacy on that issue will not cease on the end of my official duties!

I am especially proud of some of the advocacy efforts I have had the privilege to lead this year. Standing up for our strong, independent and talented judiciary has been its own reward, and I am confident we have managed to blunt the shrill attacks of a sometimes callow and ill-informed media. We have also stood tall on – and garnered much support for – the issue of an independent judicial commission, which would reassure the community (and disarm the shock journos).

We have also had the courage to speak out on the rare occasions that something is amiss on the Bench, especially the vexed issue of judicial bullying. I am proud we did not waiver in the face of that challenge and stood by our members even on such a difficult and delicate issue.

We have been relentless in our call for a properly funded justice system, including all levels of courts and tribunals, especially QCAT which performs minor miracles on a daily basis despite a shoestring budget. We cannot continue to rely on that, and I hope the new Council rides the momentum of 2019 to get the government to resource our justice system fully.

One of the things I really must do is thank the wonderful and supportive staff of the Society. Everything I have managed to achieve in this year has been due in no small part to their skill, hard work and support. The submissions to which I have spoken in parliamentary inquiries are succinct, fact-filled and persuasive, and my briefings always comprehensive and timely. When QLS holds events, either at Law Society House or in the far-flung reaches of our state, they go off without a hitch; all I have to do is turn up and speak!

The Ethics and Practice Centre – now known as Solicitor Support – remains the jewel in the QLS crown, and I am massively appreciative of the support and services they have delivered. I am proud to have been able to help deliver a long-held dream of Director Stafford Shepherd in making the centre an ILP, which has greatly increased the services the centre can supply.

As I say, all these things occur because QLS staff get behind them, drive them and go the extra mile, or indeed the extra five miles if that is what it takes. QLS is a not-for-profit, and we do not have heaps of money and resources to throw at our projects, but they do get done. They get done because the staff here do more than what is in their position description and go well beyond their pay grades to deliver for members. Indeed it is the case that for all the services and products the Society makes available for members, the biggest benefit to membership is that it puts this mob in your corner!

> **The people you are, the work you do, and the efforts you make on behalf of clients, colleagues and community has always inspired and fortified me.**

To the incoming Council I wish the best of luck, and warn them to be ready for hard work. The position you have is a privileged one, and you represent a noble and worthy membership; but never forget that to represent them is to serve them. Whatever you do, whatever projects you undertake, must be done for the benefit of our members and thereby our justice system and indeed the Queensland public.

I am very comforted that the incoming President, Luke Murphy, has given me his word that his presidency will continue to support those important projects – such as MALS, Aspire, Solicitor Advocates Course, practice support consultancy – that have proved so popular with our members.

Speaking of the President, I also say to the new Council: get behind him. The presidency is a powerful and influential position, and carries much prestige, but it is still only one person. I know from past experience that a president can achieve great things with a supportive council. Absent that support, however, a presidency can slip into figurehead status, and our profession be diminished.

Finally, I note that the end of this year represents the effective end of my many long years on council. Though I will retain a formal role as the Immediate Past President, that is a legacy position from the current Council; it feels much like the end of an era for me.

So I would like to take this opportunity to thank you, the members of QLS, for your support, friendship and encouragement in that time. I have enjoyed the privilege of serving you for many years and in the highest of offices in our council, and I am truly humbled by the trust you gave me with those roles.

A pleasing side benefit of my years on Council, and particularly in the roles of President, Deputy President and Immediate Past President, is that my duties included meeting so many members. I suspect I may well have met more QLS members than any other President – in any event I am going to claim it!

The people you are, the work you do, and the efforts you make on behalf of clients, colleagues and community has always inspired and fortified me. I have never doubted that I was involved in a worthy cause, because of the great worth of our membership.

Despite our (occasionally very public) detractors, we remain a noble profession working for the greater good of the community, and regularly making a positive difference – and that is down to the quality of our individual members. I can deliver resources like the practice support consultancy, lecture series and other products, but at the end of the day the success of our legal system rests in the hands of our members and how they conduct themselves. Time and again, those hands have proven to be strong and safe, and good ones to leave the system in; I confidently do so.

It has been a pleasure serving you all, take care of yourselves and each other.

Bill Potts
Queensland Law Society President

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LinkedIn: linkedin.com/in/bill-potts-qlspresident

Contribution > recognition

Celebrating our own

Perhaps in a perfect world, all of the contributions that Queensland lawyers make would be publicly acknowledged.

The truth is, however, that much of the pro bono work and the other contributions that members of the profession make remains unheralded, and in fact some of our unsung heroes are quite content for that to continue.

At Queensland Law Society we are keen to see the work of our members acknowledged, and we support other organisations which recognise positive contributions within and by the profession.

For example, we were the gold sponsor for the Women Lawyers Association of Queensland 41st annual awards dinner, held on 25 October at Brisbane's Hilton Hotel.

This ceremony recognised the achievements and contributions of the Honourable Margaret Wilson QC (Woman in Excellence Award), Bridget Cullen (Leneen Forde AC Woman Lawyer of the Year), Zinta Harris (Trailblazer of the Year), Tanya Straguszi (Regional Woman Lawyer of the Year), Annie Mish-Willis (Emergent Woman Lawyer of the Year) and Jeffrey Cuddihy & Joyce Solicitors (Legal Aid Queensland Equitable Briefing Award).

On behalf of the Society, I congratulate these award winners and thank them for the passion with which they perform their duties, and for their contributions to the profession and the community.

We have also provided significant support for an organisation which makes an enormous contribution to the community, Women's Legal Service Queensland. Last month's Legal Profession Breakfast, held in the Main Auditorium at Brisbane City Hall, was fully booked, with around 800 guests – a who's who of the Brisbane legal community, enjoying a delicious breakfast and a personal and moving keynote address from Arman Abrahimzadeh OAM.

It was exciting to be there for the presentation of the inaugural Dame Quentin Bryce Domestic Violence Prevention Advocate Award, which recognises the contribution, commitment and professionalism of an individual in the Queensland legal profession who has worked to address domestic violence and advocate for change within workplaces, through fundraising or academic engagement in the legal and/or social systems.

This is a continuing task of the upmost importance and I celebrate the many outstanding nominees we received. In the end there were eight finalists.

The winner of the inaugural award was Sharell O'Brien, the coordinator of the Mackay Domestic and Family Violence High Risk Team. She has dedicated the last six years to providing duty lawyer services, legal advice, casework representation, and early intervention and prevention strategies such as community development, community legal education, community awareness projects and advocacy for law reform for ending domestic and family violence.

In 2017, Sharell developed the Rural Regional and Remote Legal Assistance Project. The RRR Legal Assistance Project gave women the ability to obtain legal advice via Skype at several community support organisations across North, Far North and Western Queensland. In 2014, she developed the 'Ask Nola' website which provides important free legal education to community support workers in rural and remote locations who assist women experiencing domestic and family violence. The membership base of the website grew to over 200 members. QLS is proud that we can provide full logistical and event support for this event, which sees all proceeds going to Women's Legal Service to help it provide free legal and welfare assistance to women and their children who experience domestic violence.

The work that the service does, much of which is pro bono, must be recognised and acknowledged.

Specialist accreditation

An event this month recognises the dedication and professionalism of QLS members – the Brisbane Specialist Accreditation Christmas Breakfast, which was preceded by corresponding events in Cairns and Townsville late last month.

This breakfast event features the popular annual address by Chief Justice Catherine Holmes and recognises the achievements of this year's specialist accreditation graduates in the presence of family, colleagues, representatives of the judiciary and members of the specialist accreditation community.

And I am pleased to advise that this year's event will see the presentation of our inaugural Outstanding Accredited Specialist Award, which will recognise the exceptional contribution to the profession by a senior accredited specialist.

This year the specialist accreditation programs covered family law, property law and succession law. In 2020, the programs will cover business law, commercial litigation, criminal law, immigration law, personal injuries and workplace relations. The workplace relations accreditation program will be run collaboratively with other law societies.

Festive wishes

Finally, I would like to offer my best wishes for the festive season to our members, their families and staff. Our profession isn't easy; we work hard in the service of justice and our community, and sometimes this becomes a stressful, emotional rollercoaster.

Please ensure you make the time to relax, enjoy the company of family and friends, and return next year refreshed and ready for the challenges ahead.

Rolf Moses
Queensland Law Society CEO

Notice of Annual General Meeting of Queensland Law Society Inc.

(Pursuant to Rules 59 and 60 of the *Legal Profession (Society) Rules 2007)*

Notice is hereby given that the 91st Annual General Meeting (AGM) of members of Queensland Law Society Incorporated will be held in the Auditorium, Level 2, Law Society House, 179 Ann Street, Brisbane at 1pm on Wednesday 11 December 2019.

Business:

- Confirmation of minutes of the AGM held on 4 December 2018
- Reception of the annual report and financial statement of the Council for the year ended 30 June 2019
- Consideration of any motion, notice of which has been given in accordance with the requirements of Rule 60(2) of the *Legal Profession (Society) Rules 2007*
- Such further business as may lawfully be brought before the meeting.

1 November 2019

By Order

Louise Pennisi,
Corporate Secretary

If you would like to attend in person, please RSVP by **3pm on Friday 6 December 2019** to l.ellem@qls.com.au or phone 07 3842 5904.

Any full member whose subscription is not in arrears and who is present in person or by proxy is entitled to vote at the meeting.

Proxies

A member who is entitled to vote may appoint one proxy who is another member who is entitled to vote. To be valid, the completed proxy form must be received by the Secretary by 1pm on Monday 9 December 2019. Completed proxy forms can be returned by:

a. Scanning and emailing – Attention: Corporate Secretary, l.ellem@qls.com.au
b. Post – Attention: Corporate Secretary, GPO Box 1785, Brisbane, Queensland, 4001
c. Hand delivery – Attention: Corporate Secretary, Level 2, Law Society House, 179 Ann Street, Brisbane.

A proxy form can be downloaded from **qls.com.au** > For the profession > Practice support > Resources > Legal profession forms.

The Society's annual report, including financial statements, is also published on the Society's website. See **qls.com.au** > About QLS > Annual Reports.

QLS election results

The successful candidates in this year's Queensland Law Society election will take office from 1 January for a two-year tenure.

The final results of the poll, which closed on 24 October, are:

President: Luke Murphy

Deputy President: Elizabeth Shearer

Vice President: Peter Lyons

Ordinary Members of Council:

Michael Brennan

Allison Caputo

Chloe Kopilovic

Kirsty Mackie

William (Bill) Munro

Rebecca Pezzutti

Kara Thomson

Phil Ware

QLS congratulates the successful candidates in the election.

Seven-year celebration

Damien Greer Lawyers, which focuses solely on family law, recently celebrated the firm's seventh anniversary at Damien and his wife Kate Greer's residence in Fairfield, with around 150 friends, colleagues and referrers.

The evening began with words of thanks and wisdom from Principal Damien Greer, and ended with a light roast and toast from the firm's Special Counsel, Wendy Miller.

The firm's staff are pictured at the event, *from left*, Wendy Miller, Simone Langlois, Samantha Isdale, Joseph Taylor, Jodie Mulcahy, Carolyn McKenna, Wendy Wright, Damien Greer, Scott Richardson, Sarah Dibley, Justin Hine, Arlena Casey and Caitlin Wilson.

Hospitality the Mullins way

Mullins hosted its inaugural hospitality industry event on 31 October, showing appreciation to the clients, referrers and friends of the firm who have supported the firm's hospitality team.

The event was held at The Grove on 480 Queen Street and was hosted by Managing Partner Curt Schatz along with partners Louise Wallace, Matthew Bradford and Michael Potts.

The event was in line with the firm's decision in 2018 to rebrand and focus on nine key industries. Hotels and accommodation, pubs and restaurants, and clubs are three of the firm's key industries and together represent a large section of the firm's clients.

Receiver appointment terminated

On 30 October 2019, Queensland Law Society Council delegate Craig William Smiley, General Manager – Regulation, terminated the appointment of Sherry Janette Brown, Michael Craig Drinkall, Glenn Ashley Forster, William Thomas Hourigan and Deborah Yumin Mok, jointly and severally, as receiver of the regulated property of Herd & Janes.

The termination of appointment of receiver took effect from that date.

Queensland Law Society

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ON THE INTERWEB

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HAVE YOUR SAY
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FACEBOOK

The College of Law Australia
1 hr ·

The College of Law is a proud sponsor of the Queensland Law Society Legal Profession Breakfast in support of Women's Legal Service Queensland.

This incredible event was attended by 750 legal practitioners and raised $118,000 for WLSQ to help even more women and children live a life free from domestic, family and sexual abuse.

The audience sat in hushed silence as Arman Abrahimzadeh OAM delivered his powerful, personal story of his exposure to domestic violence as a child, whi... See more

Wonderley & Hall
12 November at 18:30 ·

Damian, Ian, Leesa and James spent the day at Picnic Point Café, Restaurant & Function Centre for the annual Lawyers' Conference held by the Queensland Law Society in Toowoomba.

It was a great day to help us stay updated with recent changes and developments in the law.

TWITTER

Corrs (Law Firm)
@Corrslawyers

We were delighted to attend the @qldlawsociety 2019 Legal Profession Breakfast yesterday in support of @wlsq. Find out more about the fantastic work Women's Legal Service Queensland do here: wlsq.org.au

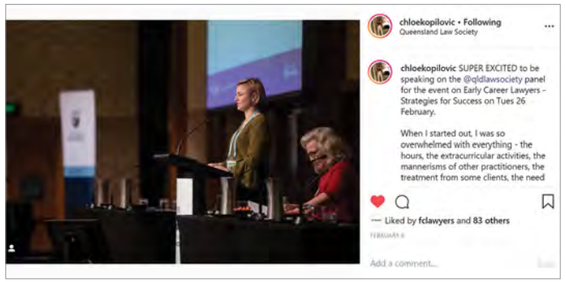
LEAP Legal Software AU
@LEAP4LawFirmsAU

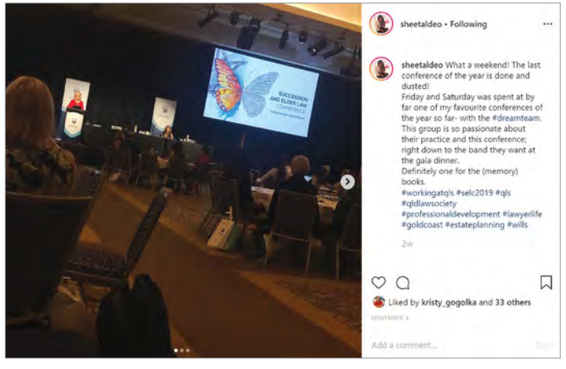
Are you at the @qldlawsociety Succession and Elder Law Conference today? Come past the LEAP stand today or tomorrow to say hello to our team. #auslaw #legaltech #elderlaw

Andrea PerryPetersen
@winkiepp

It was great to present today on my favourite topic #Innovation and #Accesstojustice to @qldlawsociety and especially to have a robust discussion about the role of #technology, #regulation and #legaleducation with representatives from the courts, private profession and CLCs.

INSTAGRAM





007 LIVE AND LET DIE

SUCCESSION AND ELDER LAW CONFERENCE

LIFE AND DEATH, MR BOND

This year's Succession and Elder Law Conference, at the Surfers Paradise Marriott Resort & Spa in early November, was another great success, both professionally and socially.

With its dual themes of life and death, the 150 attendees enjoyed sessions spanning all learning levels, from estate litigation basics to complex ethical matters involving purported wills.

Dr Helena Popovic's session on the 12 key factors to boosting your most valuable asset – your brain – was a big hit with delegates, as was the *Live and Let Die*/James Bond-themed conference dinner.

Breakfast for a multitude

One of the largest single events of the QLS year saw some 800 guests sitting down to a scrumptious breakfast and moving addresses at the Legal Profession Breakfast 2019, held in the Main Auditorium at Brisbane City Hall on 14 November.

The morning included a heartfelt keynote address by Arman Abrahimzadeh OAM, a passionate advocate against domestic violence and co-founder of the Zahra Foundation Australia, while another highlight was the presentation of the inaugural Dame Quentin Bryce Domestic Violence Prevention Advocate Award, which recognises the contribution, commitment and professionalism of an individual in the Queensland legal profession who has worked to address domestic violence and advocate for change within workplaces. It was won by Sharell O'Brien of the Domestic Violence Resource Service, Mackay.

Proceeds from the Legal Profession Breakfast benefit Women's Legal Service Queensland.

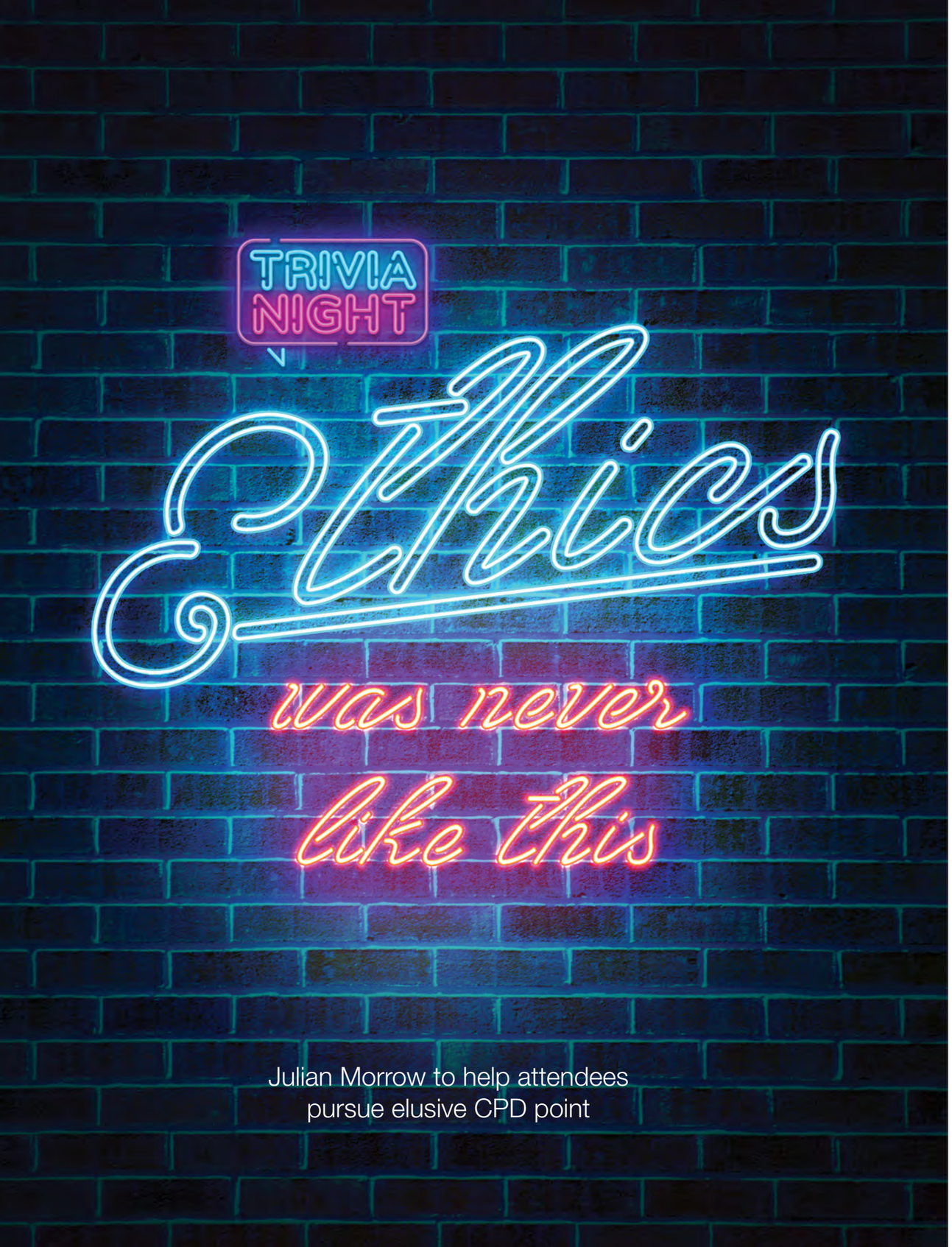
Aspiring to leadership

New Queensland Legal Services Commissioner and former QLS President Megan Mahon delivered the second address in this year's Aspire Leadership Lecture Series to an attentive audience at Law Society House on 6 November.

Toowoomba celebration a family affair

25-year membership pin recipients at last month's Celebrate, Recognise and Socialise in Toowoomba made it a family affair, bringing guests that included parents, partners and children, two of whom are law students.

Pictured above, *from left*, are QLS ethics solicitor Shane Budden, pin recipients Amanda Boyce, Dean Spanner and Leesa Beresford, and Downs and South West Queensland District Law Association President Sarah-Jane MacDonald.



Julian Morrow to help attendees pursue elusive CPD point

Lawyer and comedian Julian Morrow has made a career of public nuisance in various forms.

He co-founded The Chaser satirical media empire and joke company Giant Dwarf, as well as making TV shows including The *Election Chaser*, *CNNNN*, *The Chaser's War on Everything*, T*he Hamster Wheel* and *The Checkout*. His work has been nominated, unsuccessfully, for many awards, and prosecuted successfully in many courts.

In recent years, he has taken to claiming credit for the work of others as executive producer of Lawrence Leung's series, *Choose Your Own Adventure* and *Unbelievable*, Eliza and Hannah Reilly's *Growing Up Gracefully* and Sarah Scheller and Alison Bell's *The Letdown*.

In 2020, however, Julian's career will reach a new pinnacle when he presents 'Ethical Pursuit —The legal gen(i)us edition', billed as a "professionally-developing world-first* CPD gameshow for lawyers", at QLS Symposium 2020. *Proctor* asked Julian to explain this revolutionary concept:

What initially led to your interest in finding alternative ways to deliver engaging CPD?

I worked as an employment lawyer for several years before improving the quality of legal profession by leaving it. It's fair to say that my memory of the CPD sessions I went to as a lawyer gave me an inkling that it might be possible to make CPD more engaging and entertaining without reducing the quality or amount of legal content.

Can you tell us more about your CPDUI events?

I started CPDUI – 'Continuing Professional Development Under the Influence' – as an event at Giant Dwarf Theatre, which I run in Redfern (Sydney)…so the true origin is trying to mitigate the losses that go with trying to run a theatre...

But the aim of CPDUI is to create events that have the same quality and quantity of legal content you get in your standard CPD session, but to deliver that in a more entertaining way. I'm bringing the skills I've developed over 20 years in television to the continuing education part of my former career as a lawyer. (I'm no longer practising, but was never actually struck off).

Why did you choose to give your CPDUI events an ethics focus?

From talking to lawyers at CPDUI, I get the impression that the compulsory CPD unit in 'Practical Legal Ethics' can be the one practitioners find themselves scrambling to fill as the end of the CPD year approaches each March. So as a lapsed lawyer, I felt it was my non-professional responsibility to provide an engaging way to get your ethics point.

What do you think it is about the information you present that resonates with, and interests, lawyers?

'Ethical Pursuit?' operates as a refresher course on basic precepts of legal ethics and professional responsibility as well as providing a snapshot on recent cases and developments. That may resonate with and interest some, but to be honest the information that seems to resonate and interest lawyers most is the answer to the question, "Can I claim my compulsory CPD point for Practical Legal Ethics if I stay until the end?"

How have the skills and experience you've obtained through working in television shaped your ability to deliver education in the legal professional development space?

As well as making (ABC consumer affairs show) T*he Checkout*, which basically involved turning a 500-page statute into an informative light entertainment TV show, 'Ethical Pursuit?' also draws on other educational quiz formats I've developed, like 'Question Time' (the weekly Australian politics quiz I ran as host of Friday Drive on Radio National in 2012-13) and *The Chaser's Media Circus* on ABC TV.

Your career began working as an industrial relations lawyer in Sydney. Understanding the pressures on young lawyers, do you have any advice for them?

As a young lawyer I over-worked myself in a way that made me less effective and less happy. On reflection, that seems sub-optimal.

Can you give us a teaser of what your session at Symposium will entail?

'Ethical Pursuit?' operates like a CPD version of pub trivia. Lawyers who come along get a free glass of wine on arrival, and then use their phones to answer trivia questions about a subject that's not at all trivial.

Legal Ethics has never been this fun…which isn't saying much.

What are the ethical-type questions that you will pose during your gameshow that can be answered true or false/yes or no?

Trivia and ethics may seem an unlikely fit, but the quiz format actually makes for a clear and effective way to raise the full gamut of topics within ethics and professional responsibility.

And sure, lawyers' ethical dilemmas in real life may not have answers which are as simple or clear as the answers to trivia questions. But I'd like to think lawyers who've been to 'Ethical Pursuit?' will feel more equipped to deal with those thorny issues if and when they arise.

What sort of massive prizes will this gameshow offer?

Wow. The prizes are so massive that I think it might technically be illegal to even mention them. Certainly unethical. Either that, or the prize is the CPD point.

How do you see the delivery of CPD in the future?

I'm sure that most CPD will stay fairly conventional, but I think there's huge potential for innovation in on-demand, technology-based CPD…and I'm looking forward to being part of that!

What new technologies do you see being used to deliver legal education in the future?

Interactive video has huge potential. Imagine *Black Mirror: Bandersnatch* as a CPD module. OK, actually don't. That's terrifying. But I think combining new technology with the insights of behavioural economics has huge potential.

Do you have anything else you would like to add?

I've had a really positive response so far to 'Ethical Pursuit?'. I've done sessions interstate for the Law Institute of Victoria and the Law Society of South Australia. My favourite bit of feedback was from a very senior practitioner who came along to the 'Ethical Pursuit?' in Melbourne. I remember seeing him when he arrived and thinking to myself, "you're going to hate this". He came up at the end of the night and said: "I've been going to CPD sessions about ethics for 40 years and that was the best one I've ever seen." The poor man had clearly lost his marbles.

Julian Morrow is a keynote speaker at Symposium 2020. Register to attend at **qls.com.au/symposium**.

In 2020...

Practical Legal Ethics | Practice Management & Business Skills | Professional Skills | Substantive Law

Lock in your professional development for the new year and **secure your CPD requirements by 31 March 2020.** **qls.com.au/events**

February

06 New Year Profession Drinks

5.30–7.30pm

Brisbane

Join fellow QLS members at this relaxed, social evening to ring in the New Year.

11 Online marketing

Essentials | 12.30–1.30pm | 1 CPD

Online

Master your online marketing strategies. Create client leads, build a credible and trustworthy online presence and grow your business through cost-effective digital channels.

PS

13 Practice Management Course: Sole practitioner to small practice focus

13–15 | **PMC** | 9am–5.30pm, 8.30am–5pm, 9am–1.30pm | 10 CPD

Brisbane

Develop the essential skills and knowledge required to manage a successful legal practice. Learn the art of attracting and retaining clients through marketing and client service techniques, and best billing practices. Find out how to develop a business plan and manage your practice finances in a profitable and financially sustainable way. Hear from the experts about new legal technology and how to manage business risk, trust accounting and legal ethics in this evolving legal environment.

PLE | PM&BS | PS | SL

19 Risks of using social media

Essentials | 12.30–1.30pm | 1 CPD

Online

Minimise the risks and maximise the benefits of using social media as a tool for self-promotion in the modern legal profession.

PLE

20 Core CPD: 3 in 1 workshop

Essentials | 8.30am–12pm | 3 CPD

Brisbane

Gain your three core CPD points in one hit. Designed for practitioners of all experience levels–sessions will cover ethics, trusts, and costs.

PLE | PM&BS | PS

21 Priced to sell: Finding the right pricing model

Essentials | 12.30–1.30pm | 1 CPD

Online

More and more clients are seeking fixed-fee services – but do you know how to successfully transition your firm from time-billing, or offer fixed-fee services without compromising the due care and consideration each matter requires? This livecast will discuss alternative pricing models and better place you to decide which model is right for you.

PM&BS

24 Specialist Accreditation Information Evening

5.30–7.30pm

Brisbane

If you are a full member of QLS and aspiring to become an Accredited Specialist in commercial litigation, business law, criminal law, personal injuries, workplace relations or immigration law, then we invite you to attend this complimentary information evening.

26 How to run a profitable practice

Essentials | 8.30am–12pm | 3 CPD

Brisbane

Running a law practice has a number of competing challenges; and your profitability is directly affected by more of these frictions than you may realise. This practical workshop will bring three profitability and organisational experts together to help you relieve the frictions, and boost your bottom line–from multiple angles.

PM&BS

On-demand resources

Access our popular events online, anywhere, anytime and on any device.

qls.com.au/on-demand

ESSENTIALS Gain the fundamentals of a new practice area or refresh your existing skillset

PMC Advance your career by building the skills and knowledge you need to manage a legal practice

Career moves


Madeline Fouhy


Stephanie Murray


Brendan Whelan


Julia Zhu


Mitchell Anderson


Rina Heyns


Joelene Nel


Vicki Holmes

Clifford Gouldson Lawyers

Clifford Gouldson Lawyers has welcomed **Madeline Fouhy** to the commercial and property team. Madeline has varied property law experience, including conveyancing, leasing and business sales.

MBA Lawyers

MBA Lawyers has announced the appointment of **Stephanie Murray** as a partner. Stephanie, who joined the firm in 2017, is a QLS Accredited Specialist in Family Law, specialising in complex parenting and domestic violence matters.

Brendan Whelan has been welcomed as an associate, bringing 18 years of litigation experience in personal injuries, commercial litigation, debt recovery and criminal matters.

Julia Zhu, **Mitchell Anderson** and **Rina Heyns** have joined the firm as solicitors. Julia is responsible for managing relationships with Chinese investors conducting business in Australia. Mitchell will work closely with the litigation, construction and sports law departments, ensuring contractual compliance and commercially beneficial outcomes for large-scale projects. As a member of the litigation department, Rina will support clients across all contract and dispute and litigation matters.

McLaughlins Lawyers

McLaughlins Lawyers has announced the promotion of family lawyer and mediator **Joelene Nel** to associate director. Joelene has practised in family law for more than 15 years and has experience in an all areas of family law and domestic violence. Joelene volunteers with Women's Legal Service and My Community Legal, and is a committee member of the Gold Coast District Law Association.

Slater and Gordon

Slater and Gordon has strengthened its Queensland medical law practice with the recruitment of **Vicki Holmes** as a principal lawyer in the medical negligence team.

Vicki has more than 28 years' experience in medical law claims in Australia and the United Kingdom, and has acted for clients in some of Australia's largest and most complex medical law cases.

Proctor career moves: For inclusion in this section, please email details and a photo to proctor@qls.com.au by the 1st of the month prior to the desired month of publication. This is a complimentary service for all firms, but inclusion is subject to available space.

A delicate balancing act

Impact of new Act to be felt from 1 January

BY MEGAN FAIRWEATHER

The *Human Rights Act 2019* (Qld) (the Act) heralds a significant change to the way in which administrative decisions are to be made in Queensland from 1 January 2020.

The Act introduces 23 civil, political, economic, social and cultural human rights, drawn from international treaties, with the fundamental objective of building a culture in Queensland whereby human rights are respected, protected and promoted. The legislation will impact public entity decision makers at all levels, including by:

- making it unlawful for public entities to act or make decisions that are not compatible with human rights, or that fail to take human rights into proper consideration when making decisions: s58
- requiring every statutory provision in Queensland, to the extent possible consistent with their purpose, to be interpreted in a way that is compatible, or most compatible, with human rights: s48

The human rights protected by the Act are not absolute. It will be permissible to 'limit' a human right when taking action or making an administrative decision if it is "reasonable and demonstrably justifiable" to do so in a "free and democratic society based on human dignity, equality and freedom", and by reference to the proportionality criteria in section 13 of the Act.

A person who is aggrieved by a decision can complain directly to the Queensland Human Rights Commission or, if they have another ground to commence an action in a court or tribunal, they can add on a human rights complaint (the 'piggy-back' action). There is no standalone legal remedy and no compensation is payable following a finding that a human right has been breached. The Human Rights Commissioner does, however, have broad powers to publish information about matters raised, including to recommend actions he thinks an entity should take to ensure compatibility with the Act.

Application to public entities

The Act will apply to public entities, whether defined as 'core' or 'functional' public entities.

'Core' public entities include the obvious, such as government departments, public service offices, Ministers, local governments, local councillors, Queensland Police Service and registered providers under the National Disability Insurance Scheme. The definition also captures individual public servants and staff members, or executive officers of public entities.

Entities may be deemed as public entities on 'functional' grounds if, for example, they are:

- an entity established by an Act when the entity is performing "functions of a public nature": s9(1)(f)
- an entity whose "functions are, or include, functions of a public nature" when it is performing the functions *for* the state or a public entity (under a contract or otherwise): s9(1)(h)

Some "functions of a public nature" are defined and include corrective services, emergency services, public health and disability services, public education (including public tertiary and vocational education), public transport and certain housing services: s10(3). Otherwise, they will be assessed by non-exclusive criteria, including whether the function is conferred by statute, is connected to government functions, is regulatory in nature, or whether the entity is publicly funded or is a government-owned corporation.

There will be situations in which traditionally private businesses may be captured, such as, when private health providers are publicly funded to help clear public waiting lists or when a private university receives public funding for research activities. Questions have been raised as to how to approach, practically, which functions the Act will apply to and which it will not.

The human rights protected

The 23 human rights protected in the Act appear straightforward in most cases, however, analysis from other jurisdictions indicates that a case-by-case approach will be required to understand the nature and scope of each of the rights. The "right to privacy and reputation" (s25), for example, covers five protections, namely, that a person's privacy, family, home and correspondence must not be unlawfully or arbitrarily interfered with and a right not to have reputation unlawfully attacked. The "protection from torture and cruel, inhuman or degrading treatment" (s17) incorporates an obligation to ensure that informed consent is taken for medical treatment.

There is no hierarchy for the human rights although the "right to life" (s16) is regarded as the 'supreme' right. It will often be necessary for decision makers to balance competing rights when justifying a decision to limit one or other of them. The "right to privacy", for example, will usually be in competition with "freedom of expression" (s21) which, in turn, incorporates a "right to receive information". It is expected that existing statutory information access schemes will assist decision makers achieve this balance in compliance with the legislation.

The protections against discrimination (s15) and to promote justice in civil and criminal procedures (s31 to s35) are also expected to reflect or dovetail with existing statutory and common law protections. There will be occasions where competing rights will be more difficult to balance. The protection of families as "the fundamental unit of society" will at times be in tension with the protection of children in their "best interests", particularly for decision makers in education, health, disability, child and youth protection and corrective services (s26).

The "right to health services" is novel for Australian human rights protection, and it remains to be seen how this will be interpreted. In other jurisdictions, challenges about health access have been made by reference to the "right to life" and "humane treatment when deprived of liberty", with cases including access to drug trials, home birthing services and IVF.

Aboriginal peoples and Torres Strait Islander peoples

The special recognition of Aboriginal peoples and Torres Strait Islander peoples in the preamble is worth reflecting on:

"Although human rights belong to all individuals, human rights have a special importance for the Aboriginal peoples and Torres Strait Islander peoples of Queensland, as Australia's first people, with their distinctive and diverse spiritual, material and economic relationship with the lands, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition and Ailan Kastom. Of particular significance to Aboriginal peoples and Torres Strait Islander peoples of Queensland is the right to self-determination."

The Act protects cultural rights, generally, to ensure that all persons with particular cultural, religious, racial or linguistic backgrounds are able to enjoy their culture, to declare and practise their religion, and to use their language (s27). Aboriginal peoples and Torres Strait Islander peoples are separately, and more deeply, recognised to hold distinct cultural rights (s28), including to enjoy, protect and develop their identity, cultural heritage, traditional knowledge, spiritual practices, beliefs, teachings, language, cultural expressions and kinship ties.

The right is also aimed to protect distinctive spiritual and economic relationship with the land, territories, waters, coastal seas and other resources, with which they have a connection under custom, and the right to conserve and protect the environment and productive capacity of these resources. Aboriginal peoples and Torres Strait Islander peoples also have the right not to be subjected to forced assimilation or destruction of their culture: s28(3).

A place for international human rights law

In the absence of jurisprudence about interpretation of the nature and scope of the rights in Queensland, it will be permissible to look to the ACT and Victoria, as well as to international case law: s48(3).

In thinking about the specific cultural rights for Aboriginal peoples and Torres Strait Islander peoples, it might be mentioned that overseas advocates are becoming increasingly creative in using human rights frameworks, including 'right to life', 'right to protection of home', and 'cultural rights', to challenge government decisions that fail to adequately address or reduce the effects of climate change.

Making decisions in compliance with the Act

The Act requires decision makers to identify all of the human rights affected by the decision. The criteria in section 13 of the Act are to guide whether any proposed limitation is "reasonable" and "demonstrably justifiable". These include considerations about the nature of the right, the importance of the proposed limitation, and whether there is any less restrictive way to achieve the purpose.

The prudent use of public resources will often be a legitimate factor when making decisions that limit human rights. However, without evidence, it will not necessarily be sufficient justification. There remains a place for reasoned policy and guidelines for decision makers, however, the higher the impact on the human right in question, the higher the onus will be on establishing why it should be limited.

Preparing for implementation

The substantive provisions for protecting the human rights will commence on 1 January 2020. To prepare for the operation of the new law, public sector entities should ensure that policies are reviewed for compatibility with the Act and that decision makers are equipped with training about the nature and scope of the human rights and with tools to make and record their decisions. Complaints processes should be adapted for managing and responding to human rights complaints.

Perhaps eventually, as a Commonwealth, Australia will join other western democratic nations by introducing a standalone human rights document. In the meantime, welcome to Queensland, *Human Rights Act 2019*.

Megan Fairweather is a special counsel at MinterEllison.

FRONT AND CENTRE

Queensland's first Human Rights Commissioner **Scott McDougall** discusses his role and the impact of the state's human rights legislation.

What are your key priorities as Queensland's first Human Rights Commissioner?

My main focus to date has been on building a strong team at the Human Rights Commission to take on the ambitious project of implementing a robust human rights protection scheme in Queensland.

As Queensland's first Human Rights Commissioner my goal is to ensure that a genuine human rights culture is developed within all three arms of government. Achieving that goal would mean human rights are properly considered – not just afforded lip service – when new laws are made and when public servants are making decisions and formulating policy. I believe Queensland's judiciary is well placed to contribute to, if not lead, the development of Australia's human rights jurisprudence.

An overarching priority of the commission will be educating Queenslanders about the profound importance of human rights finally being comprehensively protected in law, and creating awareness of the potential of the *Human Rights Act 2019* (the Act) to empower individuals and communities in their dealings with government.

In terms of priority areas, it can be expected that the rights of people in 'closed environments', such as prisons, watchhouses, state-run aged care, secure mental health facilities etc., will be a focus to ensure that people deprived of their liberty are treated humanely.

Aboriginal and Torres Strait Islander people stand to benefit from the Act and promoting an understanding of their rights, and avenues for protection, will be an important responsibility of the commission.

Rights to access education and health, and the rights of people affected by climate change and severe weather events are also areas that are likely to feature in the commission's work in coming years.

And of course, I'm mindful of not losing sight of the continuing functions of the commission under the *Anti-Discrimination Act 1991*, in addressing discrimination, vilification and sexual harassment.

What avenues are available under the *Human Rights Act* to protect human rights in Queensland?

Essentially there are two avenues available to people who believe that their human rights have been unjustifiably interfered with.

Queensland is the first state or territory to introduce a human rights complaints mechanism administered by the commission. The commission has powers to compel attendance at conciliation conferences and to publish information about unresolved complaints.

Secondly, while there is no direct cause of action for human rights breaches, aggrieved individuals are able to rely upon grounds of unlawfulness due to non-compliance with the Act whenever they are entitled to seek relief on some other basis. We envisage the most common causes of action that human rights will be 'attached' to include discrimination, judicial review proceedings and also torts containing an element of unlawfulness.

The Act introduces new obligations for public entities to act in a way that is compatible with human rights. What do you expect the practical impact will be on government decision-making?

The Act requires public entities to give proper consideration to human rights when exercising a discretion.

The Victorian cases have made clear that this requires a common sense approach. At a practical level, the impact of the obligation should be improved decision-making through the early identification of risks and of stakeholder interests.

To build a genuine human rights culture it needs to be more than a compliance exercise, and to date I have been impressed by the willingness of public sector leaders to embrace the changes as a means of improving the quality of their agency's services.

The Act permits human rights to be limited in a way which is reasonable and justified. Do you have any expectations about how the balancing should be approached?

A key feature of the Act is the 'proportionality test' to be applied in deciding whether the limitation of a right can be justified in law.

Queensland's version of the 'lawful limitations clause' in my view represents a best practice model for structured and ethical decision-making. It essentially calls upon decision makers to consider less impactful ways of achieving objectives, ensuring that the limitation is actually directed at that purpose and that the importance of preserving the human right is properly weighed.

The starting point for decision makers considering the weight to be given to the preservation of human rights, should be a recognition of the 'cherished' value and importance of human rights in a healthy democracy. Protection of human rights has been hard fought for and should not be limited lightly.

What approach do you intend to adopt with legal representation in dealing with human rights complaints?

As a former lawyer I am well aware of the constructive and, in many cases, vital role that can be played by the profession in alternative dispute resolution. I anticipate the profession engaging with the human rights complaints process in a similar way to the conciliation of discrimination complaints.

Do you see any areas where further reform should be considered to strengthen human rights?

There will be a review of the Act after 1 July 2023 at which time the question of a direct cause of action and the availability of damages will no doubt arise for consideration.

The provisions governing parliamentary procedures is an area in which improvements could be made, for example, the establishment of a dedicated human rights committee and requirements for minimum consultation periods to ensure proper scrutiny of new legislation.

What key message would you have for lawyers in using or complying with the Act?

Be creative and be concise.

WHEN CAN HUMAN RIGHTS BE LIMITED?

The *Human Rights Act 2019* (the Act) requires all public entities in Queensland to act compatibly with human rights and give proper consideration to human rights before making a decision.

Section 13(2) of the Act provides public entities with guidance on when human rights may be limited.

The following is a brief guide to assessing for compatibility under the Act and giving proper consideration to human rights. More detailed guidance and information about the scope of each right, as well as a Public Entity Toolkit, is available at **qhrc.qld.gov.au**.

STEP 1: Identify relevant rights

Consider each of the rights protected under the Act and to see which are relevant to the situation. Rights may be broader than they first seem.

STEP 2: Consider whether rights are being limited by your action or inaction

Will your decision limit or interfere with the relevant rights you've identified?

If no, you are acting compatibly with human rights.

If yes, you should move to step 3.

STEP 3: To lawfully limit a right you must:

Be authorised

What law or regulation allows you to limit a person's rights? If you can't identify a law or regulation then you may not be able to limit rights.

Be justified and proportionate

Determine whether your limitation of a person's rights is justified and proportionate in the circumstances, taking into account all relevant factors including:

a. *the nature of the right/s:* What does the human right/s protect? What are the values that underpin the right?
b. *the nature of the purpose of the limitation:* What is your purpose for limiting a human right? What are you trying to achieve by your decision or action?
c. *the relationship between the limitation and its purpose?* Will what you are doing, or proposing to do, actually achieve your purpose?
d. *are there less restrictive and reasonably available ways to achieve the purpose?* Is there another way to achieve your purpose that won't limit a person's human right/s as much? If so, you should take the least restrictive option.
e. *the balance between the importance of the purpose of the limitation and the importance of preserving the human right:* Consider whether the benefits gained by fulfilling the purpose of the limitation outweigh the harm caused to the human right.

TIME FOR A HUMAN RIGHTS ACT

Graphic developed from information provided by Queensland Human Rights Commission

AUSTRALIA'S FIRST HUMAN RIGHTS BILL

December - Queensland Premier Frank Nicklin introduces Australia's first human rights Bill, the Constitution (Declaration of Rights) Bill 1959, to State Parliament. The Bill aims to protect only two rights – to habeas corpus and to just compensation for seizures of property – and lapses at the next state election, six months after its introduction.

›1948

HUMAN RIGHTS DECLARATION ADOPTED

10 December - Universal Declaration of Human Rights adopted by the General Assembly of the United Nations following the end of World War II.

›1989

THE FITZGERALD INQUIRY

The Fitzgerald Inquiry report leads to establishment of the Electoral and Administrative Review Commission, which in turn recommends Queensland adopt a Bill of Rights.

Image courtesy of State Library of Queensland, image no. 78930.

'INORDINATE LEGAL, SOCIAL AND ECONOMIC COSTS'

The parliamentary Legal, Constitutional and Administrative Review Committee recommends against Queensland adopting a Bill of Rights, citing concerns including "inordinate legal, social and economic costs" and "a significant and inappropriate transfer of power" from the parliament to the judiciary. The committee instead recommends "widespread education" of the community about their rights and "enhancing a rights culture" in government law and policy-making.

GOVERNMENT COMMITTEE CONDUCTS INQUIRY

The parliamentary Legal Affairs and Community Safety Committee conducts an inquiry into a possible Human Rights Act for Queensland. A Human Rights Act is supported by the majority of submitters to the inquiry and is recommended by government members of the committee.

›2016

›2015

INVESTIGATION INTO A BILL OF RIGHTS

Independent MP Peter Wellington agrees to support the formation of a minority Labor government under Annastacia Palaszczuk, in return for several considerations, one of which is an investigation into a Bill of Rights for Queensland.

SCRUTINY OF THE BILL

Attorney-General Yvette D'Ath introduces the Human Rights Bill 2018 to Parliament and it is referred to the Legal Affairs and Community Safety Committee for inquiry. The committee recommends the Bill be passed.

›2018

PROVISIONS OF THE ACT

1 January 2020 – The operative provisions of the *Human Rights Act 2020* commence.

›2020

›2019

PHASE ONE

February 2019 – Queensland Parliament passes the Human Rights Bill 2018.

1 July 2019 – The first phase of the *Human Rights Act 2019* comes into effect. The Anti-Discrimination Commission Queensland is renamed to Queensland Human Rights Commission and its educative functions under the Act commence.

TECHNOLOGY AND ACCESS TO JUSTICE

WILL IT PROVIDE THE ANSWERS?

BY ANDREA PERRY-PETERSEN

When you think about legal innovation, do you think of access to justice?

If not, why not? Access to justice is linked to poverty reduction and inclusive growth,[1] two factors crucial for a properly functioning rule of law.

However, providing justice to all who need access is one of the legal profession's largest challenges. Arguably, access to justice must be at the forefront of our minds when considering innovation, as great challenges often provide significant opportunity.

The challenge

The challenges arising from a lack of access to justice are not new to the profession. Two years ago, then President of the Law Council of Australia Fiona McLeod SC wrote: "Community legal centres are turning away 160,000 people a year due to lack of capacity, while an additional 10,000 people a year are facing the courts alone due to cutbacks."[2] This figure doesn't take account of those people who either don't identify that they have a legal issue or who do not seek help from legal sources.[3]

Two years on, the number of self-represented litigants making their way through the courts is increasing around the world, challenging court resources and the overall administration of justice.

If the available resources (or indeed dispute resolution processes) cannot support demand, something must change. Either the legal system needs to adapt, more affordable or government-funded legal advice must become available, or people must be more effectively supported to self-represent.

At the top end of town, technological innovation is being applied to improve business efficiency, cut costs, and better serve clients. Yet there is little application where it could arguably provide the most benefit. Today, many people struggle to afford legal assistance, or even find and apply legal information on their own when they experience disputes affecting their basic rights in housing, employment, consumer and family matters.

The opportunity

Considering the challenge, there is huge scope for improvement; not to mention a significant legal market that hasn't traditionally been able to access legal services in appropriate and affordable ways.

Along with properly funded legal aid[4] and pro bono assistance, innovation has a role to play in assisting vulnerable clients and the underserved missing middle.

Opportunities for innovation include new approaches to legal education, adapting legal business models and utilising technology.

What is possible

In terms of technology, there are examples from near and far showcasing applications which increase access to justice:

Providing online legal information and assistance directly to consumers

Legal tech start-ups with a mission to increase access to justice and legal assistance services are making legal information available via apps, web forms and document automation. There is also a growing trend among entrepreneurial lawyers to unbundle, productise and package legal services.

In the A2J & Innovation clinic I supervised at LawRight, we configured a prototype to assist claimants file a claim for unpaid wages in the Federal Circuit Court and to prepare a 'life story' for review of a negative notice for a Blue Card in the Queensland Civil and Administrative Tribunal.

Law students used A2J Author,[5] a cloud-based document assembly software tool (there are many such tools, not all open source) developed in the United States where 1.1 million interviews have been developed across 42 states. Since 2005, 4.7 million guided interviews have been run and 2.6 million documents assembled on issues ranging from joint dissolution of marriage, name change petitions, a brief builder to assist veterans, custody and visitation matters, tenant bond claims, applications for waiver of court fees and costs, a post-judgment collections guide and many others.

Penda, developed by Women's Legal Service Queensland, is "Australia's first financial empowerment app for women with a domestic and family violence (DFV) focus. Penda is a free, simple-to-use app with national safety, financial and legal information and referrals for women who have experienced DFV." [6]

In the US, start-ups such as Upsolve, JustFix.nyc and SoloSuit provide online tailored assistance on specific legal issues. Upsolve[7] assists people with bankruptcy, and recently claimed to have relieved $100 million in total debt for low-income families across the United States. JustFix.nyc[8] assists with tenancy matters and Solo Suit[9] with defending debts. In Australia, Fine Fixer assists people in Victoria with information on what to do when they receive a fine.[10]

Some of these solutions incorporate back-end data collection enabling (privacy-protected) analysis of legal need which can be drawn upon for systemic advocacy.

The ideas for these businesses are sometimes generated in hackathons, incubators and law school programs. In the 12 months since I compiled and published a list of Australian courses, many more such courses have been launched and I predict this trend to continue.[11]

In the US also there are many examples of project-based multidisciplinary university courses[12] that focus on improving access to justice.[13] Ongoing funding for some of these ideas is provided by universities, government and philanthropy (which is much more common in the US).

I mentioned earlier the trend for lawyers to unbundle and productise legal services. This increases access to justice for clients who previously struggled to make appointments in CBD locations during office hours but who can now obtain information from home without having to take time off work or arrange childcare. It may also assist those in regional, rural or remote areas and those with disabilities,[14] especially if the fixed fee for the product is more affordable than being billed by the hour.

Once developed, these products may be administered by a paralegal (saving law firm costs) and are potentially scalable, however the challenge for lawyers and (especially solo and small) law firms is the perennial challenge of internal resourcing – in finding a software platform that is priced for small business rather than large enterprise, and the time to invest in developing an effective product.

Intake, referrals and matching platforms

Legal assistance organisations and entrepreneurs (who are often but not always lawyers) are developing online portals to facilitate intake to their services, or to provide matching platforms for pro bono, low bono or fixed fee referrals. In some cases this is paired with free legal information and document creation.

In the US in 2016, with funding of $1M and project management expertise provided by Microsoft, the Legal Services Commission and Pro Bono Net announced the development of a prototype access to justice 'portal':

"Drawing on state-of-the-art cloud and Internet technologies, this portal will enable people to navigate the court system and legal aid resources, learn about their legal rights and prepare and file critical court documents in a way that is accessible, comprehensive and easy to navigate. The ultimate goal is to help people every step of the way toward addressing their legal problem."[15]

Today, that prototype incorporates artificial intelligence so that people can 'talk' to the system and be directed to the most appropriate legal assistance.[16]

Another US example is Paladin, a public benefit corporation which "helps law firms, companies and law schools manage their pro bono with streamlined sourcing, tracking and outcome reporting on a modern, tech-forward platform".[17]

Closer to home, Justice Connect's Legal Help Gateway allows for online intake and triage so that someone can use it to identify which of that community legal centre's services are most appropriate. Justice Connect says that the "time taken to process applications has dropped between 22 and 44% across programs when compared with phone-based intake".[18] Using human-centred design principles, Justice Connect has also developed an online referral tool and pro bono portal pilot.[19]

Future applications

Virtual reality and artificial intelligence (AI) are examples of technology that could increase access in the future.

The Learned Hands project, a collaboration between the Stanford Legal Design Lab and Suffolk Law School LIT Lab, is using machine learning to create a taxonomy of legal terms with the end goal being to link people's plain language queries (which contain a legal issue) to legal assistance.[20]

At the end of October, Justice Connect announced it would also be "building AI to diagnose a legal problem" after receiving funding to "train a natural language processing model to diagnose legal problems in the natural language of everyday Australians using anonymous data captured through its online intake tool"[21] to assist people to connect online to appropriate services.

At Harvard's A2J Lab, researchers are testing the idea that, if people experience the court room via virtual reality, they will feel better prepared and less intimidated, which will lead to better outcomes.[22] This technology could also assist junior lawyers or lawyers running a pro bono case in an area of law in which they don't usually practise.

System reform

Online dispute resolution[23] and professional regulation also have a role to play in access to justice.

While concerns exist about the quality of automated services and remedies available should they fail, assuming that the usual consumer protections apply there may be scope for a client to pay less for a legal service, bear more risk (or indeed waive some rights) in proportion to the gravity or quantum of a dispute. After all, will kits have been available in newsagencies for years.

While regulators advise lawyers to only provide productised online assistance in conjunction with accompanying review of the information provided by the client, by a lawyer (even if the online tool was developed by a lawyer), the cost to the client is likely to remain higher than if such products were offered independently and directly to consumers. Currently, if a legal tech solution were to be offered directly or with the assistance of an unlicensed person, this is likely to lead to an allegation of unauthorised practice of law.

So, while lawyers maintain a monopoly on the provision of legal advice there are limits on innovation. Considering these topics in any detail is outside the scope of this article, although I refer to the system of limited license legal technicians in Washington State for consideration.[24]

What Australia needs

In the US, the Legal Services Commission recently announced $5 million in grants for technology projects.[25] Pro Bono Net, the A2J Tech Store, Legal Tech for a Change and other organisations provide project and IT support to legal assistance organisations.

In Australia, grants for such activities are tied to organisational funding for service delivery and are limited. In Victoria the Public Sector Innovation Fund has financed some projects and in late October the Victorian Legal Services Board and commissioner released its list of successful applicants who met the "requirements of using technological and/or human-centred design orientated interventions to interrupt, streamline or change legal services and the justice system to improve access to justice".[26]

In New South Wales an access to justice innovation fund was announced in February this year[27] and recently the Queensland Government announced $10,000 per centre for upgrades to digital infrastructure[28] (an issue being supported by the work of Community Legal Centres Qld).[29]

Australia must do more to fund appropriate development of sustainable solutions which may alleviate the access to justice crisis. Leadership from those in positions of power ought to support the growing numbers of lawyers and entrepreneurs who are prepared to experiment with new approaches for this purpose, to encourage prudential exploration and proper evaluation with appropriate financial support and organisational infrastructure.

Conclusion

To avoid exacerbating disadvantage, any innovation including technology should be co-developed with experts from other disciplines, including social scientists, and take a human-centred design approach to ensure it is 'fit for purpose' and effectively meets the needs of the people it aims to assist.

Use of technology by community legal centres, especially client-facing solutions, will remain limited under traditional funding models, particularly if it is perceived to exacerbate social exclusion. Access to justice is the responsibility of all, and while more of the missing middle will be served by entrepreneurial lawyers unbundling and commoditising legal services, that kind of innovation may remain constrained by legal regulation.

Legal education will also contribute, but deeper collaboration between universities, law firms and legal assistance organisations needs to occur before those solutions are sustainable and have any significant impact on improving access to justice. In the near future, any significant change to our judicial system seems unlikely.

While there are examples now of innovative approaches aiming to improve access to justice, perhaps it is the current generation of students and graduates – digital natives who have familiarity with all kinds of technology, greater expectations for digital service delivery, and understanding of the importance of human-centric design principles – who will embrace the opportunity to carefully leverage appropriate and effective technology to create a different future, one providing greater access to justice for all.

Andrea Perry-Petersen is a consultant, podcaster and lawyer with a background in community law and human rights. Andrea has a keen interest in design thinking in human services, digital innovation and new models of multidisciplinary collaboration. She is a member of the QLS Innovation Committee, this year's QLS Innovation in Law award recipient and a Churchill Fellow.

Notes

1 OECD, 'Leveraging the SDGs', 3.
2 abc.net.au/news/2017-08-03/how-the-justice-system-is-failling-vulnerable-australians/8770292.
3 lawfoundation.net.au/ljf/app/&id=FC6F890AA7D0835ACA257A90008300DB.
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5 a2jauthor.org.
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7 upsolve.org.
8 justfix.nyc.
9 solosuit.com.
10 finefixer.org.au.
11 andreaperrypetersen.com.au/wp-content/uploads/2018/09/Legal-Innovation-Education-Sep-2018.pdf.
12 I also interview people working in these programs on the podcast I host, 'Reimagining Justice', andreaperrypetersen.com.au/podcast. See episodes 11, 16 & 21.
13 legaltechinnovation.com/law-school-index.
14 Of course, any application of technology must be designed to ensure it does not *increase* disadvantage to those without the physical or emotional ability to utilise what is on offer. See digitalinclusionindex.org.au and see thelegaleducationfoundation.org/wp-content/uploads/2019/09/Digital-Technology-Summer-2019-v2.pdf.
15 blogs.microsoft.com/on-the-issues/2016/04/19/microsoft-partners-legal-services-corporation-pro-bono-net-create-access-justice-portal.
16 blogs.microsoft.com/on-the-issues/2019/01/31/milestone-reached-ai-at-heart-of-legal-navigator-complete-will-connect-people-with-legal-resources – "We could imagine a system that would enable people to describe the problem they are facing in their own words, a system that would understand the user's meaning (and not simply look for keywords, like a search engine), a system that could learn from interactions with users how best to help them navigate the legal system."
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Interlocutory costs orders

A guide to their purpose and principles

BY KYLIE DOWNES QC AND MAXWELL WALKER

Costs orders contain terms of art and technical language that may confuse practitioners.

This article explores the different types of interlocutory costs orders and will assist practitioners to negotiate the terms of consent orders and understand the client's rights and obligations under the various species of costs awards.

An entitlement to costs – who is paying and who is getting paid?

The first issue is to determine whether the circumstances are such that a court would make a costs order, and whether any factors exist which may persuade the court to favour one party or another in relation to an award of costs.

General rule

The general principle for all costs awards in the state courts is rule 681 of the *Uniform Civil Procedure Rules 1999* (UCPR), which provides that "[c]osts of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise".[1]

This means that, if a party is successful in obtaining or opposing relief in an interlocutory application, that party is generally entitled to costs.

The costs of a proceeding (that is, the costs awarded on judgment after trial) do not include the costs of an application in the proceeding (an interlocutory proceeding), unless the court orders otherwise.[2] Therefore, unless a costs order is made in relation to an interlocutory application (either one party paying another, or costs reserved or made costs in the proceeding), the entitlement to claim those interlocutory costs, including at the end of the matter, would ordinarily be lost.

Specific rules

Some interlocutory steps are subject to specific rules under the UCPR. For example, rule 386 applies to costs thrown away as a result of an amendment, requiring the costs thrown away by the amendment to be paid by the party making the amendment unless the court orders otherwise. Other specific rules apply to freezing orders,[3] search orders,[4] summary judgment,[5] strike out applications[6] and costs of ADR processes.[7]

Should an alternative order be made?

It is impossible to catalogue the circumstances in which a departure from the rule that costs follow the event would be justified in interlocutory proceedings. The discretion to depart from the rule is a broad one.[8] An alternative costs order is exceptional and compelling circumstances need to be shown.[9] Below is a non-exhaustive list of some circumstances where alternative orders may be made.

a. Delay and other misconduct

Delay or other misconduct can lead to a successful applicant in an interlocutory application being refused costs.[10]

b. Seeking an indulgence

When a party seeks interlocutory relief in order to correct an error, regularise a position or seek some other relief that will facilitate its case, but which is not attributable to the conduct of the other side, costs will not generally be awarded in favour of the successful applicant.

These types of applications seek 'indulgences'. Examples include amending pleadings where leave is required, seeking more time to comply with an order to file a document, seeking an order that a party's witness give evidence by telephone, withdrawal of admissions, applying for an adjournment, and seeking to set aside default judgment.

Whether the party seeking the indulgence is successful or not, that party generally pays the costs of the other parties, unless the grant of leave has been unreasonably opposed or some other reason exists for refusing costs.[11] Because of this, parties seeking an indulgence should consider making offers that may render opposition unreasonable. For example, if leave were required to withdraw an admission, an offer could be made to pay the costs of the opponent on the standard basis of perusing the application, affidavit in support and proposed amended pleadings, and executing consent orders.

A party applying for the extension or shortening of a time set under the rules must pay the costs of the application, unless the court orders otherwise.[12]

c. Offers to settle

Parties to interlocutory applications should consider making a 'without prejudice' offer to settle the applications, as an unreasonable refusal to accept such an offer may impact on the costs order which is made. For example, it may mean that a successful party is deprived of its costs or an unsuccessful party is required to pay indemnity costs, depending on which party made the offer which was not accepted.

Negotiations are usually conducted in writing by proposing a draft order and draft request for consent order which contain the precise orders that are offered to resolve the application.[13] The correspondence should be marked "without prejudice save as to costs" so that it is without prejudice except that it can be relied on in respect of submissions as to costs if the offer is not accepted.[14]

Different types of costs orders

Costs in the proceeding

'Costs in the proceeding' means that the successful party in the proceeding as a whole (that is, after final judgment) obtains the costs of the interlocutory application.[15]

It is not appropriate in Queensland state courts to use the expression 'costs in the cause', which was replaced by the concept of 'costs in the proceeding'.[16]

An order for costs in the proceeding can be formulated such that it is only if a particular party is successful in the overall proceeding that it gets its costs of the interlocutory step, for example, that costs of an application be "the plaintiff's costs in the proceeding".[17]

Reserved costs

'Costs reserved' means, in summary, that the costs will be dealt with by the trial judge. Reserved costs follow the event, unless the court orders otherwise.[18]

The courts have identified certain types of applications for which an order for reserved costs or costs in the proceeding may be more appropriate than an immediate order for costs in favour of the successful party. Whether this will occur in any particular case is determined by the circumstances of each case, and subject to the overriding discretion of the court. Examples include summary judgment applications that are unsuccessful (unless the applicant ought to have known it would fail or it was brought to obtain a strategic advantage),[19] and the costs of interlocutory injunction applications in which the applicant has shown a prima facie case.[20]

However, there is a broad discretion to reserve costs or make them costs in the proceeding, or to make no order as to costs, and factors that may support such a course include when there is mixed success on different issues in an application.[21]

Costs in any event

An award of costs 'in any event' means that the costs will be paid to the nominated party at the conclusion of the matter,[22] regardless of whether that party ultimately succeeds.[23]

Further, the court can order that costs of an application in a proceeding not be assessed until the proceeding ends.[24]

Basis of assessment

An award of costs is taken to be an award of costs 'to be assessed' unless the court orders otherwise.[25] Costs can be assessed on the standard or indemnity basis.

If an order does not nominate a basis of assessment (for example, by saying "the defendant pay the plaintiff's costs of the application"), or adds to that phrasing "as assessed" or "as assessed on the standard basis", the costs will be assessed on the standard basis. This is the default basis of assessment unless the order specifically nominates that costs be paid "on the indemnity basis" or "as assessed on the indemnity basis" (which mean the same thing).[26]

Kylie Downes QC and Maxwell Walker are both barristers in Brisbane and members of Northbank Chambers. Kylie Downes QC is also a member of the *Proctor* Editorial Committee.

Notes

1 Rule 681(1).
2 Rule 693.
3 Rule 260G.
4 Rule 261F.
5 Rule 299.
6 Rule 171(2) in respect of pleadings and 162(2) in respect of particulars.
7 Rule 351.
8 *Johnston v Brisbane City Council & Ors* [2014] QSC 268 at [77]; *Sweaney & Another v Bailie* [2017] QDC 295 at [29].
9 *Bucknell v Robins* [2004] QCA 474 at [17].
10 *Gerring v The Nominal Defendant* [2001] QDC 61 at [13]; *Oldfield & Ors v. Gold Coast City Council* [2009] QCA 124 at [71].
11 *J & A Vaughan Super Pty Ltd (Trustee) v Becton Property Group Ltd (No.4)* [2015] FCA 218 at [5].
12 Rule 695.
13 See article on preparing consent orders: 'Consent orders and judgments in state and federal courts', Kylie Downes QC and Maxwell Walker, *Proctor*, May 2019, page 36.
14 *Huni v Huni & Anor* [2014] QDC 296 at [6].
15 *Juniper Property Holdings No.15 P/L v Caltabiano* [2015] QSC 95 at [27].
16 *Bechara v Sotrip Pty Ltd* (In Liquidation) (No.3) [2013] QSC 178 at [7].
17 G Dal Pont, *Law of Costs*, 4th Ed., LexisNexis, 2018, [1.15].
18 Rule 698.
19 *Day v Humphrey* [2018] QCA 321 at [10], Rule 299.
20 G Dal Pont, *Law of Costs*, 4th Ed., LexisNexis, 2018, [14.26].
21 *Papale & Ors v Sucrogen Ltd & Anor* [2015] QSC 141 at [7]; *Bechara v Sotrip Pty Ltd* (In Liquidation) (No.3) [2013] QSC 178 at [5].
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25 Rule 687.
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Sea law, do law

Student sets sail to experience maritime law

BY CASSANDRA HEASLIP

I am a Griffith University student in my fifth year of a double degree in law and environmental science.

Throughout my time at university I have continued to ask myself: How can I stand out? What are the skills I'm going to need in the future, and how can I learn those now?

These questions play a role in my development as a law student, but I didn't make real progress until I made a commitment to take action.

I have had a keen interest in maritime law since the beginning of 2018. The idea of working with multiple jurisdictions and being part of a system which connects the world appeals to me greatly.

However, as a girl raised in a small country town, I did not grow up around either water or ships. I knew nothing about the industry, and my inner critic wondered how I could expect to be brilliant in such a specialised field without understanding maritime systems or the daily lives of the people working within them. I knew I needed some firsthand experience in order to learn, but I wasn't sure what this would be.

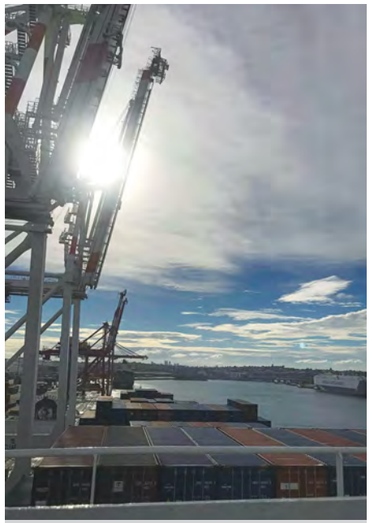
One day I found myself searching the internet for 'cargo ship trip', and three results for cargo voyages appeared. Over the next few days I decided that a journey on a cargo ship would be the firsthand experience I was looking for, and I booked an eight-day voyage from Fremantle, Western Australia, to Singapore!

On 21 June this year I was cleared by security at Fremantle Ports and, before I knew it, I was climbing the stairs of the CC Georgia! At almost 300 metres long and carrying 5500 containers, the ship was overwhelming.

I must admit I'd had a preconceived idea about the life of a seafarer. Even though I had studied a maritime law subject and was aware that there were many regulations in place to ensure safety at sea, I wasn't convinced that they were followed, and since a ship can go days without seeing land, it seemed that it would be easy to slack off without anyone noticing.

I settled down in my new home for the next week and the captain came to welcome me and collect my paperwork. I was then asked by the third mate whether I had proof of my yellow fever vaccinations "in case we can't stop in Singapore and have to go to Malaysia".

I had not been warned that this could be an issue for the voyage, but luckily I had received the vaccination previously, so that wasn't a problem. However, this lack of communication did build on my concern over safety standards aboard ships.



The Fremantle docks.

The remainder of the day was spent in the port, as cargo was still being unloaded and loaded. It was the closest I'd been to the huge cranes that lift the containers, and I was blown away at how they coordinate the loading and unloading process. And I finally understood how they locked the containers together, so they were stable on the voyage!

I was just in time for lunch, where I met the rest of the crew and learnt that 11 members were men from Sri Lanka, working as the navigation crew and seamen. The other members were 10 men and one woman from China, who were navigation crew and engineers.

Early the next morning we prepared to leave the port and I was encouraged to come onto the bridge (the highest storey of the ship used for steering and navigation) to observe everything that was happening and ask questions, as long as I wasn't interfering with the work. I watched in amazement as the pilot and captain worked together to complete a 180-degree turn in a narrow port and navigated the shallow waters.

As we moved out of the port and onto the open sea, I soon realised just how boring this could possibly be. I felt quite alone for the first few days, as there was a lot more work on the ship than I expected. The seafarers worked all day, every day. The captain was in the office constantly planning, communicating, making sure that they kept up with regulations and other necessary paperwork. I barely saw the engineers, as each day they were downstairs making sure the ship was running smoothly and maintaining the machinery.

One of the greatest experiences was being allowed into the engine room. I had to check a day in advance, and re-check at breakfast on the day that it was still okay to visit, and I was met before the door by an engineer who ensured I was wearing all the right safety gear.

My concerns about slacking on safety were definitely being challenged. The engine room semi-terrified me; the engine itself is four storeys tall! They showed me everything it takes to keep the ship running. One of the most interesting parts was the desalination plant which provided everyone on the ship with clean washing water! The control room was full of dials and switches and I am truly in awe of how brilliant these engineers are.

I spent the majority of my time on the bridge with the crew on watch duty and I had plenty of time to talk with them about their life at sea. Luckily, I was on what is considered a safe route, but many of them had travelled dangerous routes past the east coast of Africa where the piracy rate is high.

I wasn't fully aware of just how relevant piracy still is, but on those routes they have armed guards aboard the ships, and ropes on the side of the ships that can be released to snag the propellers of pirate boats that come close. One of the men told me about being aboard a ship where they had barbed wire surrounding the entire vessel!

Another crew member said that he was working on a vessel that was carrying a shipment of nuclear substances. In this situation every crew member had been given the chance to disembark and be sent to work on another ship if they didn't feel comfortable transporting it. There are so many situations that I never would have thought of before talking with the crew!

One of the most interesting parts of learning about maritime law thus far was how complex issues surrounding jurisdiction can be. The CC Georgia was flying under a Maltese flag, for a French company; I couldn't access details of who the current owner was, but its previous owner was an Irish company (which dissolved in February this year), and this ship is sailing all over the world!

As a law and science student majoring in environmental sustainability, I am passionate about learning how to resolve maritime pollution incidents. When the ship entered the Singapore Strait, an experienced pilot came onboard to guide us, and he was happy to talk with me about my interests.

He told me a few stories of ships grounding in the strait and other places he had worked, and how the oil could leak into the ocean. Reading news on the internet is very different to hearing it from someone who has experienced it firsthand. I felt both sad and extremely inspired to work towards being part of a team which could help resolve maritime pollution issues.

By the end of my voyage I had a much better understanding of just how much work it takes to safely navigate the seas. I realised that a crew member's responsibility is not just that of their title, but they are all protectors of the ship, the cargo onboard and responsible for ensuring safety for the rest of the crew and the environment.

There is always a crew member on watch duty, even in the middle of the night, in the middle of the ocean. The watch person on duty must press a reset alarm which goes every five minutes to make sure they are alert! The chances of groundings, collisions and piracy are all too real out there and help can be hundreds of miles away. Thankfully this voyage went smoothly, but it gave me a whole new appreciation of international trade.

Making the decision to take action and do something completely out of the box can be daunting, but when we stay inside our comfort zone, we don't know what greatness we are capable of.

Cassandra with the crew of the CC Georgia.

Cassandra poses on the bridge with the engine order telegraph, which is used to send speed instructions to the engine room.

I spent many of my university trimesters stressing about which direction I should go and what decisions to make, but in hindsight the worst decision I could make in those circumstances was not deciding at all.

If I decide that maritime law isn't for me, this experience will still be invaluable. In taking action to pursue my dreams, I have learnt to be comfortable being uncomfortable, and to open my mind to every possibility.

Submissions of interest to early career lawyers should be sent to the Queensland Law Society Early Career Lawyers Committee Proctor working group, chaired by Adam Moschella (amoschella@pottslawyers.com.au).

Secret client base is dishonest

BY STAFFORD SHEPHERD

The Full Court of the Supreme Court of South Australia in *Legal Practitioners Conduct Board v Patterson*[1] struck off a practitioner who had maintained a secret client base while employed by a legal practice.

The facts

The practitioner was admitted in 2000 at the age of 52. He practised initially in criminal law and criminal injuries compensation. Prior to his admission he had been a police officer and rose to the rank of acting inspector.

In December 2003, he accepted a position as a senior associate working in industrial law. The practitioner resigned from this position in May 2005.

The Legal Practitioners Disciplinary Tribunal (the tribunal) found that in the years 2002 to 2009 the practitioner engaged in a number of acts of dishonesty. The tribunal sought an order that the name of the practitioner be removed from the roll of legal practitioners. The practitioner did not oppose this order.

His acts of dishonesty fell into two classes.

The first was that, while in the employ of at least two legal practices, he maintained a 'secret client base'. The practitioner acted for a number of clients in criminal matters (mainly drug-related charges) without the knowledge or permission of his employers.

The practitioner undertook work for these 'clients' without opening files, recording times, entering into fee arrangements and without accounting for the monies received to his employers. The payments for the services rendered by the practitioner were received in cash and amounted to many thousands of dollars.

The tribunal found this conduct to be dishonest. The practitioner's evidence that the work performed was minor and essentially pro bono, and in respect of which he did not anticipate payment, was rejected.

The second class related to the practitioner conducting work in breach of the terms of the restricted practising certificate or engaging in legal practice without a practising certificate.

The Full Court considered that the totality of the circumstances supported a finding that the practitioner "lacks the qualities of character and trustworthiness which are necessary attributes of a person entrusted with the responsibilities and privileges of a legal practitioner".[2]

The Full Court noted that public interest demands that practitioners behave properly and be accountable, and if the court tolerated behaviour of maintaining a secret client base then the profession would be brought into disrepute.

The conduct was characterised as behaviour that abused the privileges that accompany our position as officers of the court. The public was to be protected from those in the legal profession who are "ignorant of the basic rules of proper professional practice or indifferent to rudimentary professional requirements".[3]

The Full Court ordered that the practitioner's name be removed from the roll.

Conclusion

What can be learned from this decision?

Firstly, we should be absolutely transparent in our dealings with our employers. Secret client bases and payments under the table are dishonest, and public interest would demand such behaviour is not to be tolerated.

Secondly, if we wish to do pro bono work outside our work environment, then we discuss this with our employer. This is again to ensure transparency and to avoid conflicts either of duty or personal interest.

Thirdly, we have a duty to understand the restrictions (if any) on our entitlement to practise and to comply with such restrictions.

Fourthly, the failure to open client files, to record time properly, to bill in accordance with the disclosure made to the client and the cost agreements entered into could be either unsatisfactory professional conduct or professional misconduct.

Fifthly, we owe certain fiduciary duties to our employer. Secret profits made from secret client bases could be recoverable due to our obligation to account.

Stafford Shepherd is the Director of the Queensland Law Society Ethics and Practice Centre.

Note

1 [2011] SASCFC 102.
2 Ibid [9].
3 Ibid [11].

De factos – the I do's and I don'ts

WITH CHRISTINE SMYTH

Love and marriage go together like a horse and carriage…[1]

It seems for many Australians the crooner's chorus is not a melody which resonates, because, as of 2016, some 1,751,424 Australians had chosen to be in a de facto relationship. Nationally, that equates to just over 10% of our population, but in Queensland it is as high as 12%.[2]

Perhaps it was for that reason the Queensland State Parliament saw fit to amend the *Succession Act 1981* (Qld) in 2017,[3] inserting a new section 15B which provides for the effect of the end of a de facto relationship on a will. In short, the ending of a testator's de facto relationship now revokes:

- a disposition to the testator's former de facto partner made by a will in existence when the relationship ends
- an appointment, made by will, of the former de facto partner as an executor, trustee, advisory trustee or guardian
- any grant, made by will, of a power of appointment exercisable by, or in favour of, the testator's former de facto.

The amendments alter a longstanding difference between the effect of the end of a marriage on a will and the end of a de facto relationship on a will. While some might consider the amendments have harmonised and equalised the circumstances, they may in fact create more problems than they solve.

This is because no other state or territory has an equivalent provision. This provision only exists in Queensland. That will likely create a conflict of laws issue on their death, if the testator executes a will in any jurisdiction and then moves interstate and the de facto relationship ends. At the very least it creates a risk management issue for both estate planning lawyers and family lawyers, not just in Queensland but Australia-wide.

It is also important to note that this Queensland provision only impacts the will on the ending of a de facto relationship. Entry into a de facto relationship does not impact on the will. A further anomaly is that entry into and ending of a marriage impacts a Queensland enduring power of attorney, however there is no corresponding amendment to s15B *Succession Act 1981* made to the *Powers of Attorney Act 1998*, nor within the recent amendments to that Act passed in April this year.

A further conundrum is that, while we are legislatively prohibited from having more than one marriage at a time, there is no prohibition on having multiple de facto relationships, or being married and in a de facto relationship simultaneously.

So that we can properly advise our clients, we and they need to understand what a de facto relationship is for the purposes of succession law and when does it end? This is important because currently Australia has no less than 33 different legislative definitions of de facto status.[4]

For the purposes of Queensland succession law, the answer lies in the combination of the definition of 'spouse' under S5AA of the *Succession Act 1981*, which then refers to section 32DA of the *Acts Interpretation Act 1954* (the AIA). However, neither the *Succession Act 1981* (Qld) nor any other provides guidance on when a de facto relationship ends. For that, we are left looking to the common law and there we are faced with a wide array of approaches and outcomes.

Most recently, in *In the Matter of the estate of Benjamin John Gleeson, deceased* [2019] VSC 589, the court found that the onus is on the propounder to positively demonstrate that the defining characteristics of a de facto relationship are in existence, with the court taking a cautious approach to the evidence, because the deceased party is not able to give evidence.[5]

In attempting to demonstrate the ending of a de facto relationship, in *Dow v Hoskins* [2003] VSC 206 the court considered it must take into account the human reality and not apply a narrow and pedantic view of living together in the circumstances. There the court considered that the propounder must demonstrate the shared intentions of the parties to continue their relationship, despite the existence of extenuating difficulties.

In *Estate Hawkins; Huxtable v Hawkins* [2018] NSWSC 174 Justice Lindsay determined that whether there was or was not a de facto relationship was a question of how the parties conducted their relationship.

In that context the family law decision of *Cadman & Hallett* [2014] FamCAFC 142 evidences just how complicated that can be. The matter involved a gay couple in a non-exclusive relationship for 19 years. They were not always residing together. One party left Australia to study overseas and did not return full time but did return from time to time. Despite living in different countries and not having a sexual relationship, the determination as to whether the relationship had come to an end came down to a question of whether communication of the end of the relationship had occurred. The court looked at a number of things, including ongoing financial contributions and when one of the parties made changes to his will.

Levers v Superannuation Complaints Tribunal [2016] FCA 936 involved an application for judicial review of a trustee's determination to pay 100% of super to the de facto husband. Mrs Levers, the mother of the deceased, was the legal personal representative of her deceased daughter's estate, Ms Redfearn. She died tragically on 22 April 2011, as a consequence of an attempted suicide on 20 April 2011. Mr Hattingh, the third respondent, contended he was living with Ms Redfearn at the time in a relationship. He lodged a complaint in relation to the trustee's decision with the Superannuation Complaints Tribunal, the first respondent. The tribunal set aside the trustee's determination and determined that 100% of the death benefit should be paid to Mr Hattingh.

There was evidence as to the history of domestic violence between the couple. Relevantly, Mr Hattingh was imprisoned for a period for breach of a domestic violence order. Central to this was the interaction between the couple after Mr Hattingh was released from jail. Mrs Levers asserted that the cause of the testator's suicide was because Mr Hattingh had ended the relationship. However, it was found there was no evidence supporting that. Further, the existence of domestic violence in a relationship was not considered a relevant factor in determining whether the relationship existed.

So, what practical steps can practitioners take to address these complexities?

- When discussing de facto status with the client, identify for them what it means in succession law terms.
- Conflict of laws – advise the client that if they change their domicile, then they should review the situation with a succession lawyer in that state or territory.
- Be aware that clients can have more than one spouse, and multiple de factos, and raise that with them.
- Recommend the client seeks legal advice if they are concerned about whether they have ended the de facto relationship.

Christine Smyth is a former President of Queensland Law Society, a QLS Accredited Specialist (succession law) – Qld, QLS Senior Counsellor and Consultant at Robbins Watson Solicitors. She is an executive committee member of the Law Council Australia – Legal Practice Section, Court Appointed Estate Account Assessor, and member of the QLS Specialist Accreditation Board, *Proctor* Editorial Committee, QLS Succession Law Committee and STEP.

Notes

1 *Love and Marriage*, Frank Sinatra, 1955.
2 2016 Census – Australian Bureau of Statistics.
3 See the Court and Civil Legislation Amendment Bill 2017passed on 5 June 2017. cabinet.qld.gov.au/documents/2017/Mar/CandCBill/Attachments/Bill.PDF.
4 For list of the various pieces of legislation defining 'de facto' see the writer's *Proctor* column, August 2015, discussing de facto matter of *Spence v Burton* QCA 104.
5 At [31].

2019: CaseLaw upgrades and more

WITH DAVID BRATCHFORD, SUPREME COURT LIBRARIAN

As 2019 draws to a close I thank Queensland Law Society and its members for your continued support and patronage of the library over the last 12 months.

For us in the library, it has been another busy year in which much has been accomplished.

Perhaps our most significant achievement has been the substantial improvements made to our CaseLaw service, a comprehensive collection of the official unreported decisions of Queensland courts and tribunals. CaseLaw now provides free, universal access to a range of functionality and content previously only available to paying subscribers. It also links to the authorised versions of decisions in the *Queensland Reports*.

We've received positive feedback about the new CaseLaw advanced search and collection-specific search options, which enable you to tailor your research to find more relevant and useful results.

You can also now customise your search results view, easily navigate between cases, and select and save decisions to *My case list* to view later, download, print and share.

Another popular enhancement has been to case landing pages, making it easier to browse and select relevant cases without needing to download the full-text PDF. The landing pages highlight key information about a decision such as catchwords, cited legislation and cases, and subsequent judicial consideration by Queensland courts and tribunals.

We've also greatly expanded the CaseLaw collections by migrating content that had previously not been available publicly, and continuing to publish all new decisions of the courts.

Other highlights for 2019 include:

- launching **@LawLibraryQueensland**, our official Twitter account – follow us for alerts to newly published civil judgments of the Queensland Court of Appeal and Supreme Court Trial Division, and library news and events, with more to come
- attracting more users and increased use of our popular Virtual Legal Library (VLL) service (**sclqld.org.au/vll**)
- responding to over 6500 information enquiries and research requests
- commencing a major project to redevelop our websites to help our customers find the information they need more easily
- welcoming visitors to our exhibition, Overturning *terra nullius*: the story of native title, which explores the cases that were particularly influential in shaping native title law reform (**sclqld.org.au/native-title**) – visit the exhibition in Sir Harry Gibbs Legal Heritage Centre, Monday to Friday, 8.30am to 4.30pm
- launching our brand new podcast series – subscribe to listen to lectures from our popular Selden Society lecture series (**sclqld.org.au/podcast**)
- hosting a justice system-themed art exhibition in the library space, *Next Witness* by Julie Fragar.

We attended and presented at several key QLS conferences throughout the year to raise awareness of the library and promote our free services for QLS members. It was great to meet lots of new members at these events and see some familiar faces. We were especially excited to attend our first QLS Career Expo, where we met with over 100 law students and future members of the profession.

We look forward to working with you again in 2020. From everyone at your law library, I wish you a safe, relaxing and enjoyable festive season.

Christmas book sale

Stuck for Christmas gift ideas or just want to treat yourself to a good read? Order one of the library's publications from us before 18 December and get 25% off—includes free delivery within Brisbane CBD.

Visit **sclqld.org.au/publications** for a full list of titles. Phone 07 3247 4373 to place an order by credit card.

Christmas closure

The library will be closed for the duration of the Christmas court closure, from Monday 23 December 2019 to Friday 3 January 2020 inclusive.

Equipping for success in a changing legal market

BY SHEETAL DEO

There's been a lot of discussion about the changing legal landscape.

The delivery of legal services has seen the introduction of automation and artificial intelligence (AI), the national profile of solicitors has seen an increase in women[1] and practising certificate holders under the age of 35,[2] but perhaps the most important change legal practitioners need to pay attention to is the change in consumer needs and expectations.

Are you equipped to meet their expectations?

Clients are spoiled for choice when it comes to selecting their legal service provider. They are becoming more conscious about how and where they spend their money. As a result, *just* having a solution to a client's legal problem isn't enough anymore. The solution has be delivered quickly, conveniently and relatively 'cheaply'.

How can you do this without compromising the quality of legal services you provide?

Step 1:

Understand and embrace technology as a tool – not a replacement or a threat.

Step 2:

Focus on what sets you apart (as a human and a practitioner).

Step 3:

Continuously work towards improving your personal and professional toolkit.

In 2018, LawGeex published a major report on a study which pitted 20 experienced US-trained lawyers against an algorithm. The challenge focused on reviewing non-disclosure agreements (NDAs). In particular, each lawyer was given four hours to annotate five NDAs with the relevant issues according to a set of clause definitions.

According to LawGeex: "The contract review platform achieved a 94% accuracy rate at surfacing risks in the sample of never seen before [NDAs]. This compared to an average of 85% for the experienced lawyers."[3]

When we know better, we can do better. So when we know there are applications which can complete certain tasks at a fraction of the cost and with increased accuracy, would it not make commercial sense to use such technologies to assist your practice? This would then allow you to spend your (billable) time on tasks requiring higher order thinking and perhaps offer a more competitive fee.

This takes us to Step 2 – focusing on what sets you apart: the human brand.

Clients are the centrepiece of our profession. Spending the time getting to know your client, offering warmth and competence – this is your competitive edge. Sharpening that edge by investing in education or training to improve your interpersonal skills is highly recommended. Communication is a two-way street. We not only have to speak to our clients in a language they understand, but we also have to listen to what is not being said, visual cues, circumstantial or external factors – information we can only discover by asking the right questions.

This takes us to step 3 – continuously improving your personal and professional toolkit. The legal profession has undergone a paradigm shift – has your approach?

Sheetal Deo is a Queensland Law Society legal professional development executive.

Notes

[1] According to the URBIS National Profile of Solicitors (2018).

[2] Ibid.

[3] Source: artificiallawyer.com/2018/02/26/lawgeex-hits-94-accuracy-in-nda-review-vs-85-for-human-lawyers.

Why we must be climate conscious

How legal needs are changing

BY MONICA TAYLOR

As global calls for action on climate change grow resoundingly louder, the profession must also consider how it conceptualises the impact of climate change in daily legal practice.

Four years ago, the Land and Environment Court of New South Wales Chief Judge, Justice Brian Preston SC, called for lawyers to adopt a climate-conscious approach. Addressing an audience of legal ethicists, his Honour said:

"Climate change is often seen as a global problem, one that is remote and removed from the daily practice of lawyers and courts. But in fact climate change is a multi-scalar problem. It is as much a small scale, local and immediate issue as it is a global issue…

"Recognising that addressing climate change depends on responses on a small scale and that any legal action which involves climate change issues will impact on climate change policy gives rise to a responsibility on lawyers to be aware of climate change issues in daily legal practice. It calls for a *climate-conscious approach* rather than a climate-blind approach."[1] (*emphasis added*)

Lawyers working across the spectrum of commercial law in fields as varied as insurance, property, corporate governance, energy and finance are already addressing the tangible legal, risk and reputational issues that climate change poses for their clients.

But what does a climate-conscious approach mean for lawyers who work in the legal assistance sector? What is the connection between climate change and legal need? This article attempts to address these questions through a brief demographic scan of Queenslanders who typically experience multiple and intersecting legal problems.

Climate change and legal need

As our summers become longer and hotter, they carry increased risks of bushfire and drought (and also paradoxically, increased risks of extreme rainfall and flooding). Life will become more uncomfortable and unpleasant for those without access to air-conditioning, proximity to council facilities or cooling breezes, which includes population cohorts who typically fit the publicly-funded legal service client profile.

These clients are most vulnerable to the impacts of climate change because people who experience poverty and inequality generally have the least capacity to cope, adapt, move on and recover from climate change events.[2]

A scan of Queenslanders who experience legal need shows how climate change is set to become a 'fundamental legal disruptor' or 'whole of legal system' problem.[3] Vulnerable Queenslanders include the elderly and people with chronic disease, with these demographics expected to experience poorer health outcomes due to climate change.

The link between climate change and physical health impacts is conclusive, with climate change likely to increase heat-related illnesses and deaths, worsening asthma and allergies, diseases spread by food, water and insects, increased incidence of infectious diseases and mental health impacts, and increased suicide risk.[4]

It is estimated that Queensland will have an additional 300,000 older people by 2026, prompting an increase in legal need across health law, elder law, succession law and conceivably also elder abuse issues. Additionally, including for the younger cohort of the population, mental health problems such as the recently coined 'eco-anxiety',[5] depression and stress are on the rise, with foreseeable flow-on effects in family violence law, employment, and credit and debt issues.[6]

In an Australian study, researchers found that there is a positive correlation between mean annual maximum temperate and suicide rates.[7] From a service design perspective, resourcing to upscale health justice partnerships across Queensland will become more important.

The impact of climate change will be most directly felt by Queensland's regional, rural and remote (RRR) population groups. In 2016, more than one third of the Queensland population lived outside major metropolitan areas.

Community Legal Centres Queensland expects that climate crises will disproportionally impact people living in RRR communities through exacerbating existing social and financial pressures.[8] The downstreaming of social and legal problems by this cohort will likely include property law, employment, bankruptcy, family and disputes about water allocation.

Some 17% of Queensland families are single-parent families, many of whom rent rather than own their own home. More than one in three Queenslanders live in rental accommodation. Disputes with landlords about repairs and maintenance issues that arise from climate events are also likely to become a common feature of every day legal need. Tenants' rights to access to air-conditioning and disputes between tenants and landlords regarding solar energy schemes inputs may also increase.

This quick scan demonstrates the extent to which climate change is infiltrating everyday legal practice.[9] Many additional client groups such as climate refugees and people with disabilities whose legal problems also intersect with climate change events will face specific barriers to accessing justice. A climate-conscious approach to lawyering in the legal assistance sector requires us to embed climate change consequences into the legal support and advice we provide to our clients.

Conclusion

We must understand that climate change and the legal work it generates is no longer solely the preserve of specialist environmental lawyers. In the access to justice sector, a climate-conscious mindset to legal practice is clearly needed; one that conceptualises climate change in all aspects of our work.

We can expect the intersectionality of clients' legal problems to be constantly shaped by climate change events. With the support of the Society, the Queensland legal profession, and particularly the legal assistance sector, must adopt a climate-conscious approach. In doing so it must also build its own adaptive capacity, resilience and responsiveness to climate change.

This article appears courtesy of the QLS Access to Justice Pro Bono Committee. Monica Taylor is the Director of the UQ Pro Bono Centre and a member of the committee. This QLS policy committee brings together practitioners working full time in the access to justice sector, and private practitioners who have an interest in access to justice including pro bono practice, legal aid work and/or innovative models of providing legal services to fill the justice gap. If you are interested in the work of the committee, contact Chair Elizabeth Shearer via elizabeth.shearer@shearerdoyle.com.au.

Notes

1 Preston, B, 'Implementing a climate conscious approach in daily legal practice', Australian & New Zealand Legal Ethics Colloquium Fifth Bi-Annual Meeting: Sustainable Legal Ethics as part of the public symposium 'Should Lawyers Challenge Emitters?', 4 December 2015, Monash University Law Chambers, Melbourne.

2 Australian Council of Social Services, 2013, 'Adapting the Community Sector to Climate Change', 13.

3 Advocates for International Development (AFID) and King's College London, 'What lawyers can do about climate change', kcl.ac.uk/law/research/centres/climate-law-and-governance/docs/what-lawyers-can-do-about-climate-change-briefing-paper.pdf (accessed 8 October 2019).

4 Australian Medical Association, Climate Change and Human Health, position statement revised 2015, ama.com.au/position-statement/ama-position-statement-climate-change-and-human-health-2004-revised-2015 (accessed 7 October 2019); Ying Zhang, Paul Beggs, Hillary Bambrick, et al, 'The MJA-Lancet Countdown on health and climate change: Australian policy inaction threatens lives' (2018) 209(11) *Medical Journal of Australia – Lancet* 474.e18.

5 'Eco-anxiety' How to spot it and what to do about it, bbc.co.uk/bbcthree/article/b2e7ee32-ad28-4ec4-89aa-a8b8c98f95a5 (accessed 7 October 2019).

6 American Psychological Association et al, March 2017, 'Mental Health and Our Changing Climate: Impacts, Implications, and Guidance'.

7 Ying Zhang, Paul Beggs, Hillary Bambrick, et al, above n4.

8 Community Legal Centres Queensland, 'Evidence & Analysis of Legal Need', August 2019. The number of people living outside of major cities in Queensland was 1,733,514 in 2016, representing 37% of the total population, see p30.

9 AFID and King's College London, above n3.

High Court and Federal Court casenotes

WITH ANDREW YUILE AND DAN STAR QC

High Court

Limitation of actions – recovery of debts – conflicting limitations periods

In *Brisbane City Council v Amos* [2019] HCA 27 (4 September 2019) the High Court considered which of two potentially overlapping limitation periods applied to the appellant's action. Pursuant to statutory powers, the appellant levied rates and charges against the respondent, the owner of land in Brisbane. Statute also provided that "overdue rates and charges are a charge on the land". The appellant brought an action to recover unpaid rates levied between 1999 and 2012. A number of defences were raised, but the High Court appeal related only to a limitation period pleaded. Section 26(1) of the *Limitation of Actions Act 1974* (Qld) provided for a 12-year limitation period for actions "to recover a principal sum of money secured by a mortgage or other charge on property". That provision encompassed debts created by statute and secured by charge. Relevantly for this appeal, s10(1)(d) provided for a six-year limitation period for "an action to recover a sum recoverable by virtue of any enactment". The appellant argued that only the longer of the two limitation periods applied. The High Court said that one cannot understand the overlap between the sections without understanding their history. There was a long history of predecessor provisions and authorities dealing with interpretation of such provisions, English and Australian. Until the late 1800s, the overlap was dealt with by confining the longer limitation period to actions for real or proprietary claims, and the second and shorter period applied only to personal claims. However, in *Barnes v Glenton* [1899] 1 QB 885 it was held that a defendant could plead either limitation period where there was overlap. The shorter period for personal claims would not be extended by the s26 predecessor. The appellant in this case argued that *Barnes v Glenton* should not be followed. The High Court unanimously rejected that submission. The case had been followed consistently for more than 100 years and was the understanding on which the current provision had been drafted. The court agreed with the majority from the Court of Appeal and dismissed the appeal. The defendant could plead either limitation period where there was overlap. Kiefel CJ and Edelman J jointly; Gageler J, Keane J and Nettle J each separately concurring. Appeal from Court of Appeal (Qld) dismissed.

Personal injury – inferences of fact – error in material inferences at trial – review of Court of Appeal

Lee v Lee; Hsu v RACQ Insurance Limited; Lee v RACQ Insurance Limited [2019] HCA 27 (4 September 2019) concerned the correctness of inferences of fact drawn by the trial judge. The case concerned a car accident in which the appellant was rendered an incomplete tetraplegic. The critical issue at trial was, who was driving the car? The appellant and his family argued that the father was driving. The respondent argued that the appellant was driving and that he had been moved by his father into the back of the car following the crash. The driver of the other car involved in the crash observed the father, very shortly after the crash, in the back of the car removing one of the children. There was blood on the driver's side airbag belonging to the appellant. The trial judge found that the appellant was driving the car. On appeal, the Court of Appeal found critical errors in the reasoning of the trial judge. McMurdo JA said that, absent the DNA evidence, he would have found that the father was driving the car. However, the DNA evidence was such that the trial judge's finding could not be said to be wrong. The High Court held that judicial restraint in interfering with a trial judge's findings are limited to findings likely to have been influenced by impressions about witnesses and reliability. Aside from that, the Appeal Court is in as good a position as the trial judge to draw inferences from facts found. In this case, having rejected critical planks in the trial judge's reasoning, the Court of Appeal had to weigh the conflicting evidence and decide for itself what was the correct inference to draw. Further, the view that the DNA evidence was persuasive failed to consider an important assumption underlying expert evidence about the DNA, that the appellant was unrestrained by a seatbelt. However, the Court of Appeal found, consistent with the evidence at trial, that the driver was wearing a seatbelt. That finding required consideration of further expert evidence about seatbelts, which would have prevented the driver's face (and blood) coming into contact with the airbag. The High Court assessed the evidence and inferences for itself, and held that the better conclusion was that the father was the driver. Consequential orders were made allowing the appeal. Bell, Gageler, Nettle and Edelman JJ jointly; Kiefel CJ separately concurring. Appeal from the Court of Appeal (Qld) allowed.

Costs – legal practitioners acting for themselves – *Chorley* exception

In *Bell Lawyers v Pentelow* [2019] HCA 28 (4 September 2019) the High Court considered whether a barrister acting for themselves in litigation should be able to recover costs for their time spent in the matter. As a general rule, a self-represented litigant cannot get recompense for the value of their time spent in litigation. However, there is a general exception to that rule for self-represented litigants who also happen to be solicitors. The exception was established in *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872. In the present case, the appellant retained the respondent, a barrister, to act in proceedings in the NSW Supreme Court. At the end of the proceedings there was a dispute over the respondent's costs. The respondent was unsuccessful in the local court but successful on appeal in the Supreme Court. Costs were awarded to the respondent. The respondent was represented by a solicitor in the local court and by senior counsel in the Supreme Court. She also attended court herself a number of times and was engaged in preparation of the case. The appellant disputed the respondent's costs. The issue for the High Court was whether the *Chorley* exception for solicitors should be extended to self-represented litigants who were also barristers. The court unanimously held that the *Chorley* exception should not extend to barristers and a majority of the court held that the *Chorley* exception should not be recognised as part of the common law of Australia at all (Nettle J held that there was no need or justification to decide the second point). The plurality said the exception was "an affront to the fundamental value of equality of all persons before the law", which could not be justified by policy. It was also inconsistent with the relevant statutory definition of 'costs'. Kiefel CJ, Bell, Keane and Gordon JJ jointly; Gageler J, Nettle J and Edelman J separately concurring. Appeal from the Court of Appeal (NSW) allowed.

Constitutional law – chapter III – parole periods – extension of non-parole by naming person

In *Minogue v Victoria* [2019] HCA 31 (11 September 2019) the High Court upheld the constitutional validity of provisions specifically preventing the parole of the plaintiff except in very limited circumstances. The plaintiff was convicted of the murder of Angela Taylor in 1988. The court set a non-parole period of 28 years, which ended on 30 September 2016. On 3 October 2016, the plaintiff applied for parole. On 14 December 2016, the *Corrections Act 1986* (Vic) was amended to insert s74AAA, which prevented the Parole Board (the board) making parole orders when the prisoner had been sentenced to a non-parole period for the murder of a person who the prisoner knew or was reckless as to whether the person was a police officer, except where the board was satisfied that the prisoner was in imminent danger of dying or was seriously incapacitated, so that the prisoner no longer had the physical capacity to do harm to any person. The plaintiff commenced proceedings in the High Court's original jurisdiction challenging the constitutional validity of s74AAA. On 1 August 2018, the *Corrections Act* was further amended to insert s74AB. That section specifically applied to the plaintiff and prevented the board from allowing his parole unless the board was satisfied that: the plaintiff was in imminent danger of dying or was seriously incapacitated, such that he no longer had the physical capacity to do harm to any person; the plaintiff had demonstrated that he does not pose a risk to the community; and other circumstances justified the order. The plaintiff alleged that the amended provisions were contrary to Ch.III of the Constitution because they imposed additional or separate punishment by extending the non-parole period; they constituted cruel, inhuman or degrading treatment or punishment contrary to the *Bill of Rights 1688*; and they were inconsistent with the constitutional assumption of the rule of law. The High Court held that the new provisions were relevantly indistinguishable from the provision upheld in *Knight v Victoria* (2017) 261 CLR 306, in which the court refused to reopen its decision in *Crump v New South Wales* (2012) 247 CLR 1. The sections did not alter the sentence or impose additional punishment, nor did they involve the exercise of judicial power. They did no more than change the conditions that had to be met before the plaintiff could be released on parole. This conclusion meant that the second and third arguments of the plaintiff did not need to be considered. Section 74AB was valid, and as such, s74AAA did not need to be considered. Kiefel CJ, Bell, Keane, Nettle and Gordon JJ jointly; Gageler J and Edelman J separately concurring. Answers to Special Case given.

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Federal Court

Consumer law – construction of disclosure obligation in the Franchising Code – civil penalties

In *Ultra Tune Australia Pty Ltd v Australian Competition and Consumer Commission* [2019] FCAFC 164 (20 September 2019) the appellant (Ultra Tune) appealed against the trial judge's decision that it contravened a disclosure obligation owed to franchisees in cl.15(1) of the Franchising Code (Schedule 1 to the *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth)) and the imposition of penalties for that and other admitted contraventions of the disclosure obligations in the Franchising Code. Ultra Tune is a franchisor for motor vehicle engine repair and maintenance services provided by a national network of about 200 franchises. It admitted various contraventions of the Franchising Code but disputed other claims of contraventions pressed by the respondent (ACCC).

The disputed contraventions gave rise to a question of construction as to the proper meaning of the expression "sufficient detail" in cl.15(1)(b) of the Franchising Code (at [19]). The Full Court dismissed Ultra Tune's appeal on the contested contraventions and upheld the trial judge's construction (at [46]-[48]). Further, Allsop CJ and Jagot and Abraham JJ said at [47]: "The facts of the particular case will determine the issue of sufficiency which lends support to the primary judge's observation at [104], that a franchisor would be well advised to err on the side of candour."

However, the appeal against penalty was allowed and the Full Court reduced the trial judge's penalty of $2,604,000 to $2,014,000. The Full Court disagreed with the trial judge that the disclosure contraventions were in or towards the worst category of case (at [60]). Ultra Tune's contravening conduct was characterised and assessed by the Full Court as "egregious inadvertence" (at [59] and [70]-[72]).

Consumer law, torts and trade marks – whether conduct in the course of an industrial dispute (i) infringed trade mark, (ii) was misleading or deceptive, or (iii) injurious falsehood – 'in trade or commerce' requirement for misleading or deceptive conduct

In *National Roads and Motorists' Association Limited v Construction, Forestry, Maritime, Mining and Energy Union* [2019] FCA 1491 (11 September 2019) the applicant (NRMA) brought a proceeding alleging that the respondent (MUA) engaged in trade mark infringements, misleading or deceptive conduct and committed the tort of injurious falsehood. The court dismissed the NRMA's case on all bases. The impugned conduct occurred in an industrial dispute relating to the wages and conditions of employees of a ferry business owned by the NRMA. The NRMA's claims included that, as part of the industrial dispute, the MUA used the NRMA's word and device marks, and made false or misleading statements which were detrimental to, and designed to injure, the NRMA and its brand.

In relation to the claims of misleading or deceptive conduct, the central issue was whether the conduct was "in trade or commerce". The court considered and applied the principles from the seminal High Court case of *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 (at [132]). The court also discussed the body of caselaw which indicates that it is not the intention of ss18 and 29 of the Australian Consumer Law (or its predecessor) to govern public or political debate (at [133]-[149]). It was held that the relevant conduct of the MUA was not conduct "in trade or commerce" (at [154]). Griffiths J explained at [135]: "It was properly acknowledged by [Counsel for the NRMA] that there is no precedent which establishes that the conduct of a trade union or its members in campaigning for improved wages or conditions of employment constitutes conduct 'in trade or commerce'. Conduct in the course of an existing employment relationship is unlikely to constitute conduct 'in trade or commerce' even where it is the conduct of the parties to the relationship itself...Similarly, I consider that statements by an employer to its employees in the context of a proposed enterprise agreement will not generally constitute conduct 'in trade or commerce'. By analogy, representations made by a trade union in the context of an industrial campaign in relation to the existing conditions of employment of employees will generally fall outside conduct that is 'in trade or commerce'."

The claim based on the tort of injurious falsehood failed because the relevant statements and representations were not made maliciously and because the NRMA did not establish actual damage in the relevant legal sense (at [191]-[219]).

Administrative law and environment law – appeal from AAT – the precautionary principle

0of the Administrative Appeals Tribunal (AAT). The primary decision under review by the AAT was the decision of the Great Barrier Reef Marine Park Authority to grant two permissions under the *Great Barrier Reef Marine Park Regulations 1983* (Cth) to the applicant to use and enter the Marine Park (i) to conduct a program to take animals or plants that pose a threat to human life or safety, being the Queensland Shark Control Program; and (ii) to conduct a research program comprising certain specified studies. The AAT varied the decision under review and the appellant challenged the AAT's decision on various administrative grounds, all of which were dismissed by the Full Court.

Among other matters, there was consideration of the 'precautionary principle'. The precautionary principle is one of the "principles of ecologically sustainable use" in s3AB of the *Great Barrier Reef Marine Park Act 1975* (Cth). Section 3(1) of that Act defines the 'precautionary principle' to mean "the principle that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage". The precautionary principle is also defined in the same terms in s391(2) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). Allsop CJ and Greenwood and Robertson JJ rejected the ground of appeal that the AAT misunderstood or erred in applying the precautionary principle (at [119]-[128]).

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Non-compliance with s60I derails application

WITH ROBERT GLADE-WRIGHT

Children – father's application for parenting orders dismissed for non-compliance with s60I (family dispute resolution)

In *Ellwood & Ravenhill* [2019] FamCAFC 153 (6 September 2019) Kent J (sitting in the appellate jurisdiction of the Family Court of Australia) allowed the mother's appeal against orders made on the application of the father in respect of the parties' daughter (17) and son (nearly 16). His application sought to have the existing, informal parenting arrangement (equal time with daughter but son spending no time with mother due to conflict between them) reflected in an order. In response, the mother applied for the dismissal of the father's application as s60I *Family Law Act 1975* (FLA) had not been complied with, arguing that the court lacked jurisdiction.

The father filed an affidavit as to his not filing a s60I certificate, deposing that mediation had been tried by the parties but failed, which the mother disputed. At first instance, a judge of the Federal Circuit Court directed the parties to attend with a family consultant pursuant to s11F FLA. The mother appealed.

In setting aside the order and dismissing the father's parenting application, Kent J said (from [21]):

"(…) [T]he provisions [of s60I(7)] emphasise the requirement for parties to a dispute about parenting orders to make a genuine effort to resolve that dispute with the assistance of family dispute resolution before application is made to the Court. Only if one of the exceptions contained in subsection (9) applies, can an application be filed without the parties having participated in family dispute resolution. Even then, it can be seen that subsection (10) requires the Court to consider an order for the parties to attend family dispute resolution with a family dispute resolution practitioner. (…)

[28]…[T]he primary judge was in error in proceeding to hear the father's application not having made any finding…that any of the exceptions in subsection (9) applied. In other words, the mandatory requirement of subsection (7) applied, and the primary judge was in error in proceeding to hear the application notwithstanding that that mandatory requirement had not been complied with."

Property – initial contributions of $4.97m (h) and $500,000 (w) to $12.5m pool assessed at 80:20

In *Daly & Terrazas* [2019] FamCAFC 142 (13 August 2019) the Full Court (Ainslie-Wallace, Aldridge and Austin JJ) considered a nine-year cohabitation between a 47-year-old husband and 44-year-old wife. The parties' 14 and 11-year-old children lived with the husband and saw the wife on weekends and on holidays. Finding that the husband's initial contributions were worth $4.97 million and the wife's $500,000, Rees J at first instance said that during the parties' relationship they "conducted their financial affairs independently", although "each party invested both formally and informally in properties owned by the other" ([10]) and "each contributed their money and their efforts to the enterprise of their family" ([59]).

The $12.5 million pool excluded superannuation, which was worth $342,351 (husband) and $83,619 (wife). The wife had worked professionally and earned income from shares during the relationship. Rees J found that the parties' contributions up to the date of trial were equal, but that their initial contributions warranted an 80:20 contributions-based adjustment. The wife then received a 10% adjustment for s75(2) factors, a division of 70:30 in favour of the husband overall. The husband appealed.

In dismissing the appeal, Ainslie-Wallace J (with whom Aldridge and Austin JJ agreed) said (from [20]):

"In short, the argument as to the first ground, shorn of the lawyerly language of the submission, is: '20 per cent is too much'. (…)

[22] The appeal ground invites this Court to do the impermissible, to substitute our determination of what figure is appropriate to reflect the parties' contributions instead of her Honour's. Nothing put to us persuades me that we ought to, and further, her Honour's conclusion was entirely open to her on the evidence. The outcome is not unreasonable or plainly unjust such that a failure properly to exercise the discretion may be inferred (see *House v The King* (1936) 55 CLR 499 at 505).

[23] In my view his challenge has no foundation and must fail."

Spousal maintenance – applicant may reasonably claim expenses not being incurred due to inability to pay

In *Garston & Yeo (No.2)* [2019] FamCAFC 139 (16 August 2019) Aldridge J (sitting in the appellate jurisdiction of the Family Court of Australia) heard Mr Garston's appeal against an interim order for spousal maintenance after the breakdown of a same-sex marriage. Mr Yeo sought maintenance of $2500 a week, Judge Boyle at first instance accepting that Mr Yeo was not in good health and, although looking for work, he had been unemployed since 2014 while receiving a $1000 weekly allowance from Mr Garston. It was ordered that the stipend continue at $1000 per week, the court rejecting $1500 of Mr Yeo's claimed expenses, including rent, skincare and holidays.

In refusing leave to appeal, Aldridge J said (from [24]):

"The appellant correctly submitted that a person seeking an order for spousal maintenance must satisfy the court, on the evidence before it, that he or she cannot support himself or herself adequately as set out in s72(1) of the Act (*Hall v Hall* [2016] HCA 23…at [8]). (…)

[29] A claim for maintenance is not limited by reference to current expenses because an applicant applying for maintenance may not have the ability to pay for commitments necessary to support themselves (s75(2)(d) of the Act) and thus avoid incurring what otherwise would be a reasonable expense. Therefore, the focus is on what is necessary for support.

[30] Often, and conveniently, the identification of reasonable needs may be done by reference to expenses that are currently being incurred but obviously, that will not be possible or lead to adequate support in all cases. It is reasonable to claim that you need more money than you are currently spending (*Seitzinger & Seitzinger* [2014] FamCAFC 244…at [53]). Here too, the Financial Statement was prepared very shortly after separation when it would be more difficult to identify the cost of reasonable needs.

[31] It follows that the submission that because a claim is an estimate it must be disregarded cannot be accepted. It also follows that verification of expenditure is not necessarily required. (…)"

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Basic entitlements – community service, public holidays and more

BY ROB STEVENSON

In this series of articles, I have dealt with the basic entitlements of every employee under the National Employment Standards (NES).

So far, I have dealt with those relating to:

- maximum weekly hours
- requests for flexible working arrangements
- parental leave
- annual leave
- personal/compassionate leave (including family and domestic violence leave)
- long service leave
- notice of termination/redundancy pay.

The remaining NES deal with:

Community service leave – Employees are entitled to this leave if taking part in an eligible community service activity, which is defined as:

- jury service required by law
- a voluntary emergency management activity, or
- otherwise as prescribed by regulation.

There is no restriction on leave for jury duty. Employees absent on jury duty (other than casual employees) do have to be paid the difference between their base pay and the amount received for jury duty for the first 10 days of absence.

A voluntary emergency management activity involves the employee:

- being a member of a recognised emergency management body (such as the State Emergency Service, Country Fire Authority or RSPCA)
- being requested to engage in an activity dealing with an emergency or natural disaster on a voluntary basis (no formal request is necessary in urgent circumstances), and
- engaging in the activity.

Leave for emergency management purposes must be reasonable in all the circumstances and covers not only the time engaged in the activity but also reasonable travelling and rest time following the activity. Employees absent on voluntary emergency management activities do not have to be paid by the employer.

Notice of the absence for all types of community service leave must be given as soon as practicable by the employee and reasonable evidence must be produced on request.

Public holidays – An employee is entitled to paid absence from work on public holidays. Public holidays are listed as:

- 1 January (New Year's Day)
- 26 January (Australia Day)
- Good Friday
- Easter Monday
- 25 April (ANZAC Day)
- Queen's Birthday holiday
- 25 December (Christmas Day)
- 26 December (Boxing Day)
- state-declared public holidays.

An employer can make a reasonable request for an employee to work on the public holiday, which the employee can refuse on reasonable grounds. The *Fair Work Act 2009* (Cth) sets out certain factors to take into account in deciding what is reasonable:

- the nature of the employer's workplace (including its operational requirements) and the nature of the employee's work
- the employee's personal circumstances, including family responsibilities
- whether the employee could reasonably expect that the employer might request work on a public holiday
- whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, work on the public holiday
- whether the employee is full time, part time or casual, or is a shift worker
- the amount of advance notice given by the employer.

Fair Work Information Statement – Employers are required to provide every new employee with a document called a Fair Work Information Statement (FWIS) before, or as soon as practicable after, the employee commences employment. It contains details of the NES, awards, agreement-making, the right to freedom of association and the role of the Fair Work Commission and the Fair Work Ombudsman. It is good practice to attach the FWIS to the new employee's employment agreement. The FWIS is updated each year and can be accessed at **fairwork.gov.au**.

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The law firm employee experience

What really works?

BY GRAEME MCFADYEN

While work-life balance is a topical issue generally, it is especially so within the legal industry, which has the unfortunate reputation as being the most depression-prone profession in Australia.

In a recent survey of 200 legal professionals across Australia and New Zealand, more than 60% said they had experienced depression or knew someone who did, while 85% said they had experienced anxiety.[1]

This focus on work-life balance has seen many initiatives introduced in firms, but not always effectively. In another recent survey, by GlobalX and the Australasian Legal Practice Management Association (ALPMA),[2] lawyers were asked whether their firms had implemented positive changes to the employee experience. Some 80% confirmed that they had, with large firms achieving a 90% positive response.

However, the same survey also found that lawyers in large firms reported the worst rates of work-life balance so "there is clearly a disconnect between investment in the employee experience and a flow-on effect to employee wellbeing".[3]

The same survey asked what positive working conditions were offered by their firm. The most common at 83% was flexible working hours with the second most popular, surprisingly, was working from home at 73%. There were no further details provided about the extent of this option – such as whether one or five days per week so it is unclear as to the extent of this offering. And while these conditions may positively influence employee attitudes, they may well not achieve a positive workplace environment as most admin employees are unlikely to enjoy the same benefits.

While the workplace environment of most law firms may have improved markedly over the past decade, the legal environment is clearly still characterised by high levels of stress and anxiety. This is demonstrated in part by the fact that the respective law institutes and societies across Australia all provide LawCare programs to promote the health and wellbeing of their members.

While the benefits of a positive work environment are well known – improved teamwork, morale, productivity and staff retention while reducing stress – the fact that there are still high rates of depression within the legal profession suggests that law firms are not doing enough to address the problem.

This situation may be attributable to the leadership team having a different view from their employees on how best to achieve a positive workplace. In a 2012 survey by Deloitte,[4] executive respondents regarded the organisation's financial performance and staff remuneration as significant factors in establishing a positive workplace culture, while these same factors ranked amongst the lowest in the eyes of the employees.

Rather, the employees prioritised intangibles – regular and candid communications, employee recognition and access to management – as the most relevant factors in establishing a positive workplace.

So where do you start the cultural renaissance? The steps required are likely to vary depending on specific circumstances, but in large part the steps outlined below should take you a fair way down the path.

Develop a confidential staff survey that asks staff to identify what they would like to change in the office to improve client service in particular, and the general office environment as a whole.

Follow this initial survey up with six-monthly, firm-wide satisfaction surveys. It may take a few surveys to demonstrate that you take the process seriously and that you are prepared to be accountable for implementing or not implementing particular recommended actions. It is not until you have demonstrated your bona fides in this regard that you will start to enjoy the full confidence of staff.

1. Develop and promote your values vigorously. Staff buy-in is imperative, so significant staff input into the values is necessary. Once developed, don't be shy about your values. They need to be highly visible across the office(s).
2. Walk the talk. Your values define acceptable behaviours at all levels, particularly at partner level. There can be no exemptions and anyone engaging in persistent, serious breaches needs to be exited quickly. Decisive leadership by the managing partner in managing the sometimes errant (and frequently highly visible) behaviour of partners is critical.
3. Don't wait for a formal appraisal session to let somebody know if their conduct is unacceptable. If somebody's behaviour is inconsistent with your values, make sure they know it. A quiet word by a senior member of the team may be all that is required, but the conversation has to occur and it needs to be done promptly.
4. Recruit for fit against the values of the firm. If implemented properly, this will produce a significant improvement in staff interactions, reduce internal bickering and seriously enhance overall compliance with values and the quality of the work environment.
5. Carefully analyse the language of the firm to see if it inadvertently promotes class distinctions. For example, many firms absent-mindedly use the generic description 'professionals' to describe all team members with legal qualifications. The inference is that somehow the professionally qualified staff within HR, marketing, finance and IT are somehow less deserving.
6. Look for opportunities to communicate, communicate and communicate. The surveys are only one link in the communications chain. You might consider keeping staff informed of firm performance against revenue targets and strategies. If you want your people to take a personal interest in the performance of the firm, you need to take them into your confidence.
7. Look for opportunities to celebrate successes. Circulate the good news stories and ensure heroic performances by support staff especially are publicly celebrated.

Postscript: The poor business practices at the banks and especially AMP uncovered by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry demonstrates how pockets of toxicity may develop, even within otherwise respectable organisations. Management needs to remain alert to these possibilities.

"A positive culture in the workplace is essential for fostering a sense of pride and ownership amongst the employees. When people take pride, they invest their future in the organisation and work hard to create opportunities that will benefit the organisation. Positive attitudes and behaviour in the workplace are the direct results of effective leadership and a positive management style".[5]

Graeme McFadyen has been a senior law firm manager for more than 20 years. He is Chief Operating Officer at Misso Law and is also available to provide consulting services to law firms – graeme@misso.edu.au.

Notes

1 'Lawyers experience high rates of anxiety and depression, survey finds', ABC News, 14 August 2019, abc.net.au/news/2019-08-15/study-finds-high-rates-anxiety-depression-in-legal-profession/11412832.

2 'Move Forward with Confidence, Your Roadmap to Transformation', 2019 GlobalX+ALPMA Legal Industry Report. July 2019.

3 Ibid, p8.

4 'Core beliefs and culture, Chairman's survey findings', Deloitte Development LLC, 2012, in which 1005 adult employees and 303 corporate executives were interviewed in the United States.

5 'How to Create a Positive Workplace Culture', Dr Pragya Agarwal in *Forbes*, 29 August 2018; forbes.com/sites/pragyaagarwaleurope/2018/08/29/how-to-create-a-positive-work-place-culture/#18a5a2524272.

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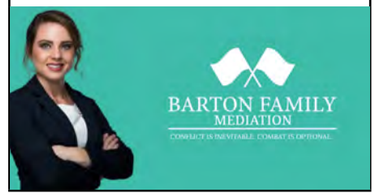

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EXPERT SEVEN REVEAL THEIR FESTIVE FAVOURITES

WITH MATTHEW DUNN

Christmas is just around the corner, so this month we've asked a group of senior practitioners with outstanding knowledge of wines to answer four festive season questions:

1. What Christmas celebration wine would you recommend for less than $80?
2. What food wine would you recommend for the Christmas table, and what would you serve it with?
3. If you were down to your last $30 at Christmas, what wine would you buy?
4. Imagine you are spending New Year's Day on Lady Elliot Island and you can only take one bottle with you on the plane to enjoy there, what would it be and why?

Justin McDonnell

(PARTNER, KING & WOOD MALLESONS)

1. Primo Estate Sparkling Shiraz an Australian unique style of wine, a red bubbly!

2. Noon Cabernet Sauvignon with the ham/turkey, or a good Australian tokay/ muscat with the pudding.

3. Rockford Alicante Bouchet Rose – my wife's favourite!

4. Giaconda Chardonnay – perfect for an island lunch.

Ian Bloemendal

(PARTNER, CLAYTON UTZ)

1. Primo Estate Joseph Sparkling Red – released every two years, it is opulent but not too sweet, and different to every other sparkling red wine on the market. Made from shiraz, cabernet, merlot and "select bottles of ancient Australian red". As the back label says: "Don't ask any questions, the answer is in the bottle."

2. Weingut Keller Riesling von der Fels – any vintage between 2015 and 2018, served with seared scallops with a ginger soy dressing and shallots. For the recipe, look for 'Scallops with ginger and shallots' at **taste.com.au**.'Von der Fels' means 'from the rocks'. It is a riesling made using some of the top-shelf GG 'cru' vines from 10 to 30 years old. Jancis Robinson MW is reported as saying: "If I had to choose one wine to show how great German riesling can be, I would choose a Keller riesling. Those wines are the German Montrachets."

3. I'd reach for a **Blue Poles Allouran (Merlot Cabernet Franc)**. A Bordeaux Right Bank blend from the Wallcliffe Precinct of Margaret River (same region as Leeuwin Estate, Voyager Estate, Cape Mentelle).

4. I'd thoroughly enjoy a **2014 Home Hill Kelly's Reserve Pinot Noir**. Smashingly delicious with dark berries and savoury notes, it's a Tassie pinot masterclass from the Huon Valley. Worth hunting down – a well-deserved Jimmy Watson trophy winner, with a boot full of other trophies.

Bruce Humphrys

(MANAGING PARTNER, HOPGOODGANIM LAWYERS)

At this time of year I tend to get a little nostalgic with my wine selections and am inclined to pick things that serve my memory with a deal of happiness:

1. Charles Melton Sparkling Shiraz

2. Andrew Thomas Braemore Semillon – oysters and shellfish.

3. Pepper Jack Shiraz

4. Perrier Jouet Belle Epoque – because you need nothing else.

Joanne Rennick

(MANAGING PARTNER, MURPHYSCHMIDT SOLICITORS)

1. Primo Estate Joseph Sparkling Red

2. Giaconda Chardonnay with scallops or prawns simply done.

3. Last $30 wine – impossible to choose. I'll vote for **Ministry of Clouds Tempranillo Grenache**.

4. Lady Elliot special wine – the island views would outshine the wine, but it would have to be Australian and it would have to be red (I'm assuming no refrigeration) – **Yabby Lake Pinot Noir**.

Lucy Bretherton

(COUNSEL, ASHURST)

1. Champagne is the only drink of celebration. In fact every time you open a bottle of champagne, it's a celebration!

If you look hard enough, you should be able to find non-vintage champagne from many of the major champagne houses for under $80 a bottle. It's very hard to go past **Louis Roederer Brut Premier** or **Pol Roger Brut Champagne NV**. For a bargain (around $59), you can't beat **Canard-Duchene Cuvee Leonie Brut NV**.

2. Lallier Rose Grand Cru NV (at around $77) is the perfect accompaniment for a traditional roast turkey Christmas dinner or even turducken. For a seafood Christmas, I recommend a blanc de blancs champagne such as **Ruinart Blanc de Blancs NV** (although a little more pricey at around $120).

3. A half-bottle of champagne!

4. Given the 'one bottle' limitation, it would have to be a jeroboam (three litres) or even a methuselah (six litres) of champagne. **Champagne Palmer & Co** does great champagne in large formats. If push-came-to-shove, a magnum (1.5 litres) might just suffice. As Winston Churchill quipped (being perhaps a little sexist): "A magnum is the perfect size for two gentlemen over lunch, especially if one isn't drinking."

If it had to be single 750ml bottle, it would be a **Louis Roederer Cristal 2008** – one of the best vintages of the last 20 years.

Brett Heading

(PARTNER, JONES DAY, AND CHAIRMAN, CLOVELY ESTATE, SOUTH BURNETT)

1. Arras Grand Vintage 2008 – A wine of outstanding quality, enriched by the great complexity of character that follows seven years of tirage. The Arras Grand Vintage retains freshness and longevity with exceptional balance and a rich, full-bodied taste. Simply the greatest sparkling wine from the greatest sparkling producer in Australia.

Or:

Clovely Estate 2013 Blanc de Blanc – Like a phoenix rising from the ashes, the 2013 chardonnay was a blessing in the year of the big floods. Secondary fermentation in bottle and then left in peace for six years before disgorging in September 2019. The fine acidity will have the taste buds looking for more and the wine delivers with classic chardonnay flavours and notes of toasty brioche and gentle complexity.

2. Clovely Estate Chardonnay 2019 – On the eve of one of our finest vintages, Nick Pesudovs our prodigal winemaker was desperate to be let loose on an exceptional, yet very small parcel of chardonnay. Ever cautious in his approach, this time he let nature lead the winemaking process and the wine is simply sublime. Barrel fermented with indigenous yeast from the vineyard, like a tightly wound clock this wine unfurls in the mouth with evolving flavours. Kick off Christmas lunch with freshly shucked Coffin Bay oysters and our 2019 chardonnay.

3. Golden Grove 2018 Barbera – The perfect red wine for drinking in Queensland, medium bodied with a juicy berry fruit nose and a palate that is soft and supple. Mouth-watering tannins, a touch of oak and that classic crunchy Barbera acidity. Spend the last dollar on this wine, leave nothing for the Boxing Day sales, but make sure you have already bought the prosciutto.

4. La Petite Mort 2017 Pinot Noir Rosé – An engaging label, albeit a little absurd. If I can only take one bottle, then I need/ want both red and white in the one bottle! The winemakers here push the limits of the varieties with excellent results. Classic southern French style rosé, bone dry with delicious earthy characteristics and hints of red fruits from the pinot noir. A delicate balance of both red and white wine is what every good rosé should display.

Matthew Dunn

(WINE WRITER 3RD CLASS, *PROCTOR*)

1. Lubiana Grand Vintage 2009 (Tasmania)

2. Current release **Hunter Semillon** and fresh large ocean king prawns or **Freycinet Vineyard Pinot Noir** and BBQ lamb backstrap.

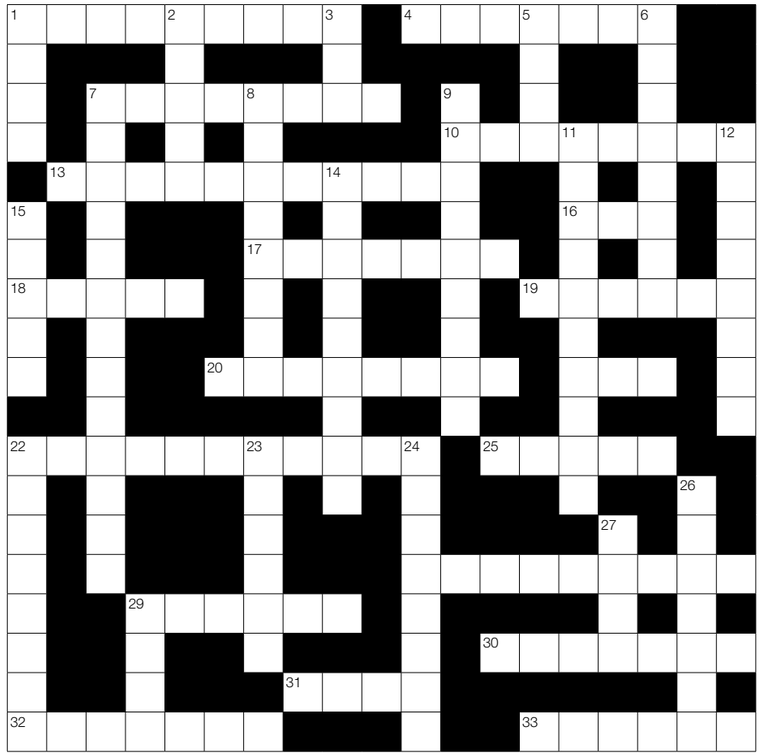
3. Cirillo Vincent Grenache, the little brother to the 1850 vines but bang on for value.

4. Nicolas Carmarans Mauvais Temps from Averyon, the most obscure but singular and 'alive' wine experience I have ever had.

Matthew Dunn is Queensland Law Society Policy, Public Affairs and Governance General Manager.

Mould's maze

BY JOHN-PAUL MOULD, BARRISTER AND CIVIL MARRIAGE CELEBRANT | JPMOULD.COM.AU



Across

1 Demit. (Two words) (9)

4 Spending time with a child, as opposed to having residence. (Archaic) (7)

7 Contracting party. (8)

10 Prison. (US; jargon) (8)

13 Lawyer whose methods are petty, underhanded or disreputable. (11)

16 Bachelor of Laws. (Abbr.) (3)

17 Convert into cash. (7)

18 Without bail or escaped from custody, at ..... (5)

19 Spending time with a child, as opposed to having custody. (Archaic) (6)

20 A ..... debt is an amount accepted as owed by a bankruptcy trustee to a creditor for proportional payment from available funds. (8)

21 Victorian equivalent of the Motor Accident Insurance Commission. (Abbr.) (3)

22 Accused's family or social background, usually mentioned at the commencement of a criminal sentence. (11)

25 Sir ..... Fielding Dickens KC was the eighth son of Charles Dickens and a Common Serjeant of the Old Bailey from 1917 to 1932. (5)

28 A ..... penalty order compels an offender convicted of a Commonwealth indictable offence to pay money for benefits derived from the offence, often accompanying a forfeiture order. (9)

29 An opinion given by the Australian Taxation Office to an individual taxpayer, private ..... (6)

30 Deny or contradict a fact or statement. (7)

31 Recent High Court decision which confirmed a debtor may invoke by way of defence the shorter of any limitation period applicable: BCC v ..... (4)

32 Agreement by which a person assents to relinquish a claim or right against another, usually in exchange for compensation. (7)

33 Confirm genuineness of a document or bear witness that someone actually signed a document. (6)

Down

1 Stamp affixed to a court document. (4)

2 Supposed right of a feudal lord to have sexual relations with the bride of a vassal on their wedding day, ... *du seigneur*. (French) (5)

3 Originally called. (3)

5 A beginner, apprentice or trainee. (4)

6 Corporeal. (8)

7 Lying or speaking evasively. (13)

8 The District Court and Magistrates Court are '.....' courts of record. (8)

9 Condition precedent. (9)

11 Seeking to influence or incite to unlawful action. (10)

12 Official seat of the Lord Chancellor in the House of Lords, the ..... (8)

14 Concept by which general damages in defamation are increased, especially in publications involving social media, the '.....' effect. (9)

15 A court will ..... an appeal when the appellant succeeds. (5)

22 Insurance agent employed to evaluate liability for and quantum of a claim, loss ..... (8)

23 Silk awarded an AM for services to surf lifesaving and the law, Ralph ..... (6)

24 Persian death sentence involving tying a defendant in two facting boats and smearing their hands, feet and head with honey to attract insects. (Archaic) (8)

26 Outstanding instalments of debt. (7)

27 Security interest of a mechanic. (4)

29 TV series in which Richard Roxburgh plays the role of barrister Cleaver Greene. (4)

Solution on page 56

Anniversary at the day hospital

My procedures, from one end to the other

BY SHANE BUDDEN

In the first 51 years of my life, I had no operations, unless you count the time I had a discoloured patch of skin on my lip removed; it wasn't my idea.

My then-girlfriend convinced me to do it, and I would like to note that I underwent the procedure based on the sound medical arguments she advanced, but that would be a lie. I did it because she was very attractive.

The same young lady also convinced me to watch (or at least take pains to appear to watch) *Steel Magnolias*. That's how attractive she was.

Actually, the lip operation didn't turn out too badly, apart from the fact that the needle for the local anaesthetic puncturing my lip was the most painful thing I have experienced this side of listening to Julia Gillard speak. Plus my lip swelled up to a shape and size that would have allowed me to be the understudy for the lead in *The Elephant Man*. Also, we broke up not long after that, and I guess it is entirely possible that the two events are not unrelated (my girlfriend and I broke up that is; not the Elephant Man and I).

However, I digress, and return to the point which was (as far as I can recall) having operations. Having compared notes with many of my friends who are now entering that phase QLS likes to refer to as 'Pinnacle Practitioners' because it sounds a lot better than 'dinosaurs', I have come to the conclusion that doctors have a quota system.

By that, I mean that they feel that, by a certain age, a person should have had a number of operations, possibly so that their doctors can collect loyalty points with various hospitals and specialists, perhaps thereby earning a time-share holiday. Of late, my doctor fairly regularly says things like: "Hey! Looking at your file, it turns out we haven't done the one where we remove a tiny portion of your pancreas once a week for three months and see if it grows back!"

Many of my friends report similar stories, and we have noticed that the more unpleasant the preparation for the operation is, the keener the doctors are. This also makes me suspicious, as very often the preparation for the operation tends to resemble a weird hazing initiation like they have for admission to college fraternities in the United States.

"Well," the doctor will say, "we need you to eat nothing but raw sardines for a day, then fast for 24 hours after drinking a bottle of warm vinegar; then you have to stand on your head for 20 minutes while I poke you with this stick." It goes without saying that this abuse does not come for free.

I wonder if the doctors sit around making these things up, and whether they can barely keep a straight face as they instruct us before rushing down to a special doctor bar and shrieking, "You'll never believe what I got this one to do!"

On a seemingly unrelated note, the relevance of which will be illuminated later in this column, my wife and I celebrated our 20th wedding anniversary on 25 September this year.

Anyway, at one check-up it came to my doctor's attention that I had not had a colonoscopy, ever. This is the medical system's equivalent of telling someone you haven't seen *Star Wars* (NB: I use the comparison as a humour device only; not having seen *Star Wars* is clearly far worse than pretty much anything else, and if you haven't, you need to see it as soon as you finish reading this vital column).

My doctor quickly arranged for a colonoscopy, and – now here is where the wedding anniversary becomes relevant – decided that 25 September was definitely the day. Those wedding planners amongst my readership – a significant demographic for me, I am sure – will not be surprised, as this is quite traditional – the 15th anniversary is crystal, the 25th is silver, and the 20th (in a tradition started by Queen Elizabeth I, if I am not mistaken) is Glycoprep.

So on our 20th wedding anniversary, my wife whisked me off to a romantic day hospital, where the staff prepared me by peppering me with questions ("You've never had a colonoscopy? Really? Truly?"). They also confirmed that I had prepared properly by drinking Glycoprep until it came out my ears.

Glycoprep is a special drink that prepares you for the operation, and is made by adding about 6000 teaspoons of salt to a truckload of Gatorade and then straining it through unwashed running socks. At least, that is what it tasted like to me.

The good news is that it turned out there was nothing wrong, and on the plus side I believe my doctor now has enough hospital points to get a new toaster, so it's all for the good. The serious side of the story is that had there been a problem, it could have been easily fixed by being detected early – so in all seriousness those screenings your doctor wants you to do are worth it, even if they are a pain in the backside (Har! See what I did there? No wonder I write a humour column!).

I should now say a word or two about our outgoing QLS President, Bill Potts, speaking of pains in the backside (I am on fire today!). In all seriousness, I want to thank Bill for his hard work over the last year. He has led the profession with courage, courtesy and collegiality. I have enjoyed working with Bill, partly because he is a great president but mostly because he is great bloke and a great friend. Appreciate your friendship and support Mr President, good luck on the next challenge!

DLA presidents

District Law Associations (DLAs) are essential to regional development of the legal profession. Please contact your relevant DLA President with any queries you have or for information on local activities and how you can help raise the profile of the profession and build your business.

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Direct queries can also be sent to interestrates@qls.com.au.

Crossword solution

From page 54

Across: **1** Stand down, **4** Contact, **7** Promisee, **10** Hoosegow, **13** Pettifogger, **16** LLB, **17** Realise, **18** Large, **19** Access, **20** Provable, **21** TAC, **22** Antecedents, **25** Henry, **28** Pecuniary, **29** Ruling, **30** Gainsay, **31** Amos, **32** Release, **33** Attest.

Down: **1** Seal, **2** Droit, **3** Nee, **5** Tyro, **6** Tangible, **7** Prevarication, **8** Inferior, **9** Threshold, **11** Soliciting, **12** Woolsack, **14** Grapevine, **15** Allow, **22** Adjuster, **23** Devlin, **24** Scaphism, **26** Arrears, **27** Lien, **29** Rake.

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