



OCTOBER 2019

## NOT A SIMPLE MATTER OF LIFE OR DEATH

Navigating the complexities of implementing  
voluntary assisted dying laws in Queensland

### MENTAL HEALTH MONTH

Balancing a legal  
career with life

### INNOVATION IN LAW

Meeting regulatory demands –  
How small innovations can add value

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# It's a matter of trusts

## Overhaul is long overdue



“Trust no-one, Mr Mulder.”

– *The Well-manicured Man, X-Files*

Good advice, at least for agents Scully and Mulder in the classic TV series *The X-Files*.

It might, however, be difficult to be guided by it here in Queensland, at least when it comes to legal trusts, because our *Trusts Act 1973* (Trusts Act) does not set out the elements of what constitutes a valid trust.

Indeed, that is far from the only area of our Trusts Act that requires attention, a point that Queensland Law Society has made many times in the past. Our Trusts Act was passed in 1973, and although like all legislation of that vintage it has had some minor alterations, it really needs a major renovation. Our Trusts Act suffers from the lack of a long-overdue overhaul.

A lot has changed in the world since 1973 in many areas. In terms of trusts, the increase in their use, and the forms they can take, has been exponential. Trusts were once the province of monied families seeking to preserve their wealth for future generations, or perhaps to hold money for charitable purposes.

Now, myriad small businesses – from builders to medical centres to newsagents – use trust vehicles for many and varied purposes. What amendments there have been have evolved in fits and starts, a piecemeal process that has produced legislation which is hardly fit for the purpose it serves. Some essential pieces of trust law, like the rule against perpetuity, exist in entirely separate Acts (in that case the *Property Law Act 1974*), which makes no sense at all.

Legislative reform is an ongoing obligation and the failure to keep pace with the world causes problems. For example, when the Trusts Act came into force in 1973, the life expectancy for Australians was around 72 years; in contrast, men who were 65 in 2017 can expect to live almost another 20 years, and women another 22 and a bit.<sup>1</sup>

In 1973, whether or not a trustee could purchase an interest in a retirement home was not a pressing question; now, it is a priority.

This has become acute because the disparity between healthy life expectancy (living well without disease or pain) and total life expectancy means that retirement villages with care facilities will be high on everyone's shopping list.

The saddest part is that the work on this has been done, and a new Trusts Act should have been passed long ago. The Society made substantive submissions to a review on this issue back in 2013, and in 2017 Attorney-General Yvette D'Ath addressed the QLS Symposium and said she was putting the legislation before Parliament – and still we wait.

It is time for the Attorney to make good upon that promise and ensure that we have a modern and working Trusts Act. It is doubly important given the many legislative challenges that are lining up for attention, especially in relation to the issues above regarding Australians living longer.

While we all hope that exercise, diet and medical advances will help us live well and capably for most of our lives, it is inevitable that with age comes frailty. Most children, of course, have only their parents' best interests at heart, but some see only dollars as we begin the largest transfer of wealth in the world's history. The prosperous baby boomer generation is now distributing its hard-earned treasure, and naturally there are some sharks circling.

It isn't always relatives either; in the recent New South Wales case of *Mekhail v Hana*; *Mekhail v Hana* [2019] NSWCA 197 the propounder of a suspect (and ultimately discredited) will was found to be no relation whatsoever to the deceased, despite claiming to all and sundry that she was the deceased's daughter. The fact that she got as far as being granted probate before the NSW Court of Appeal set things right is deeply concerning; it is clearly time to beef up our laws with respect to elder abuse.

Probably the most divisive legislative issue we will face in the near future also has the potential for elder abuse: voluntary assisted dying. Again, we are now living longer which is wonderful, but it also allows us to

develop conditions that – for some – make life no longer worth living. Whereas dying with dignity was not much of an issue when shorter life spans were the norm, it is now a reality we must confront.

It is not only older Australians faced with this traumatic choice; such conditions can strike people at a tragically young age. This is all the more reason that we need to address this question as a priority. The Victorian legislation, on which any Queensland version would be largely based, contains significant checks and balances to ensure people are protected; naturally any legislation here would require similar protections.

The Society cannot, of course, make this decision for its members or indeed for the general public. Our role is to start these conversations, lead the discussion and collate the views of our members, as we have done with previous complex issues such as same-sex marriage. In a democracy like ours it is important that all voices are heard and all points of view considered. Nobody has a monopoly on wisdom with such a personal and potentially divisive question.

In fact, I would suggest that the role of the legal profession itself is to lead this discussion in the community – not via imposing one view or position on people, but by framing the issues and guiding the debate. Just as we might do before an administrative review tribunal, our role here is to assist our community in coming to grips with the facts around this vexing question, to inform them fully so that whatever debate occurs is done with logic and facts, not emotion and intractable positions. That is our role, so let's get to it.

**Bill Potts**

Queensland Law Society President

**president@qls.com.au**

**Twitter:** @QLSspresident

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

### Note

<sup>1</sup> [aihw.gov.au/reports/life-expectancy-death/deaths-in-australia/contents/life-expectancy](http://aihw.gov.au/reports/life-expectancy-death/deaths-in-australia/contents/life-expectancy).

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# The fabulous 14

## Ensuring our regional members don't miss out



**Fourteen out of every 100 QLS members work in regional Queensland, and ensuring their needs are met remains a priority for the Society.**

Given the 'tyranny of distance', a great deal of effort goes into the development of online resources and services that meet these needs. These include an extensive catalogue of on-demand content and access to a range of livecast programs, such as presentations in the Modern Advocate Lecture Series and the recent mindfulness session which was livestreamed on 13 August.

There are specific livecast programs aimed at regional, rural and remote practitioners, and services such as LawCare, ethics support and our practice consultancy service are only a (free) phone call away.

So while there are excellent online resources for professional development and other needs, organising events that allow for face-to-face contact is still considered an essential part of the membership experience. We manage to get to most parts of the state each year, and also assist district law associations whenever possible with their conferences and activities.

Recently we have been to Hervey Bay (16 August) and Kingaroy (23 August) with local workshop and networking events, and held a First Nations clients and witnesses session in association with the Townsville District Law Association (TDLA) (12 September). I was also privileged to join with the TDLA to present a session in Townsville in July on workplace behaviours and culture.

We have also provided bespoke ethics and practice support visits to many regional areas in person – Townsville, Toowoomba, Gold Coast, Sunshine Coast, Cairns, Kingaroy and Noosa to date.

And we were able to present a Modern Advocate Lecture Series session in Cairns featuring Justice James Henry of the

Supreme Court of Queensland on 20 June. Immediately following that lecture we ran the two-day Solicitor Advocate Course in Cairns as well.

Coming up there's the CQLA and QLS two-day conference in Rockhampton this month, with more events scheduled for Toowoomba, Cairns and Townsville next month.

And for those members based in regional Queensland who wish to attend Symposium 2020, special discounts will again be available.

Even though 60% of QLS members practise in Brisbane, and another 21% work in the state's south-east corner, it is obvious that the 14% working in regional Queensland (and the 5% outside Queensland) are not neglected.

Our 'Celebrate, Recognise and Socialise' events are an important part of our relationship with members across Queensland, providing an opportunity for practitioners to come together, celebrate the collegiate nature of our profession, recognise the achievements of their peers, and socialise with friends and colleagues.

These events usually include the presentation of 25- and 50-year membership pins to members. In Kingaroy, we congratulated Andrew Kelly on his 25 years of membership, while in Brisbane last month two practitioners – Michael Hart and Donald Palmer – had notched up 50 years and another 62 members had reached the 25-year mark.

By the way, the statistics above are drawn from our annual report, and by the time you receive this edition of *Proctor*, it should have been tabled in Parliament and made available for public review.

Check [qls.com.au](https://qls.com.au) for the announcement on its availability.

### Highlighting mental health

Mental health remains a critical issue for the legal profession and the entire community. The need for all of us to pay attention to our mental wellbeing, and that of our family, friends and colleagues, is underscored by the number of events dedicated to this issue this month.

The key event is Queensland Mental Health Week, which runs from 5 to 13 October. This incorporates World Mental Health Day on 10 October, an event first celebrated in 1992 as an initiative of the World Federation for Mental Health. At Law Society House that day, we'll be hosting the annual Minds Count lecture in partnership with the Bar Association of Queensland featuring King & Wood Mallesons partner John Canning as the presenter (also available as livecast, see [qls.com.au/events](https://qls.com.au/events)).

Then October is National Mental Health Month, organised by Mental Health Foundation Australia, and incorporating a national Walk for Mental Health, with the Brisbane event being held at the City Botanic Gardens on Sunday 20 October.

Other states, and countries, have events focusing on mental health in October, so no matter where you are, it should come to your attention.

As part of Queensland Law Society's ongoing campaign to assist its members in their mental health and wellbeing, there are a few articles in this edition of *Proctor*, including a guide to creating your own mental health toolkit.

And in November we will be holding another mental health first aid (MHFA) officer course (see [qls.com.au/events](https://qls.com.au/events))

### Election update

Voting in the QLS Council election is about to begin. The voting period opens on Wednesday 9 October and runs until 4pm Thursday 24 October, with results expected to be announced the following day.

See [qls.com.au/election](https://qls.com.au/election) for more details, including a full list of the nominees for the positions of President, Deputy President, Vice President and Council members.

### Rolf Moses

Queensland Law Society CEO



## LETTER TO THE EDITOR

## S24 Criminal Code

I have just been reading the articles in the September 2019 issue of your great magazine regarding Section 24 of the Criminal Code.

One thing that stood out for me was that none of the writers seemed to put the whole of the section to the test. I have over some 30-odd years in practice endeavoured to use the defence on possibly five occasions, only to fail. The courts have said that there are three elements to the defence and all must be present at the time for a defendant to be successful in the defence. These are:

The belief **MUST** be honest.

The belief **MUST** be reasonable.

The belief **MUST** be mistaken.

The belief cannot be one or two of the three; it must be all three arms at the one time.

Intoxication is in another section and I believe should not be conjoined with Section 24.

The defence of intoxication is also reasonably hard to prove to the requisite standard.

*John Gould, HSH Lawyers*



**HAVE YOUR SAY**

#qlsproctor | proctor@qls.com.au

## Appointment of receiver for Pene Legal, Springfield Lakes

On 15 August 2019, the Executive Committee of the Council of the Queensland Law Society Incorporated passed resolutions to appoint officers of the Society, jointly and severally, as the receiver for the law practice, Pene Legal.

The role of the receiver is to arrange for the orderly disposition of client files and safe custody documents to clients, and to organise the payment of trust money to clients or entitled beneficiaries.

Enquiries should be directed to Candace Gordon or Bill Hourigan, at the Society, on 07 3842 5888.



## Trivial support for a serious cause

The Townsville District Law Association held its annual trivia night on 30 August. The event is usually held in February, but was postponed this year due to the flood crisis at that time.

More than 240 members attended, answering questions, playing games and putting their hands in their pockets to raise money for the Avner Pancreatic Cancer Foundation in support of research into a disease which has had a personal effect on members of the Townsville profession.

The winners were Legal Aid Queensland's Townsville office (team name: Do I need to get a real lawyer?), and the evening raised an impressive \$7121 for the foundation.







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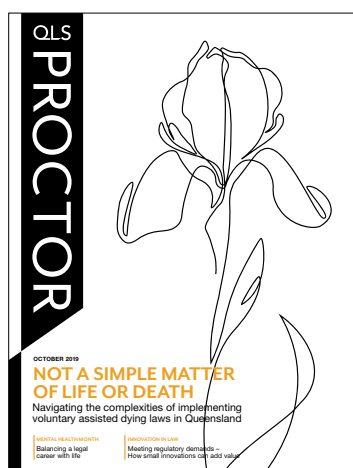
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# NAVIGATING THE COMPLEXITIES OF IMPLEMENTING VOLUNTARY ASSISTED DYING LAWS IN QUEENSLAND



Life and death. Opposites, both simple...yet infinitely complex.

So how do we reflect this, and the controversial issue of  
voluntary assisted dying, on a magazine cover?

Our choice was to do two covers, each representing one  
side of this now topical debate. Which one did you receive?





## On Appeal moves online

*Proctor's* monthly On Appeal column, which features summaries of significant Queensland Court of Appeal decisions, has moved online, and can now be found at [qls.com.au/onappeal](http://qls.com.au/onappeal).

The move frees several pages of *Proctor* each month for more legal news and information, and allows practitioners browsing On Appeal to make use of familiar digital tools such as search and cut-and-paste functions.

Summaries of key August decisions are now available and include:

*Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors* [2019] QCA 160

*Slatcher v Globex Shipping S.A.* [2019] QCA 167

*R v Armitage; R v Armitage* [2019] QCA 149

*R v Potter* [2019] QCA 162

*R v Cooney* [2019] QCA 166.

## Receiver appointments terminated

On 29 August 2019, Queensland Law Society Council delegate Craig William Smiley, General Manager Regulation, terminated the appointment of Candace Gordon, William Thomas Hourigan, Michael Craig Drinkall, David John Franklin, Hwee Cheng Goh and Deborah Yumin Mok, jointly and severally, as the receiver of the regulated property of Bennett and Bennett Lawyers.

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

On 10 September 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 Gregor McCarthy and Company.

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

## Honesty not always best in insolvency

Women in Insolvency and Restructuring Queensland (WIRQ) held its annual comedy debate on 1 August, debating the topic 'honesty is not always the best policy in insolvency'.

The affirmative team (*pictured*) was Borcsa Vass of Level 27 Chambers, Mark Goldsworthy of Results Legal and Stephen Earel of Cor Cordis, while the negative team included solicitor Emma Fitzgerald, Steven Hogg of McPherson Chambers and Ryan Kim of GraysOnline.

While the affirmative team didn't win based on the superiority of their argument, they were victorious by being that little bit funnier!



Kylie Downes QC graciously judged the event and summarised each speaker's defining 'arguments', while Alex Myers from event sponsor Results Legal was the emcee.

## Ashurst extends global reach from Brisbane

Ashurst has officially opened its Brisbane global delivery centre (GDC), only the second office of its kind in the world.

The GDC, in Brisbane's Ann Street, complements a similar centre in Glasgow, enabling the firm to provide its Ashurst Advance services to staff and clients virtually 24 hours a day globally.

These services extend across legal project management, process improvement, analysis and technology.

The new open-plan office, which also incorporates a number of Ashurst corporate services such as HR, has opened with some 85 staff, a number expected to increase to around 120.

The opening ceremony included, (*below, from left*) Global Delivery Centre Brisbane Head Samantha Banfield, Australia HR head Richard Knox, Ashurst global managing partner Paul Jenkins and Brisbane office managing partner Gabrielle Forbes.



# ON THE INTERWEB

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**Mark Fenlon** • 2nd  
Senior Prosecutor at Queensland Police Service and Sessional Lecturer at Jame...  
1w • Edited

Great evening at the State Reception for the North Queensland Parliament 2019 to cap off an exciting couple of days talking with our elected representatives about things that are important to local lawyers. Massive thanks to both the Attorney-General and the Shadow Attorney-General who were both so giving with their time and accommodating when it came to discussing matters we consider important. Also thanks to [Queensland Law Society](#) IPP Ken Taylor for attending our meetings so we could talk about the macro issues as well and our IPP [Rene Flores](#) for being there this evening.

[#advocacy](#) [#parliament](#) [#lawyers](#) [#queensland](#) [#townsville](#)




31

**Sheetal Deo** • 1st  
Solicitor & Legal Professional Development Executive  
1w

Thank you [Tegan Acton](#) 🌈 for coming to @Queensland Law Society and sharing valuable tips on how we can be more inclusive and create safer workplaces as we usher in the next generation of members.

[#goodlaw](#) [#goodlawyers](#) [#publicgood](#)



81

**Joelene Nel** • 1st  
Family Lawyer, Mediator, Volunteer and Wellness Advocate  
2w

"The Gold Coast District Law Association aims to provide a forum for local legal practitioners to connect with each other"


That is what our [#gcdla](#) website says, and we did that in style at our recent AGM.

Thank you to the profession for your support and engagement [sold out AGM - [#lawyerscanbefun](#)] and to the committee who continue to volunteer their time, expertise and knowledge for the betterment of our legal community. [Mia Behlau](#) [Dean Evans](#) [Erin Mitchell](#) [Kathy Atkins](#) [Paul Brake](#) [Caralee Fontenele](#) @Alice Drummond [Elisha Hodgson](#) [Lauren Hicks](#) [Ross Lee](#) [Lynne Weathered](#) [Anna Morgan](#)

We held a raffle with amazing prizes to support [My Community Legal Inc.](#) A big shout out to [Queensland Law Society](#) @Rolf Moses for continuing to collaborate with us and for sponsoring our great new media wall !

I have met wonderful colleagues and community members in my years serving on the committee and I hope to be able to continue to do so.

[#wedowhatwesaywewill](#) [#lunchlastfriday](#) [#goldcoastlawyer](#) [#surfersparadise](#) [#teameffort](#) [#bringiton](#) [#mclaughlinlawyers](#)







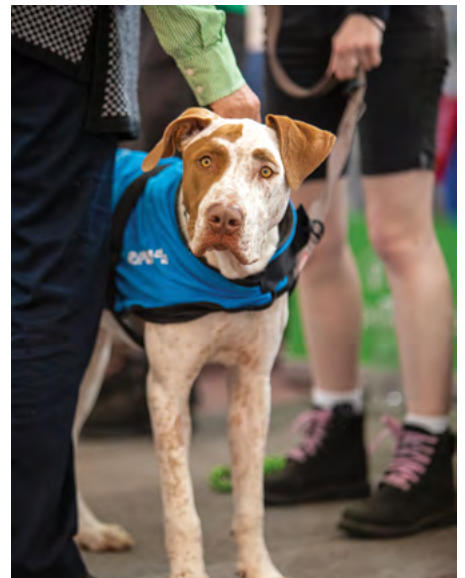
## Property still hot, hot, hot

Hot topics at this year's QLS Property Law Conference included changes to the REIQ contracts and verification of identity (VOI) procedures. Almost 150 attendees enjoyed the two-day event at the Brisbane Convention and Exhibition Centre on 11-12 September.

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Silver sponsor







## Government lawyers updated

This year's QLS Government Lawyers Conference attracted more than 70 attendees, including high-profile speakers such as Attorney-General Yvette D'Ath, Human Rights Commissioner Scott McDougall and Information Commissioner Phil Green. Key topics at the conference, held on 13 September at the Brisbane Convention and Exhibition Centre, included managing vicarious trauma and digital transformation.



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# In October...

Practical Legal Ethics ✓

Practice Management &amp; Business Skills ✓

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Substantive Law ✓

## 10 Modern Advocate Lecture Series: Lecture four, 2019

🎯 Essentials | 6–7.30pm | 0.5 CPD

Brisbane

Featuring notable members of the judiciary, each presentation in the Modern Advocate Lecture Series aims to enhance delegates' advocacy skill base for work in courts and tribunals, especially for career-building practitioners. Justice Soraya Ryan of the Supreme Court of Queensland will be delivering lecture four of 2019.

PLE ✓

## 14 Sharing knowledge: The small business roadshow

🎯 Hot topic | 12–2.30pm | 1.5 CPD

Brisbane

Have direct access to a panel of government regulators and agencies for a Q&A session on small business. The panel will also provide updates on support services, insights on how to navigate regulation, and information about the latest resources to support small businesses.

PS ✓

## 15 Indemnities, warranties and exclusions

🎯 Essentials | 12.30–1.30pm | 1 CPD

Livecast

Gain practical tips on how to protect your client's interests and give best effect to their instructions by negotiating and drafting robust indemnity, warranties and exclusions clauses.

SL ✓

## 16 Ethics fundamentals

🎯 Essentials | 12.30–1.30pm | 1 CPD

Livecast

QLS Ethics and Practice Centre Director Stafford Shepherd will introduce you to solicitors' fundamental duties, with reference to the *Australian Solicitors Conduct Rules 2012* and case studies.

PLE ✓



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**INTRODUCTORY** Understand key concepts and important aspects of a topic to better support your team

## 22 Introduction to conveyancing

22-23 | 🌐 Introductory | 8.30am–5pm, 8.30am–3.10pm | 10 CPD

Brisbane

Are you a junior lawyer new to this area, or are your support staff in need of training? Secure registration for this popular, practical course covering the fundamentals.

PLE ✓

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PS ✓

SL ✓

## 23 Costs and costs assessments

🎯 Essentials | 12.30–1.30pm | 1 CPD

Livecast

Learn what best practices you can implement to limit the chances of your costs being contested and, in the event that they are assessed, how you can increase the likelihood of those costs being deemed recoverable.

PM&BS ✓

## 23 Young Professionals Networking Evening

6–8pm

Brisbane

Join fellow legal professionals from Pride in Law, The Legal Forecast and members of Chartered Accountants Australia & New Zealand at this relaxed evening of networking.

## 24 Practice Management Course: Sole Practitioner to small practice focus

24–26 October | 🌐 PMC | 9am–5.30pm, 8.30am–5pm, 9am–1.30pm | 10 CPD

Brisbane

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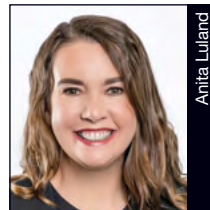
Emily Wilson



Robert King



Brent Turnbull



Anita Luland



Nina Thomas



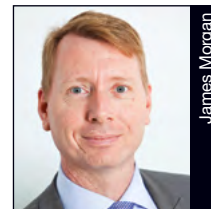
Jeremy Elliot



Zoe Adams



Ben Ashworth



James Morgan

# Career moves

## Bennett & Philp

Bennett & Philp has announced three appointments and a promotion.

**Adam Hempenstall** has joined the firm as a senior associate in the construction disputes and litigation team. He has represented corporate, commercial and government clients in a range of disputes with particular expertise in construction disputes and contentious property law matters.

**Lachlan Thorburn**, who joined the firm as an associate in 2013, has been promoted to senior associate in the disputes and litigation team. Lachlan has broad experience across a range of commercial litigation matters and advises clients on dispute resolution, consumer disputes, debt recovery and automotive law.

**Kenneth Davies** has joined the firm as a lawyer in the intellectual property team, where he advises clients on trade mark, patent, copyright and IP licensing matters, and assists clients with litigation of IP matters in the Federal Court.

**Ezekiel Ting** has joined Bennett & Philp as a lawyer in the business advisory team, where he assists businesses of all sizes in their ongoing transactions. Ezekiel has been involved in the management of various family businesses and understands the challenges that businesses face on a personal level.

## Brandon and Gullo Lawyers

Brandon and Gullo Lawyers has congratulated **Blayde Hemmings** on his promotion to associate. Blayde commenced with the firm in mid-2014 and practises in personal injury law.

The firm has also welcomed **Emily Wilson** as a solicitor. Emily was admitted on 5 August and practises in personal injury law and commercial law.

## Cornwalls Law + More

Cornwalls Law + More (Brisbane office) has announced the promotion of two lawyers to partner, and welcomed both new staff and an associate back to the firm.

**Robert King**, who has moved into the position of partner, focuses on the employment, contractor, and health and safety space. He has more than 25 years' experience and leads the Brisbane office's employment, industrial relations and work health and safety team. Robert is also an experienced workplace trainer who regularly designs and delivers training programs for clients.

**Brent Turnbull** has also been promoted to partner. Joining the firm in 2018, Brent has more than 10 years' experience as a building, engineering, construction and infrastructure lawyer, covering transactional, litigious and regulatory matters. Brent also has extensive experience in drafting construction contracts, providing project management advice and project financing.

Associate **Anita Luland** has rejoined the industry services team where she advises on a range of commercial transactions. She has extensive experience in contract interpretation and advice, commercial agreements, trading terms and conditions, and business succession planning.

**Nina Thomas** has joined the firm as a lawyer focusing on building and construction, workplace relations and safety, and local

government. Her experience includes regulatory matters, local laws, compliance and enforcement.

**Jeremy Elliot** has joined the firm's litigation and dispute resolution team as a lawyer with a focus on civil litigation. He has broad experience, including in commercial litigation and insurance litigation.

## Michael Lynch Family Lawyers

Michael Lynch Family Lawyers has welcomed **Zoe Adams** to the team as an associate. Zoe has represented clients in all areas of family law, including property settlement, spousal maintenance, parenting matters and divorce.

## Small Myers Hughes

Small Myers Hughes has announced the promotion of **Ben Ashworth** to senior associate. Ben joined the firm in 2011 and has a wealth of experience in strata and management rights across all states.

## Tucker & Cowen Solicitors

Tucker & Cowen has announced the promotion of **James Morgan**, who has been promoted to senior associate. James is a QLS accredited specialist in commercial litigation with extensive knowledge of construction law, civil procedure in state courts and tribunals, insolvency law and securities legislation.

*Proctor career moves:* For inclusion in this section, please email details and a photo to [proctor@qls.com.au](mailto: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.



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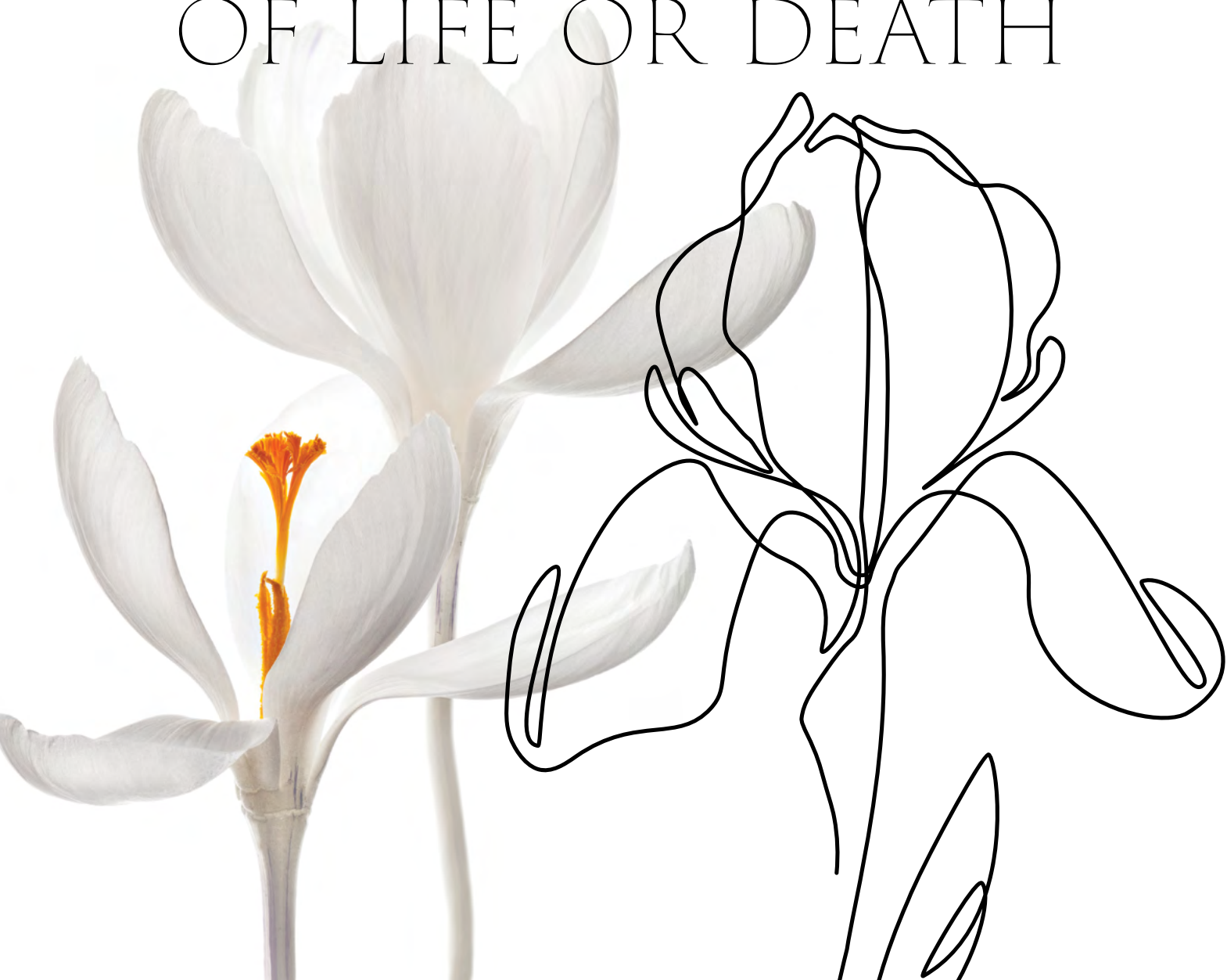
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# NOT A SIMPLE MATTER

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OF LIFE OR DEATH







## WITH TONY KEIM

**Euthanasia or dying with dignity – there are many euphemisms for the termination of a human life before nature runs its course, the latest being the rather more socially palatable and acceptable voluntary assisted dying (VAD).**

It is the quintessential topic to cause a raging stoush of conflicting views and opinions over an average dinner party or suburban barbecue, and even more divisive among the wider populous to reach a relative consensus on laws to ensure an individual's right to opt to shorten their own life rather than suffer the pains and unimaginable indignities a slow and guaranteed death entails.

There are myriad reasons to consider when deciding whether you are for or against proposed legislation – the list is as long and as personal as many life decisions – but from a legal perspective the issues are even more complex.

In Victoria, which enacted VAD laws in 2017, they laid out the issues worthy of consideration quite succinctly.

The Victorian Government – in a bid to engage and inform its community – published an information sheet that read:

End of life issues can be distressing and difficult for many people.

There is also a range of views in the community about death and dying and how to improve the experience of people at the end of their lives.

For these reasons, a parliamentary committee considered issues about palliative care, advance care planning and voluntary assisted dying. There was a lot of consultation with people in the community as well as medical bodies, consumer and carer groups, disability advocacy groups, legal organisations, mental health providers and health administrators.

The committee recommended that voluntary assisted dying should be made law. An expert panel then consulted on what the law should look like before a Bill was brought into the parliament. Across this time, many people said they wanted genuine choices at the end of life. They wanted to make decisions about the treatment and care they needed. They also wanted to choose where they die. Some people also wanted to decide the timing and manner of their death.

## END OF LIFE ISSUES CAN BE DISTRESSING AND DIFFICULT FOR MANY PEOPLE.

All laws regarding assisted death in Australia are the sole domain of the states, not the Federal Government. It was made legal in Victoria via the *Voluntary Assisted Dying Act (2017)* which did not come into effect until 19 June this year.

However, the nation's first euthanasia laws were enacted as a result of the leadership and tenacity of the Northern Territory's first Chief Minister Marshall Perron – making assisted dying legal for a period in 1996-97 until the Federal Government removed the territories' right to legislate on assisted death.

In Australia, the Federal Government retains the power to overturn laws passed by territories (all 10 of them, including the ACT, Northern Territory, Jervis Bay, Norfolk Island and Christmas Island), whereas states have the right to rule independently on a variety of issues, including healthcare.

While assisted dying has become the cause celebre for the past several decades, governments in Tasmania, South Australia and New South Wales have made concerted efforts to consider whether these rights should be enshrined in law but have so far failed to pass legislation in support of it.

With the exception of Victoria, the only current rights extended to Australians to make a choice to end their life prematurely are to opt out of receiving treatment for terminal illnesses, sign or make a do-not-resuscitate order, or request life support be withdrawn.

During the past year, Queensland Law Society's legal policy team, alongside three of its policy committees, has engaged with the profession, parliamentary committees and a range of academics and delegates to discuss perspectives and issues related to any potential changes to Queensland laws regarding voluntary assisted dying.

This month (15 October) the Society will host a Voluntary Assisted Dying: Perspectives and Issues forum to discuss myriad topics to galvanise and inform the legal profession in preparation for a submission to the Queensland parliamentary inquiry into aged care, end-of-life and palliative care, and voluntary assisted dying.

In this edition of *Proctor* we hear from leaders with varying views and insights into the topic – including former Northern Territory Chief Minister and VAD advocate Marshall Perron, and prominent and highly respected Catholic priest Frank Brennan.

Tony Keim is a newspaper journalist with more than 25 years' experience specialising in court and crime reporting. He is the QLS Media manager and in-house journalist.

# SHOULD IT BE LEGALISED IN QUEENSLAND?

BY ASSOCIATE PROFESSOR ANDREW MCGEE

In its call for submissions to the Inquiry into Aged Care, End-of-Life and Palliative Care and Voluntary Assisted Dying, the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee raises the following question in relation to voluntary assisted dying (VAD):

Should voluntary assisted dying be legalised in Queensland?<sup>1</sup>

Let's call this 'the fundamental question'.

The fundamental question is, at least in part, a question about the ethics of VAD.<sup>2</sup> As an academic medical ethicist and lawyer, I can give some guidance on how to answer this question.

First though, it is useful to clarify some terminology.

## Terminology

There is extensive peer-reviewed literature on VAD and alternative practices such as euthanasia. In this literature, the terms 'assisted dying' and 'euthanasia' have been used to cover either or both of the following situations:

1. A person ends their own life using lethal medication provided to them for that purpose.
2. A third party, usually a doctor, ends another person's life using lethal medication.

The standard use of 'assisted dying' is recorded in situation 1. 'Euthanasia' usually refers to situation 2. Sometimes, the word 'euthanasia' is avoided, in an attempt to distance the discussion from some unwanted connotations of the term (for example, it is sometimes associated with the Nazi practice of killing people with mental and physical disabilities because such people were considered a burden on society).<sup>3</sup>

Accordingly, 'voluntary assisted death' and 'voluntary assisted dying' may be used instead of 'euthanasia' to refer to the practice in situation 2. Since these terms also already refer to the practice in situation 1, they are often used to refer to both, as umbrella terms. Although this can be misleading, it is entirely legitimate<sup>4</sup> to use these terms to avoid unwanted connotations, and the practice of using 'voluntary assisted dying' has been adopted by Queensland and Western Australia<sup>5</sup> in considering this issue.

Another term that is largely avoided, at least in parliamentary debates, is the term 'assisted suicide'. This term is avoided because, in contrast to what we might call 'conventional suicide', voluntary assisted dying involves helping the terminally ill, and those who suffer from neurodegenerative or other chronic diseases who are approaching death to avoid unnecessary suffering as they approach their inevitable death. It applies only to those who are already dying.

## Two types of ground for prohibiting or permitting VAD

In thinking about the fundamental question, we should take careful note of the nature of the VAD debate. In peer-reviewed research I published with my colleagues in 2018,<sup>6</sup> we examined the parliamentary debates that accompanied the introduction of every VAD

Bill introduced into Australian state, territory and Commonwealth parliaments from 1993, when the first ever Bill was introduced, to the end of 2017 (thus including, for example, Victoria's *Voluntary Assisted Dying Act 2017*).

When analysing all the arguments given for and against legalisation, we discovered that they fell into two broad categories:

1. Arguments concerning what we call 'personal matters', referring to personal beliefs and personal values that not everyone shares, such as 'only God should take a life'<sup>7</sup> or 'killing devalues human life'.
2. Arguments concerning what we call 'public matters', referring to matters in which the state has a legitimate interest, such as the possible impact of legalisation on vulnerable people – people who, for example, could feel some pressure to undergo VAD but who, in feeling that pressure, would not be making a voluntary decision (and so would not be genuine candidates under the proposed legislation).

In the next section, I discuss category A, the personal matter arguments. In section 4, I will discuss category B, the public matter arguments.

## Why you should support legalisation even if you don't believe VAD accords with your own values

In our 2018 paper,<sup>8</sup> we argued that people who base their position in respect of VAD (whether for or against) on personal matter grounds, should actually support legalisation. Let me explain.

For the most part, when we base our views about *controversial* matters on our personal values and beliefs, we know that other



people can reasonably disagree with us. A number of parliamentarians acknowledge this themselves.<sup>9</sup> Consider those parliamentarians who claim that it is wrong for anyone other than God to take a life. These parliamentarians also know that some others do not share this view. The parliamentarians may think those other people are wrong or misguided. But could they also think that those people are *irrational*?

Well, they might. But the question is whether they could *reasonably* hold them to be irrational. What counts as a reasonable view, and reasonable disagreement, is determined objectively. No reasonable person can hold the view that it is permissible to torture an innocent person just for the fun of it. This is not a controversial matter, about which people can reasonably disagree. But reasonable people *can* hold the view that people other than God can take a life. Beliefs about who can take a life can be the subject of reasonable disagreement.

Once we accept this, an important consequence follows. Even if you, personally, are not in favour of VAD on a personal matter ground, you ought (reasonably) to be in favour of legalisation if you base your position on a personal matter ground. The reason for this is that, if VAD is prohibited on a personal matter ground, we would be imposing that ground on everyone – even if those people reasonably take a contrary view. By contrast, if VAD is permitted, then everyone is free to act in accordance with their own values, beliefs, and conscience. Someone who objects to VAD on the basis that only God should take life is still free not to avail themselves of VAD in their own lives, even if VAD is permitted. Likewise, someone who accepts VAD on the basis that it is reasonable to relieve suffering through VAD, is free to act in accordance with that personal belief in their own lives.

One objection to this argument is: legalisation equally imposes the views of those in favour of VAD on those who are not in favour of VAD. But this is not so.

To see why, we should recall that there are three broad categories of legislation:

1. legislation that prohibits conduct
2. legislation that permits conduct
3. legislation that mandates conduct (for example, we must wear a seatbelt).

Permissive legislation (option 2) is the middle ground between legislation that prohibits and legislation that mandates. It allows people to decide for themselves what is appropriate, in accordance with their own values. Only legislation that prohibits and legislation that mandates, if enacted on personal matter grounds,<sup>10</sup> holds everyone hostage to one position. Neither option 1 nor option 3 are ethical, if the matter is one about which people can reasonably disagree.<sup>11</sup>

## Public matter arguments: legitimate state interest

So far, we have only established that the *default* position should be permissive legalisation. We have not yet answered the fundamental question – whether VAD should be legalised.

As noted in above, when my colleagues and I researched all the Australian parliamentary debates on VAD, we found there was another category of argument, which we termed the ‘public matter’ arguments. These concern matters in which the state has a legitimate interest, such as protecting vulnerable people.

## THE STATE'S RESPONSIBILITY IS TO TAKE ADVICE FROM EXPERTS ON THE EMPIRICAL DATA ABOUT THE ADEQUACY OF SAFEGUARDS, AND MAKE THE DECISION TO PROHIBIT OR PERMIT VAD ON THIS BASIS ALONE

The key point about these arguments is that they are not based on personal values that people reasonably disagree about. They are founded instead on beliefs that most of us share. For example, whether you are for or against VAD on personal matter grounds, you will likely share the belief that it would be wrong for vulnerable people to be negatively affected by this legislation. As others argue, VAD regulation is a matter of public policy because the practice involves the prescription or administration of a lethal intervention by professionals who are licensed by the state to serve the best interests of vulnerable patients.<sup>12</sup>

To answer the fundamental question definitively, then, we need to answer the question about the possible impact on vulnerable patients: could it be the case that people who should not have access to VAD – because they are not making a voluntary decision – are going to have access and end their lives?

This is the question about adequacy of safeguards. It has a notoriously long history and is brought up in each and every debate about VAD. But we cannot answer this

question by a vote. It is an empirical question. My aim is not to persuade you that safeguards are adequate. I can only say that articles in the leading peer-reviewed journals in the world claim that, in jurisdictions with similar VAD legislation to that proposed in Queensland, safeguards are indeed adequate.<sup>13</sup>

## Concluding remark

In closing, I want to emphasise one point that follows from the distinction between the personal matter and public matter grounds for permitting or prohibiting VAD. In deciding whether to legalise VAD, states and territories should direct their efforts towards resolving the public matter issues, and avoid personal matter issues. The state's responsibility is to take advice from experts on the empirical data about the adequacy of safeguards, and make the decision to prohibit or permit VAD on this basis alone.

Dr Andrew McGee is an Associate Professor at the Australian Centre for Health Law Research, Faculty of Law, QUT

### Notes

<sup>1</sup> Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Issues Paper No. 3, 56th Parliament, February 2019 <https://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2019/5619T191.pdf> (accessed 08 September 2019).

<sup>2</sup> it can also be about other things, such as whether it is possible to legalise VAD, but I set this aside.

<sup>3</sup> <https://encyclopedia.ushmm.org/content/en/article/euthanasia-program>.

<sup>4</sup> Others, however, have been critical. See Western Australia, *Parliamentary Debates*, Legislative Council, 29 August 2019 (M M Quirk), 16.

<sup>5</sup> Government of Western Australia, Department of Health, Ministerial Expert Panel on Voluntary Assisted Dying, *Discussion Paper* <https://www2.health.wa.gov.au/~media/Files/Corporate/general%20documents/Voluntary%20assisted%20dying/PDF/Ministerial-Expert-Panel-VAD-Discussion-Paper-March-2019.pdf> (accessed 08 September 2019).

<sup>6</sup> A McGee, Kelly Purser, Christopher Stackpoole, Ben White, Lindy Willmott, Juliet Davis, 'Informing the euthanasia debate: Perceptions of Australian politicians' (2018) 41(4) *University of New South Wales Law Journal* 1368-1417.

<sup>7</sup> This claim is made by several MPs. Full details with references are given in the paper cited in reference 6.

<sup>8</sup> *Ibid*.

<sup>9</sup> See Western Australia, *Parliamentary Debates*, Legislative Council, 28 August 2019 (M McGowan) 5989; 29 August 2019 (A Sanderson), 30.

<sup>10</sup> We turn to the public matter ground, which can alter the position, in section 4.

<sup>11</sup> This does not apply to every case we can disagree about: there can be reasonable disagreement about the death penalty, but we cannot accommodate this by having permissive legislation in this case, because that would mean the criminal could choose whether to have it or not, which would defeat the purpose of the penalty.

<sup>12</sup> Jansen, Wall and Miller, 'Drawing the line on PAS' (2019) 45 *Journal of Medical Ethics* 190-197

<sup>13</sup> Ezekiel J Emanuel et al, 'Attitudes and Practices of Euthanasia and Physician-Assisted Suicide in the United States, Canada, and Europe' (2016) 316(1) *Journal of the American Medical Association* 79-90.

# VOLUNTARY ASSISTED DYING LAW REFORM FOR QUEENSLAND

BY PROFESSORS BEN WHITE AND LINDY WILLMOTT

## Voluntary assisted dying (VAD) is a controversial topic.

Victoria's *Voluntary Assisted Dying Act 2017* and the proposed Western Australian Voluntary Assisted Dying Bill 2019 have been the subject of much media and public debate. Queensland is now considering the issue given the current parliamentary Inquiry into Aged Care, End-of-Life and Palliative Care and Voluntary Assisted Dying. The committee and many Queenslanders are grappling with the question of what the law should be.

Our view is that limited and highly regulated VAD should be permitted. It is possible to have a safe and rigorous VAD system that provides choice for people who are terminally ill and are suffering and, at the same time, protects the vulnerable. We reached this view after many years of reflecting on the ethical issues associated with VAD and the large volume of empirical research on how VAD systems operate in other parts of the world where it is lawful.

## A draft voluntary assisted dying Bill

As part of our research, we undertook the exercise of writing a draft VAD Bill. The purpose of this was to state, in Bill form, our position as to how VAD should be permitted and regulated. The starting point for drafting the Bill was the values that we outlined and explained in the chapter 'Assisted Dying in Australia: A Values-based Model for Reform' in *Tensions and Traumas in Health Law*.<sup>1</sup> Those values are life, autonomy, freedom of conscience, equality, rule of law, protecting the vulnerable, and reducing human suffering.

We later added to this list the concept of safe and high-quality care. As the proposed model positions VAD within the health system, it

must be provided in a way that is safe and of high quality, as we would expect for all other health care.

When drafting the Bill we drew on other models, most significantly the Victorian VAD law. Where we agreed with the policy position in Victoria's *Voluntary Assisted Dying Act*, we adopted that approach and much of the draft Bill reflects the Victorian model. However, we also drew on a range of other sources including international models and recent Australian Bills, especially those that were close to passing through the relevant house of parliament.

Our objective was to put forward a values-based Bill that drew on existing legislative models and was informed by our understanding of the empirical evidence. There is not scope in this article to explain the Bill in detail but it can be downloaded here: [eprints.qut.edu.au/128753](http://eprints.qut.edu.au/128753).

## Is it appropriate for parliaments to consider different VAD models?

One question confronting state parliaments is whether they should simply follow the Victorian law or whether some differences in approach are appropriate. This has been the subject of vigorous debate in the media. In Western Australia, some proposed departures from the Victorian model – which we consider to be modest and sensible – have been the subject of significant scrutiny. And at a national level, an article in *The Australian* reported on differences between the Victorian law, the West Australian Bill and our draft Bill using the words 'death creep', a phrase coined by opponents to VAD. The strongly articulated message was that any alteration of the Victorian model represented a 'slippery slope' and was therefore undesirable.

Our view is that it is appropriate for different state parliaments to consider different VAD models. Indeed, we argue for two reasons that a commitment to optimal VAD laws actually *requires* different approaches.

The first reason is that each state must consider local conditions and views to determine what is best for its constituents. To illustrate, legislation that may work in Victoria may not work as well in Queensland or Western Australia given their vastly different geography and population distribution. This point was made by the West Australian Ministerial Expert Panel whose recommendations informed the proposed law in that state. From a Queensland perspective, to simply adopt a Victorian law without carefully considering whether that is the best model for that state and its people is not defensible.

The second reason is that, even putting aside state differences, it is incumbent on law-makers to develop the best VAD laws possible. Simply because Victoria was the first state to enact legislation does not mean it is the best legislative model. While there is much to commend in the Victorian model, as a result of research we have undertaken analysing the law, we argue that there are aspects of the Victorian law that are not optimal. Further, although it is too early for empirical research about how the Victorian law operates in practice, the 18-month implementation process has identified challenges. One is the prohibition on a health professional raising the topic of VAD with patients. This is part of the Victorian law but is not in the West Australian Bill nor our draft Bill. Such a prohibition will adversely affect openness in end-of-life discussions. Our view is that this is not the best law possible, and so Queensland should not be bound to automatically adopt this aspect of the Victorian model.

Whether it is appropriate for state parliaments to consider different models can also be viewed from an opposing perspective. Those arguing that the Victorian model must be adopted without variation must commit themselves to two positions: that local conditions do not warrant a different approach, and that aspects



of the Victorian law that are widely seen as problematic must still be adopted. These positions are difficult to sustain.

### A call for evidence-based and rational law-making

The above illustrates the importance of our final point: law-making on VAD must be rational and evidence-based. While VAD gives rise to emotive issues, this arguably makes considered deliberation when debating such laws even more important.

We distinguish moral claims (that something should or should not happen) from factual claims (that something is or is not happening in practice). A moral claim, such as that killing a person is always wrong, is based on a person's values. There are important ethical issues involved in VAD so it is appropriate for people to advance moral claims. While it is legitimate for people to have different values, they should articulate what those values are, and do so transparently so others can evaluate their position.

Factual claims, such as that VAD will adversely affect the provision of palliative care, are different because they depend on evidence. The weight that parliamentarians give to such claims should depend on whether they are supported by evidence, and how reliable that evidence is. As mentioned earlier, there is a large body of reliable peer-reviewed evidence about how VAD regimes operate in other jurisdictions which can be valuable in weighing factual claims.

There can also be factual claims in these debates about both the content and effect of VAD laws. While the complexity of the law can sometimes make this challenging, recent media coverage in Western Australia has seen aspects of its Bill being misrepresented. Those opposed to VAD have also made incorrect statements about how our draft Bill would operate in practice.

The responsibility for ensuring rational and evidence-based deliberation rests with all participants in the VAD debate. This includes the individuals and organisations advancing positions on the law, the media, and of course the parliamentarians who are ultimately called upon to decide such issues. VAD is an important social issue which needs and deserves earnest, honest, informed and rational reflection.

Ben White and Lindy Willmott are professors at the Australian Centre for Health Law Research, Faculty of Law, QUT. They have been researching end-of-life law, policy and practice for almost 20 years.

#### Note

<sup>1</sup> Lindy Willmott and Ben White, 'Assisted Dying in Australia: A Values-based Model for Reform' in Ian Freckelton and Kerry Peterson, *Tensions and Traumas in Health Law* (Federation Press, 2017).

#### OPINION

# DEATH AND THE RULE OF LAW

BY MARSHALL PERRON



**I presume that the Rule of Law is to lawyers somewhat akin to the Hippocratic oath to doctors – however, I hope it is regarded as more sacrosanct.**

Early Hippocratic oaths prohibit surgery and women entering the profession.

Two years ago, I wrote to the Rule of Law Institute of Australia pointing out that it appears laws covering assisted suicide, murder and homicide are being broken with immunity and asking them to examine the matter and respond.

They seemed to be the right organisation to go to.

The very pinnacle of the Rule of Law Pyramid on their website states "Equality before the law." I took that to mean the law must be applied equally to all – no individual or section of society should be immune from its application.

I was surprised by the one-line response I received. It read: "The Institute is fully stretched at the moment and I am afraid we cannot take up the issue of euthanasia."

I did not ask the institute to take up the issue of euthanasia. My submission was that there is clear evidence of intentional hastening of the death of very ill patients occurring in Australia today, that the practice is inequitable, unregulated and potentially dangerous yet is endorsed at the highest levels of officialdom.

In support I presented these quotes from a former Prime Minister and a former President of the Australian Medical Association explicitly endorsing the status quo as acceptable practice that should be allowed to continue.

Dr Brendan Nelson, who was then president of the Australian Medical Association in 1995, acknowledged

and supported doctors intentionally hastening death.

Dr Nelson, in a newspaper article published in the *Sunday Territorian*, on May 21, 1995 said: "Technically it would be illegal, but somebody would have to report it and register a complaint."

"Now if you do your job properly there's no way the family's going to complain". He said the police would not lay charges if the doctor could prove he had the family's backing and had sought the proper expert advice."

To add to this sentiment then Australia's Prime Minister Tony Abbott in 2013 agreed with his radio interviewer – Neil Mitchell 'Talk Back' Radio 3AW in September of that year – that pain relief was often given with the intention of speeding death.

Mr Abbott said: "Quite possibly you're right, Neil, and when was the last time any doctor or anyone was prosecuted for something like that? I think the situation that we've got at the moment is a perfectly acceptable one."

That the Prime Minister and the head of the AMA (and also later a serving federal Conservative Minister) say doctors intentionally kill terminally ill patients, acknowledging that it is breaking the law and that it is perfectly acceptable, should be of concern.

The extent of terminal sedation in Australia is unknown. No guidelines exist to regulate it and there is no scrutiny. Who would know if the doctrine of double effect is shielding abuse or cover up?

If the rule of law is indeed the foundation of our system of justice, I would hope that members of the Queensland Law Society take a keen interest in defending it.

Marshall Perron was Chief Minister of the Northern Territory from 1998 to 1995. An advocate for voluntary euthanasia, he introduced a Bill which became the *Rights of the Terminally Ill Act 1995*.

# FOUR ISSUES TO CONSIDER

BY FR FRANK BRENNAN SJ AO

Australian jurisdictions are currently considering laws and policies relating to euthanasia, physician-assisted dying and medically assisted suicide. Australia, like the United States, Canada and the United Kingdom, is a democratic society under the rule of law, a society less dependent on religious roots than it was, and a society which prizes individual autonomy for all its citizens, including those who are living longer than their predecessors.

The law can and should provide bright-line solutions, or at least firm parameters, within which the dying, their loved ones and their care providers can negotiate dying and death.

In the past, doctors and nurses were obliged to do no harm and not to do anything which was primarily intended to cause death. Once those obligations are varied, there is a range of issues requiring consideration by parliaments and courts. I will mention just four, and conclude with an observation on the often parodied 'slippery slope'.

First there is a need to strike the appropriate balance between autonomy for the invulnerable and protection for the vulnerable.

We are now at the frontier determining whether the administration of a fatal injection is the same as switching off a ventilator, and whether state-assisted and state-authorised suicide should be restricted only to some groups or made available to all self-determining citizens whether or not they are suffering a painful terminal illness. In striking the necessary balance between individual autonomy and the common good, Lord Sumption put it well in the United Kingdom Supreme Court:

"There is no complete solution to the problem of protecting vulnerable people against an over-ready resort to suicide... The real question about all of these possibilities is how much risk to the vulnerable are we prepared to accept in this area in order to facilitate suicide for the invulnerable... There is an important element of social policy and moral value judgment involved. The relative importance of the right to commit suicide and the right of the vulnerable to be protected from overt or covert pressure to kill themselves is inevitably sensitive to a state's most fundamental collective moral and social values." (*R (on the application of Nicklinson and another) v Ministry of Justice*, [2014] UKSC 38, [229].)

Second, there is a need to draw a clear dividing line between the provision of 'medical' assistance to those who are dying and the denial of social endorsement and encouragement to those who are diminished in their physical or mental circumstances and would like assistance with suicide which is more failsafe, less painful, and less traumatic for loved ones, even though they are not in imminent danger of death. The state has an interest in minimising the incidence of suicide. Does that state interest extend to denying the right to medical assistance with suicide to the young rugby player rendered quadriplegic who does not want to live any more, or the young person diagnosed in the early stages of what will ultimately be a life-shortening illness?



# WHEN LEGISLATING FOR MEDICALLY ASSISTED DYING

Third, there is a need to determine whether the state should authorise medically assisted dying only for those who can help themselves. It's one thing to permit doctors to help patients who can help themselves. The doctor prepares the potion, but the patient must administer it. Inevitably, in years to come, there will be debate over whether these laws 'discriminate' against patients who cannot help themselves.

Euthanasia advocates will argue the doctor should be able to administer a lethal injection if requested by the patient, whether or not the patient is able to commit suicide with assistance. Pointing to the experience in Belgium and the Netherlands, they will also debate whether these laws 'discriminate' against persons who, though not dying, are still enduring unbearable and untreatable suffering.

They will invoke the language of autonomy, non-discrimination and human rights, arguing that any mentally competent person has the right to end their life and the right to obtain assistance from a doctor ending their life in as painless and dignified a way as possible.

Fourth, especially with the increase in dementia and Alzheimer's disease in our society, there is a need to stipulate the conditions for free and informed consent. Those who support law reform in this area usually proceed by quoting cases of mentally competent patients who are not depressed but who are suffering unbearable pain, facing terminal illness.

The easiest and most compelling case to consider is the patient whose relatives fully support the proposed euthanasia. There is no suggestion that the relatives are exerting undue influence on the patient for their own self-interested reasons. There are good palliative care facilities available, so it is not as if the patient is under duress, feeling that she has no option but death. The patient has a good and trusting relationship with her medical team. Under existing law and policy, there is every prospect that such a patient will be euthanised or at least given increased doses of pain relief which will hasten death.

THE LAW CAN  
AND SHOULD  
PROVIDE BRIGHT-  
LINE SOLUTIONS,  
OR AT LEAST FIRM  
PARAMETERS WITHIN  
WHICH THE DYING,  
THEIR LOVED ONES  
AND THEIR CARE  
PROVIDERS CAN  
NEGOTIATE DYING  
AND DEATH.

If there is to be any move towards the legalisation of euthanasia, there will be considerable difficulty in setting criteria and safeguards. It is all very well restricting its availability to the competent, but what of the claim of the person who says, "I am now competent but I am not yet ready to die. Soon I will be incompetent and I want to have made a binding decision consenting to euthanasia once I have lost my competence. I do not want to go earlier than I need. But I do want to go once I am no longer competent."

Inevitably there will be some individuals who, in the transition to incompetence or dementia, will have changed their flickering minds and decided to cling to life for all that it is worth. At their moment of greatest vulnerability, the law will be invoked with a presumption that their earlier option for death is now binding and unreviewable.

The late American physician-ethicist Ed Pellegrino once pointed out:<sup>1</sup>

"The slippery slope is not a myth. Historically it has been a reality in world affairs. Once a moral precept is breached, a psychological and logical process is set in motion which follows what I would call the law of infinite regress of moral exceptions. One exception leads logically and psychologically to another. In small increments a moral norm eventually obliterates itself. The process always begins with some putative good reason, like compassion, freedom of choice, or liberty. By small increments it overwhelms its own justifications."

It is questionable whether we have enough in our philosophical toolbox when dealing with difficult new social questions if the only instruments available are autonomy, human rights and non-discrimination. All those involved at the table of public negotiation (regardless of their comprehensive world views, whether religious or not) are entitled to express scepticism about the adequate testing of any new proposal and to seek answers to the likely next steps should the proposal be implemented.

They are also entitled to agitate the question of whether the proposal is ethically sound according to the diverse ethical views held in the community. Our parliaments need to set some bright-line solutions or firm parameters to guide us all at those most perplexing times when we are at the death bed, whether it be ours or our loved one's.

Fr Frank Brennan SJ AO is an Australian Jesuit priest, human rights lawyer and academic.

## Note

<sup>1</sup> Edward Pellegrino, 'Physician-Assisted Suicide and Euthanasia: Rebuttals—The Moral Prohibition Remains', *Journal of Medicine and Philosophy*, 26/1 (2001): 93–100 at 98.

# VOLUNTARY ASSISTED DYING: PERSPECTIVES AND ISSUES

For the past 12 months, Queensland Law Society's legal policy team, alongside three of our policy committees, has engaged with the profession, parliamentary committees and a range of academics and delegates to discuss perspectives and issues related to any potential changes to Queensland's voluntary assisted dying (VAD) laws.

## 3 SEPTEMBER 2018

Members of the legal policy team and 2018 QLS President Ken Taylor met with members of the Clem Jones Group to discuss current trends in views towards VAD in Queensland. Another meeting was held in December 2018, with representatives of Dying with Dignity Queensland.

## 15 FEBRUARY 2019

The Queensland Government's Health, Communities, Disabilities Services and Domestic and Family Violence Prevention Committee (the parliamentary committee) released the Inquiry into Aged Care, End-of-Life and Palliative Care and Voluntary Assisted Dying (the Inquiry). The QLS legal policy team consulted on the Inquiry with three QLS policy committees: Elder, Health & Disability, and Succession Law, and formed a sub-committee to work on a submission.

## 11 & 25 MARCH, 8 APRIL 2019

The sub-committee was comprised of QLS policy committee members: Chair of the Health & Disability Law Committee, Simon Brown; Deputy Chair of the Elder Law Committee, Rebecca Anderson; Deputy Chair of the Succession Law Committee and member of the Elder Law Committee, Chris Herrald;

Member of the Elder Law Committee, Trent Wakerley; and member of the Succession Law Committee, Bryan Mitchell.

Diverse and helpful views were expressed and considered by members of the sub-committee. Alongside legal policy staff Vanessa Krulin and Madelaine Van Den Berg, the sub-committee held three meetings to formulate a response to the Inquiry issues paper, including researching the legal and ethical issues relevant to the Inquiry, collating QLS member feedback received from *QLS Update*, comparing submissions made by the Victorian and South Australian law societies, and reviewing the already-made public submissions to the Inquiry.

Upon reviewing the 462 submissions published by 1 April 2019, QLS interpreted over 360 of those to be in favour of voluntary assisted dying laws in Queensland, with the remainder divided almost equally between against and undisclosed/undecided. As at 5 April 2019, the Chair of the parliamentary committee advised that nearly 2000 submissions to the Inquiry had been received. No analysis has been published as to the percentage of submissions in favour or against VAD.

## 4 APRIL 2019

The legal policy team convened a workshop for policy committee members and QLS Council to meet with experts from the Queensland University of Technology (QUT) Law Faculty to discuss the legal and ethical framework for VAD with QUT academic Dr Andrew McGee, and review a draft Bill proposed by QUT academics Professor Lindy Willmott and Professor Ben White.

## 18 APRIL 2019

QLS provided a submission to the Queensland parliamentary inquiry. This submission is available at [qls.com.au](http://qls.com.au) (via the Advocacy page).

## 5 JULY 2019

Simon Brown and Rebecca Anderson represented the Queensland Law Society, appearing before the Queensland parliamentary

committee at a public hearing related to the Inquiry. At this appearance, QLS highlighted critical issues including the need for additional funding and resources in order to address challenges experienced by both staff and residents of the aged care sector, the need for urgent development and commencement of an action plan to improve palliative care services, and support for the introduction of voluntary assisted dying laws in Queensland with appropriate protections to safeguard vulnerable persons.

## 15 OCTOBER 2019

QLS will host a complimentary information session at the Law Society House for QLS members in relation to the Inquiry, discussing the Victorian voluntary assisted dying legislation and potential changes to Queensland's laws. The session will be open to QLS members and a number of invited stakeholders, which will include Queensland Members of Parliament. The session will convene a panel of esteemed speakers to discuss the critical aspects of voluntary assisted dying law reform, comprised of Fr Frank Brennan SJ AO, CEO of Catholic Social Services Australia; Marshall Perron, Former Northern Territory Chief Minister; Dr Andrew McGee, Senior Lecturer, Faculty of Law, Law School, Queensland University of Technology; Professor Lindy Willmott, Faculty of Law, Law School Professor, Queensland University of Technology; Professor Ben White, Faculty of Law, Law School, Queensland University of Technology; and Dr Andrew Broadbent, Gold Coast Health Director of Palliative Care.

### VOLUNTARY ASSISTED DYING FORUM: PERSPECTIVES AND ISSUES

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# INNOVATION

## IN LAW

Further to last month's *Proctor* feature, here are some more ideas to help practitioners adapt ►





# PRACTICAL STEPS TO THE TECH STARTING LINE



BY JAMES TAN

Many top-tier firms have team members dedicated to innovation.

But what about the practices that fall outside those boxes – the sole practitioners, or the small-to-medium legal practices with more than 10 years of rich history and culture; and a tried and tested ‘way that things have always been done’?

This article poses practical steps that will hopefully assist practitioners looking to move past the starting line.

## Craft a simple, high-level technology plan and innovation strategy, and stick with it

Find the time to gather your practice’s leadership around a table, to work on (not *in*) the business.

Practices with more than one partner may have different views around the leadership table about what is essential to profitability, and what isn’t; but if you take the time to document something simple on paper, you may find your leadership is able to identify more upside (or red flags) than you could have conceived on your own.

Some basic questions you may ask your leadership around the table could include:

- What are the technology gaps in your practice? What strategies is the legal industry adopting to increase revenue and lower expenses?
- What knowledge, software and hardware is needed to fill those gaps? What changes are needed to your business model to remain competitively priced?
- What is the expected upside? Are you able to prepare a detailed breakdown of the costs of implementation? What budget do you need to set aside for cash-flow ‘turbulence’?
- What is a realistic timeframe for implementation, and a review of the plan?

**With all the hype and horror that the legal profession is facing, there can be a great temptation to adopt new technology too quickly.**

## Adopt only what is relevant for your practice

Technology and innovation can be a significant investment. Build your plan and strategy around what engages with the needs of your client base, and creates capacity in your team.

It may be a bad investment to develop and maintain a website client portal or app, if clients prefer to engage with free software such as DropBox and OneDrive, or to meet face-to-face.

The better investment may be to purchase software whereby you can time-record on the go, access well-maintained electronic files remotely, or dictate voice-to-text notes on your mobile phone.

Think about whether adoption will occur within your team as well. For example, there may be no point investing in an expensive one-size-fits-all practice management system, which has extensive functionality that your team is unlikely to use regularly. Rather, your team may be more inclined to use a suite of inexpensive tools which improve real-time collaboration on documents,<sup>1</sup> or manage and visualise (in real-time) your firm’s projects and tasks.

Bring all generations of your team alongside the leadership in the innovation journey. Seek the input of your team on what tools would (realistically) help them work harder and more efficiently for your clients. Especially empower those who will be able to speak positively of change when the complaints about the inconvenience of change comes (they inevitably will).

## Break adoption down into bite-sized pieces

With all the hype and horror that the legal profession is facing, there can be a great temptation to adopt new technology too quickly.

This may alienate key senior staff who have built their personal practice through a certain style, or expose your practice to unanticipated risks.

It may be possible to mitigate this risk with staged roll-outs. Perhaps test a new pricing model with only one practice area, in which many prospective clients have asked for more payment options.

Another strategy may be to adopt strategies through gradual reductions, as opposed to sudden change. A recent *Proctor* article<sup>2</sup> proposed practical steps to go paper-lite, as opposed to paperless, which may be better received by your staff.

## Take action and pick up the phone

A significant barrier to innovation can be the legal community’s risk-adverse nature. For example, there may be uncertainty around how the Legal Services Commissioner or our insurers may respond to moving away from time-recording.

The modern legal practice is also spoiled for choice when it comes to legal tech, and has limited funds to commit to new and sometimes costly technology (frequently, on long-term contracts).

Don’t leave your uncertainty and volume of choice as unanswered questions. Rather, pick up the phone to speak to some of your colleagues, or even write to the Queensland Law Society’s Innovation Committee to see whether there is any ethical guidance on your issues, or if they are able to introduce you to another practitioner with relevant experience in a product or strategy.

James Tan is a director at Corney & Lind Lawyers.

### Notes

<sup>1</sup> The current version of the Microsoft Word has support for real-time co-authoring. See [support.office.com/en-us/article/collaborate-on-word-documents-with-real-time-co-authoring-7dd3040c-3f30-4fdd-bab0-8586492a1f1d](https://support.office.com/en-us/article/collaborate-on-word-documents-with-real-time-co-authoring-7dd3040c-3f30-4fdd-bab0-8586492a1f1d)

<sup>2</sup> Magistrate Browne, Deane, Tyndall and Hart, ‘Can our office go paperless?’, *Proctor*, August 2019 p50–51.



# MEETING REGULATORY DEMANDS

## HOW SMALL INNOVATIONS CAN ADD VALUE

### Challenges for the legal function

“The inability or reluctance of a lawyer to use common technologies should not occasion additional costs for other parties”

– *Supreme Court of Victoria Practice Note SC GEN 5 Technology in Civil Litigation*

The Australian regulatory landscape has shifted.

Our key regulators have increased and new powers; for example, the product intervention powers of the Australian Securities and Investments Commission (ASIC) and its hawkish attitude to enforcement. From February 2018 to August 2019, there was a 24% rise in the number of ASIC enforcement investigations. This trend will continue, with other regulators such as the Australian Prudential Regulation Authority (APRA) adopting this approach.

A corollary is the steady upswing in information requests from regulators keen to fulfil their mandate. It is a growing issue against the hardening enforcement landscape, multiple new implementation projects – for example, design and distribution obligations for financial products and mushrooming of computer data volumes.

The direct results are greater costs and tied-up resources in businesses’ legal and compliance functions. Faced with such challenges, in-house counsel (and their service providers) – particularly those in small and mid-size companies – have the potential to create significant value for their businesses by exploring different approaches, including those which have gathered momentum overseas.

### Small innovations, big returns

Understandably, the United States and United Kingdom enforcement landscape hardened before Australia’s did in the wake of the global financial crisis. Faced earlier with the above challenges, I sensed some broad nuances in approach by the legal function in financial services firms responding to increasing regulatory information demands when I was based overseas.

First, a greater use of technology assisted review (TAR) – most litigators will have heard of TAR; it involves a senior reviewer coding a small ‘seed set’ of documents and then using software algorithms to propagate predictive coding over the remaining data set based on their likeness to the seed set.

After that exercise, which can be conducted over many thousands of documents quickly, statistical validation and other testing follows to ensure the accuracy of the data set returned for relevance, privilege, etcetera. Usually, the much-distilled data set that the software algorithms identify as relevant are then human reviewed prior to production. But this doesn’t always happen, as I saw some financial institutions elect to do on a cost/benefit analysis.

In a litigious setting, TAR’s use is increasing and is supported by Australia’s courts<sup>1</sup> which are following the international trend. ASIC too is a public proponent of TAR (along with other global regulators), having adopted it itself.<sup>2</sup> Former Chairman Greg Medcraft said in March 2017:

“We are tailoring machine learning software for use in investigations...using algorithms for both structured and unstructured data. It allows us to visually map relationships of persons and entities and create time chronologies...We are expanding our capabilities in this area [e-discovery and TAR]...to make the identification of relevant evidentiary materials more efficient.”<sup>3</sup>

TAR may not always be appropriate, including for smaller, idiosyncratic and/or particularly time-pressured reviews. However, its reliability, official endorsement and, ultimately, its potential to save a great deal of time and associated expense compared with human review – even after the traditional keyword searches and other filters are applied – means that it should always be a consideration when a regulator’s information request is first received.

Second, a proactive focus on data management and e-disclosure strategies – identification and extraction of responsive data is often the first real challenge in responding to an information request, which may cover emails, instant messages, document management systems, portable devices or hardcopy documents.





BY LIAM HENNESSY

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It is not unusual for responsive data to be located after the initial tranche of data is identified, processed and batched for review, which can complicate tight timeframes. While there is no uniform approach, in an increasingly challenging enforcement environment I observed a drive in the internal legal function to increase efficiencies and balance reliance on external providers through advance consideration of data mapping (for example, where is our data?), storage issues (for example, server locations, who has 'possession' in group entities), extraction issues (for example, legacy systems, meta-data considerations) and related issues (for example, privacy obligations, protecting privileges).

Finally, a larger appetite to structure matters and external fee arrangements with external providers in different ways. An example of the former is bifurcating key tasks – for example, less-expensive law firm or legal outsource provider ABC will do all the document review and more-expensive law firm XYZ will do the rest of the tasks.

A simple example of the latter is 'surge pricing', whereby a law firm may agree to charge a discounted or further discounted hourly rate for certain phases – for example, a document review. Or 'risk collars' which reward efficiency – the law firm receives a bonus when they come in under budget, the client receives a discount if the matter goes over budget. More variety, in short, than discounting or (where possible) fixing fees.

Innovating with fee arrangements can be challenging and is intrinsically bespoke. A willingness by in-house counsel and law firms to experiment can lead to a compelling value proposition, though.

### Looking forward

These slight shifts in approach are not radical. However, innovating with particular review technologies or approaches to foreseeable future regulatory demands or exploring alternate service arrangements need not be.

In a profession responding to rapid changes, rising complexity and a relentless need to consistently demonstrate value to core businesses and clients, an openness to innovations being used outside Australia may lead to significant value.

Liam Hennessy focuses on financial services disputes, regulatory investigations and compliance matters. He has significant experience with large-scale document review projects. Based in Brisbane, his experience spans periods working in London, Sydney and Melbourne. The views expressed in this article are his own.

### Notes

<sup>1</sup> *McConnell Dowell Constructors (Aust.) Pty Ltd v Santam Ltd & Ors (No. 1)* [2016] VSC 734.

<sup>2</sup> Report 476, ASIC enforcement outcomes: July to December 2015 (March 2016), [29].

<sup>3</sup> Medcraft G, 'The Fourth Industrial Revolution: Impact on financial services and markets' (20 March 2017), ASIC Annual Forum 2017 (Hilton, Sydney).



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# The 'evade police' disparity

Decisions underline need for consistency

BY CALVIN GNECH



The next chapter of the legal saga around the inconsistent approach to sentencing for the offence of 'evade police' pursuant to section 754 *Police Powers and Responsibilities Act* (PPRA) has recently concluded.

In *Campbell v Galea* [2019] QDC 53, District Court Judge Long SC found that the plain reading of the current legislation did not prohibit other sentencing options, such as probation.

It is perhaps important to say at this early stage that this is not an article about the merits of mandatory sentencing schemes, because that issue, as we know, can be debated to the end of time. This article is about the need for consistency within the law, to prevent undermining confidence in the justice system as a whole and unfairly prejudicing individual defendants.

## The inconsistency

The current inconsistency across Queensland is that magistrates (and judges) are divided in regards to the sentencing options available when sentencing a person for an offence of evade police pursuant to section 754 of the PPRA. Some courts find other sentencing options such as probation are not prohibited when adopting a plain reading of the section, and others find they are restricted to actual imprisonment or a minimum fine of 50 penalty units.

Given the division between magistrates (and, as you will see, District Court judges), the practical outcome is that defendants are being sentenced under a strict mandatory sentencing regime in some courts but not others.

At least, prior to the decision of *Campbell v Galea* on 18 April, if a defendant appeared before a court charged with section 754, it was pure luck (or not) whether that defendant faced the intended mandatory sentencing regime (or not).

It has all been dependent upon differing views of individual magistrates. At the time of writing, it is not yet clear what influence, if any, the *Campbell v Galea* judgment

has had on overcoming the inconsistent sentencing approach.

## The legislation

The legislation is drafted in such a way that it states both a maximum and minimum sentence. Section 754 currently reads:

### 754 Evasion offence

This section applies if, in the exercise of a power under an Act, a police officer using a police service motor vehicle gives the driver of another motor vehicle a direction to stop the motor vehicle the driver is driving.

The driver of the motor vehicle must stop the motor vehicle as soon as reasonably practicable if a reasonable person would stop the motor vehicle in the circumstances.

#### Penalty—

Minimum penalty—50 penalty units or 50 days imprisonment served wholly in a corrective services facility.

#### Penalty—

Maximum penalty—200 penalty units or 3 years imprisonment.

It would appear uncontroversial to conclude, if one was to go directly to the explanatory notes for the amendment to the provision, that there was a clear intention of the then government to implement a mandatory sentencing regime in regards to this offence, given the following was stated:

"The clause requires the minimum imposition of either the minimum fine or minimum sentence of imprisonment and excludes other sentencing options, for example a good behaviour order, probation, or a suspended sentence."

However, before referring to the explanatory notes, there must be an ambiguity with the plain reading of the legislation. The courts, when finding against a restricted mandatory sentencing regime, conclude there is no ambiguity and therefore no need to consider the explanatory notes. See section 14B *Acts Interpretation Act 1954* (Qld).

### The history of the judicial interpretation of s754

The inconsistency has arisen because of the division among magistrates on the effect of the minimum penalty legislation, and further so in light of conflicting decisions from the higher courts without any guidance being sought from the Court of Appeal.

In *Campbell v Galea*, Judge Long provides a detailed history of the cases that have considered this point within his reasons. It should be noted, as referenced in his Honour's reasons, some section 222 appeals have been conceded, so this article focuses specifically upon the three litigated cases.

In *Commissioner of Police v Magistrate Spencer & Ors* [2013] QSC 202 (*Spencer*), Henry J found the then provision did not prohibit other sentencing options such as probation being ordered by the court, based upon a natural and plain reading of the section.

The Government amended the legislation slightly to try and overcome the *Spencer* decision. However, that amendment was unsuccessful because Judge Harrison in *Forbes v Jingle* [2014] QDC 204 (*Jingle*) followed *Spencer*, also finding the legislation still did not prohibit other sentencing options being available to the court.

Until the decision of *Doig v Commissioner of Police* [2016] QDC 320 was handed down by Judge Devereaux SC, there was no contrary view expressed to that of *Spencer* and *Jingle*, however some magistrates still maintained the restricted sentencing option view as expressed in the explanatory notes. Judge Devereaux found that the judges in *Spencer* and *Jingle* had erred and the natural meaning of the minimum sentence provision did not allow other sentencing options such as community service and probation to be imposed for an offence of evade police pursuant to section 754 of the PPRA.

In *Campbell v Galea*, Judge Long reverted to the reasoning of *Spencer* and *Jingle*. Judge Long was encouraged to refer the issue to the Court of Appeal on a case stated for resolution of this legal controversy, but decided not to make such a referral. His Honour went on to determine the matter, delivering a comprehensive judgement. He found, consistently with *Spencer* and *Jingle*, that the plain reading of the provision did not exclude other sentencing options such as probation and community service.

### A fair and just legal system

Consistency is a necessary requirement of any fair and just legal system. Putting to one side for a moment individual views on mandatory sentencing, there must be an immediate resolution to this issue to ensure confidence is not lost in the justice system as a whole, and also to prevent the ongoing injustices which are occurring for individual defendants.

If a defendant is to face a mandatory sentencing regime when being sentenced for a particular offence, then all defendants should. If a defendant is to have access to all sentencing options when being sentenced for a particular offence, then all defendants should.

Sentencing options for a particular offence should not be restricted (or not) depending upon the geographical location where the sentence proceedings are taking place and therefore which individual judicial officer is presiding over the sentence.

Whichever way the law falls on this point, there must be agreement that a consistent approach is imperative.

Calvin Gnech is Managing Legal Director of Gnech and Associates, practising predominantly in criminal and professional misconduct law. He is also Chair of the Queensland Law Society Disciplinary Law Committee.

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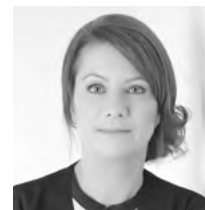


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# Statutory wills at midnight

WITH ZINTA HARRIS AND DARLENE SKENNAAR QC



## So, you have been given instructions to make an application for a statutory will.

The will maker is old, frail, but still doing okay. You start preparing the material in preparation for the application.

Suddenly, at 6pm on Friday night, after a long lunch, you receive the dreaded phone call. You know, that phone call you promised yourself would not occur when you adopted a more leisurely approach to the application? The advice from the doctors is not good. The will maker is very unwell and their survival uncertain. What do you do?

Of course, the first thing you do is pray. You pray the advice from the doctors is wrong. You pray that the will maker's health rapidly improves with some robust treatment. Praying is essential because absent divine intervention you might have to do this stuff on a Friday night.

Who wants to do that? Not you, not a judge! Having prayed a lot without success, if you are a solicitor, you call your counsel and drag them away from whatever dinner they are having or restful space they may be in. Of course, counsel will then helpfully start praying too but, alas, none of these prayers are answered; you are told the will maker is not getting any better. Can you have the application heard urgently?

Having recently had such a matter (in our case, court commenced at 11.30pm and concluded at 1.30am) we thought it might assist other practitioners in knowing the actual process. The first step is confirmation that the will maker is in fact in a dire state. Without that, you are not likely to get your application heard urgently. Once you have confirmed the dire situation, the practical procedural steps are:

1. Contact the after-hours number at the Supreme Court which is staffed by the security staff (07 3738 7744). The Supreme Court has a duty judge for urgent matters as well as a duty registrar (to open the Registry). Provide an explanation as to what the matter is about and why it is urgent. The security staff will contact the duty registrar,

who will get in touch with you (you will again need to give a brief explanation of the matter and why it is urgent). The registrar will then contact the duty judge's associate, who will in turn contact the duty judge. If the judge accepts that the matter is urgent, then the judge comes in to convene the court.

2. Contact your opponents, including anyone acting for the litigation guardian, beneficiaries or other interested parties.
3. If you can't get all of the parties to the hearing, be prepared to explain to the court the steps you have taken to attempt to get them there.
4. Arrange for the Probate Registrar to attend the court for the hearing, because, while you might succeed in application, the statutory will is not valid until it is signed by the registrar while the will maker is still alive.<sup>1</sup>
5. Do your best to tidy up whatever material you have prepared to present to the judge so as to satisfy the statutory requirements. Hopefully you have affidavits of some kind you can rely upon. If not, you need to do the best you can do to get whatever documents are relevant together so that they can be presented to the judge. Remember to have the proposed draft will available, with the correct attestation clause for execution by the registrar.
6. Get evidence from a doctor as to the condition of the will maker to establish two things. The first is the urgency of the application. The second is that the will maker does not have capacity at that time.<sup>2</sup> If time and circumstance permits, prepare the doctor's evidence in an affidavit. If not, obtain written confirmation from the doctor as to the will maker's condition or arrange for the doctor to be on standby to give evidence over the telephone.
7. Arrange for a doctor to be on hand, immediately before the order granting the statutory will is made and signed by the registrar, to provide evidence that the will maker is still alive.<sup>3</sup>
8. Stay in communication with the judge's associate to let them know what time you can get to court. The associate will provide access to the Supreme Court building.
9. Once you are at court, the hearing proceeds on the usual basis.

In addition to the above practical steps, we thought we should also share some helpful hints:

1. Don't have long lunches on a Friday or if you do – sober up quickly!
2. Don't dilly-dally. You have a will maker who might die at any minute and your duty to your client is to have the will made.
3. As soon as you have instructions to make the application, provide the beneficiaries named under the prior will with a copy of that prior will, the proposed draft will and the evidence obtained to that time.<sup>4</sup> That way, it may be possible to satisfy the court that interested parties had notice of the application and information regarding its basis, even if those parties do not appear at the urgent hearing.
4. For solicitors with instructions for such applications, make sure you know the whereabouts of your counsel at every waking (or not so wakeful) moment, just in case the urgency arises, and you need them to stop eating their dinner and turn up in court instead.
5. And finally, we suggest you stay as calm as possible, notwithstanding the urgency.<sup>5</sup>

Zinta Harris is a dual QLS accredited specialist (succession law, business law), a mediator, collaborative practitioner and principal of Resolve Estate Law (formerly known as Harris Law). Darlene Skennar QC practises in wills, estates, trusts and also commercial and property law matters. She is a member of the STEP Committee and the Surveyor's Board of Queensland.

### Notes

<sup>1</sup> Section 26 of the *Succession Act 1981* (Qld) (the Act).

<sup>2</sup> Section 21(2)(a) of the Act.

<sup>3</sup> Section 21(2)(b) of the Act.

<sup>4</sup> If there is no prior will, then any interested parties should be provided with this material.

<sup>5</sup> The decision in this case was delivered orally at the end of the hearing; at the time of writing it was not available online.

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# Balancing a legal career with life

BY AKAASH SINGH, THE LEGAL FORECAST



**Lawyers operate in a profession that idolises perfection in tight timelines with highly important and pervasive matters.**

These stressors, in concert with high-achieving personalities and a competitive environment, have been shown to cause burnout, pessimism and substance abuse among lawyers.

Institutional changes in Australia that followed the release of a survey by the Tristan Jepson Memorial Foundation in 2009<sup>1</sup> have come a long way in highlighting the impact of these stressors on the mental wellbeing of lawyers. These changes include laptops and remote logins that allow lawyers to work more flexibly, alternative fee arrangements that give lawyers more power in pushing back against unreasonable demands, and better relationships between employers and employees leading to more honest conversations.

However, junior lawyers still face uncertainty and stigma in taking time off work for themselves.<sup>2</sup> Simply being told to ‘take care of yourself’ is not sufficient when the act of taking steps (for example, requesting time off, shorter days or less demanding work) to ‘take care of yourself’ can seem insurmountable.

This is a new and emerging challenge that will require out-of-the-box thinking, but it is one that can be solved by reviewing the traditional conduct of legal practice, along with a willingness to disconnect the duties of being a lawyer from personal life.

## **A different challenge**

For young law graduates entering the profession, there is a marked change in the way firms operate now, in contrast to the stories told by senior lawyers who lived through a very different and possibly more difficult time. Back then, errors were rewarded with harsh verbal feedback, young lawyers conducted more ‘paper-pushing’

tasks, and presenteeism was seen as a necessary mechanism to get ahead.

Today’s senior lawyers have done well to change the profession to provide new lawyers with high-quality opportunities to conduct tasks requiring critical analysis and imagination, and by fostering a supportive learning environment. Prima facie, this should improve the experiences for young lawyers, giving them the opportunity to develop a range of skills and the flexibility to adapt to the challenges they face.

However, the work done to change law firm culture has potentially been undermined by the increasingly difficult demands of being a lawyer. In 2019, the increased incorporation of technology creates the expectation that lawyers are contactable at any hour, alternative fee arrangements decrease matter timelines as more work is expected for lower fees, and the continued emphasis on internal billable hour targets forces lawyers to work towards arbitrary figures without regard to efficiency and quality.



While lawyers of yesteryear had opportunities to disconnect mentally and physically from their work when they left the office, current legal practice removes that possibility.

And it is not that lawyers today can easily say no to work, either. Heightened competition for legal work creates an expectation that work will be completed on-time and at high quality; and refusing work can damage profitable relationships with clients and impair a firm's reputation in the market. Moreover, the high leverage model of law firms potentially allocates the strain of higher workloads to junior lawyers.<sup>3</sup>

The challenge for young lawyers and firms is re-creating the traditional break from the office to enable lawyers to deal with the stressors that lead to mental health issues, including depression and anxiety.

In our discussion paper on overwork in the legal profession<sup>4</sup> and our recent panel,<sup>5</sup> The Legal Forecast (TLF) discussed statistics and strategies for firms, and firms have responded. Many firms now offer wellbeing coaching (a firm-sponsored counselling service for lawyers), mental health days as part of personal leave, and an increased recognition of the susceptibility of young lawyers suffering from depression as a result of their working lives.

While the impetus does lie on junior lawyers to set up personal barriers and engage with these new strategies, firms and senior lawyers need to commit to creating a culture in which an employee's health is taken as seriously as a client or billable work.

## Role of arts and creativity

For many years, a strong link has been drawn between art and creativity as a way to promote mental health.<sup>6</sup> Moreover, the importance of art as a central component of modern society was highlighted by Justice Philippides in her keynote speech at the launch of The Legal Forecast Creative:

"The arts are concerned with investigating the inner self and with understanding the emotional and psychological dimension of being human."<sup>7</sup>

The Legal Forecast Creative is an initiative founded on this principle, incorporating a social element that can often be overlooked in the lonely career path of legal professionals. Using the arts and creativity to understand our emotions can create more powerful resilience to the stressors of being a legal professional than wellbeing coaching or mental health days. However, for most lawyers arts and creativity is a concept and activity that is left behind after commencing in the profession.

There is a two-pronged approach to elevating the mental wellbeing of legal professionals to another level:

1. Reduce the exponentially increasing level of connectivity and responsiveness required of lawyers by having strong conversations with clients and relevant stakeholders to ensure this is managed effectively.
2. Re-introduce arts, creativity and imagination that take lawyers outside the monotony of working in the law to help better understand inner emotions and to create an environment that works more than one part of the brain.

For any person interested in becoming part of TLF Creative, please visit our website, or contact the author.

*If you are having feelings of depression or suicide, please contact LawCare for 24-hour confidential information and appointments on 1800 177 743. If you are experiencing an emergency, please contact 000.*

Akaash Singh is the Queensland President of The Legal Forecast (TLF). Special thanks to Michael Bidwell and Lauren Michael of TLF and Joshua Storey for technical advice and editing. TLF (thelegalforecast.com) aims to advance legal practice through technology and innovation. It is a not-for-profit run by early career professionals passionate about disruptive thinking and access to justice.

### Notes

- <sup>1</sup> Kelk NJ, Luscombe GM, Medlow S, Hickie IB, (2009) Courting the blues: Attitudes towards depression in Australian law students and lawyers, BMRI Monograph 2009-1, Sydney: Brain & Mind Research Institute.
- <sup>2</sup> While this is not the experience of the author, it is an experience commonly encountered by junior lawyers.
- <sup>3</sup> Australian Financial Review, 'Law firms switch to lower leveraged models' (1 July 2016) afr.com/business/legal/law-firms-switch-to-lower-leveraged-models-20160629-gpuszj.
- <sup>4</sup> The Legal Forecast, 'TLF Position Paper' (28 November 2018) thelegalforecast.com/blog/tlf-position-paper-overwork.
- <sup>5</sup> Titled 'Finding the Balance: A Discussion on Overwork and Mental Health in the Law'. The full video of this panel discussion is available on our Facebook page, facebook.com/thelegalforecast.
- <sup>6</sup> See, for example, Deirdre Heenan (2006) 'Art as therapy: an effective way of promoting positive mental health?', *Disability & Society*, 21:2, 179-191.
- <sup>7</sup> 'Repositioning the Arts in our Life', Justice Philippides, 26 March 2019, archive.sclqld.org.au/judgepub/2019/philippides20190326.pdf.

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# Beating the burnout

## Tips for an early career lawyer

BY BETHANIE GOODALL



**Burnout and positive mental health are significant topics for early career lawyers, especially for those who have been told to handle the heat, or get out of the courtroom.**

But before looking at how to avoid an early career burnout, it is crucial to understand what 'burning out' actually means. Burning out, in a professional sense, simply means to "ruin one's health or become completely exhausted through overwork."<sup>1</sup> This is typically characterised by symptoms that include:

- exhaustion
- constant anxiety
- pessimism
- obsessive thoughts
- disengagement
- lost or diminished motivation
- a sense of inefficacy or feeling overwhelmed.

Often these feelings arise as a result of consistent 80-hour weeks, a heavy workload or just the competitive nature of the industry. The pressure to meet those billable hours and manage internal and external stakeholder expectations is a balance many lawyers struggle to deal with.

### Why are lawyers more susceptible?

Given the unique combination of our often highly strung personalities, obsessive attention to detail, reactive style of work and the adversarial nature of the profession, it really is no surprise that burnout appears almost inevitable.

A 2009 paper by psychologists Schaufeli, Leiter and Maslach, 'Burnout: 35 years of research and practice', found a key link between burning out, the type of work undertaken and the environment that professionals find themselves working in today.<sup>2</sup>

Another reason that lawyers will typically experience burnout is that their core values – that is, the values that make them who they are as a person – are not aligned with their own behaviours. A lawyer's moral compass and core values are the fundamental elements which ultimately form the makeup of a

person's integrity. Essentially, when what you do for work conflicts with what your conscious thinks you should be doing, it will trigger feelings of unhappiness and dissatisfaction.

This is why, as early career lawyers, it is crucial to be able to get into good habits early, particularly at the start of our career.

### Tips to avoid burnout

#### Be kinder to yourself

We truly are our own worst enemy! The first step is realising that you need to be kinder to yourself. Allow yourself to step away from the computer, switch the emails off and realise that the sun will rise again tomorrow if you don't reply within two minutes. This is the hardest 'tip' to implement, particularly as an early career lawyer, given that our inexperience and uncertainty often extinguish the desire to be kinder to ourselves.

#### Declutter

Decluttering is crucial in decreasing the risk of feeling overwhelmed, or simply that it's all 'too much'. The basic act of cleaning up your desk or creating a calmer working area will work wonders for clearing your brain too.

#### Gratitude

Be thankful for where you are and how far you have come. A quick reflection often puts current concerns into perspective.

#### Remember why you chose to be a lawyer

It wasn't for the late nights or for the student loans; it was to fulfil that burning passion that drove you to enrol in law school in the first place. Remember what that passion was and write it down to remind yourself *why* you're here!

#### Connect to your greater goal

Your life goal wasn't to work 80-plus hours a week or to be remembered as 'that girl who never slept'. There is simply more to life than that. Once we know our purpose and the greater goal we want to achieve, we can come to the realisation that there is more to life than just our individual being and self. Plus, there is much to be gained by realising your current position on your path to your greater end goal. Without this perspective,

we may become enthralled in our own self-destruction in the present, so our greater goal becomes unattainable.

#### Leave the office

Not forever, just for tonight! Go get those seven hours of sleep your body so desperately craves.

#### Communicate

Never be afraid to communicate with the senior members of your team that you are feeling overwhelmed or unsure how to undertake a certain task. They will appreciate your candid approach!

#### Give yourself a break

Remember everyone has to start out in their career, no matter what the industry. It is a learning process in which you should focus on gaining as much knowledge as possible while seeking guidance from senior members of staff. Be a 'sponge' and absorb everything from the team around you in order to get the most out of your first years of practice.

Implementing these tips and tricks will help you to initiate positive habits to avoid burnout. This will mean that you start your days refreshed, focused and ready to deliver your best work for the firm and for your clients.

As an early career lawyer, it is important to remember to enjoy the journey and the reason you became a lawyer in the first place. As a result, before you know it, you will be assisting in the development of the next generation of lawyers.

This article appears courtesy of the Queensland Law Society Early Career Lawyers Committee Proctor working group, chaired by Adam Moschella (amoschella@pottslawyers.com.au). Bethanie Goodall is a lawyer at GRT Lawyers.

#### Notes

<sup>1</sup> Definition at [lexico.com/en/definition/burn\\_\(oneself\)\\_out](http://lexico.com/en/definition/burn_(oneself)_out).

<sup>2</sup> Schaufeli WB, Leiter MP & Maslach, C (2009). Burnout: 35 years of research and practice. *Career development international*, 14(3), 204-220.



# Your daily mental health toolkit

WITH REBECCA NIEBLER



We have all heard many times that eating at least five pieces of fruit and vegetables each day is good for our physical health and wellbeing.

However, by comparison, looking after our mental health seems to be much more complex and elusive. But what if there was an equally simple guideline for five 'daily ingredients' that could protect and strengthen our psychological health and wellbeing?

To answer this and other questions, the United Kingdom's Foresight Project on Mental Capital and Wellbeing embarked on an ambitious journey to scientifically investigate which actions really increased resilience, wellbeing and mental health. The results, synthesising research from 400 international scientists, were published by the New Economics Foundation in 2008.

Part of the project's task was to produce the wellbeing equivalent of 'five fruit and vegetables a day', which later became a program known as the Five Ways to Wellbeing. This program details specific behaviours across five life domains which strengthen your psychological health and resilience.

## 1. Social connections

As English poet and cleric John Donne famously put it, "no man is an island". As humans, we are social animals, and creating meaningful connections with others is a fundamental human need. Relationships, both the strong and deep ones with our 'inner circle' of trusted confidantes, as well as the broader ones in the workplace and community, are vital to our wellbeing.

Strong social connections with friends, family and colleagues provide us with a sense of belonging, security and support, and also act as a buffer against stress. This may change your perspective on time spent chatting with colleagues about the weekend or their family life – most likely it is time not wasted, but well invested in building a valuable relationship that provides mutual support.

## 2. Be active

It's not exactly a new idea, as the Latin phrase *mens sana in corpore sano* (a healthy mind in a healthy body) confirms this advice. We have known for millennia about the deep connections between mind and body, and modern research keeps confirming it.

In other words, regular physical activity – whether it's walking, running, cycling, team sports, gardening, yoga, dancing or another activity that is enjoyable and gets you moving – is an important ingredient for inner and outer health. Exercise stimulates the production of endorphins, a brain chemical acting as a natural painkiller and mood elevator.

The term 'runner's high' refers to these endorphin-induced positive feelings of relaxation and optimism after a good workout. Regular exercise has also been shown to work as well as medication in treating some forms of depression. Why not turning the next sit-down meeting or conversation into a walking version?

## 3. Keep learning

The key here is to keep stimulating your brain and challenge well-formed neural pathways. Deeply-ingrained thinking and behaviour patterns can make us feel safe and comfortable, but they are not always healthy nor do they always allow us to grow in our careers and our personal lives.

To shake things up a bit, is there a fascinating topic you always wanted to know more about, or a musical instrument that you'd love to be able to play? A foreign language course that could be useful preparation for an upcoming overseas holiday? What matters is this: learning can be fun and doesn't have to be formal, and it is a great way to build your confidence and stay curious about life.

## 4. Be aware

What's the opposite of being aware? Spending your time stuck in endless auto-pilot mode – the feeling of continuously going through the motions, functioning, doing what you need to do. But sometimes you get to the end of the day or the month and you wonder if you have really been there at all.

Sound familiar? To break out of this automatic mental rut, make a conscious decision to switch on, reflect, and really *be there*. Be aware of the world around you; take note of the ever-changing range of interesting or beautiful sights, sounds and smells surrounding you. When you eat, see how many different taste sensations you can discern. Listen with intent to colleagues and clients, including their body language, facial expressions and tone. And check in with yourself: How are you feeling? Try to increase your mindfulness as you go about your daily activities. And notice how it lifts your wellbeing.

## 5. Help others

Giving to those in need, helping others and being kind are behaviours strongly associated with pleasure and happiness. So do something kind for a friend, colleague, client or even a complete stranger. Give your time to a community group or help a neighbour. Show your appreciation, give people the gift of your smile.

Not only does altruistic behaviour lead to a release of endorphins in your brain – which acts as an instant happiness booster – it can also give you a sense of purpose and meaning, and help you build connections.

Creating positive habits across all of the five domains is a great starting point to increase and protect your mental health and wellbeing.

*The Minds Count Lecture held on 10 October will shine the spotlight on mental health in the legal profession, make sure you visit [qls.com.au/events](http://qls.com.au/events) for more information! Also check out [5waystowellbeing.org.au](http://5waystowellbeing.org.au).*

Rebecca Niebler is a Queensland Law Society Organisational Culture and Support Officer.

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# Costs assessment: Beware the lurking six-year limit

BY STEPHEN HARTWELL AND PETER JANSSEN



The proceedings in *Allen v Ruddy Tomlins and Baxter (Allen)* raised an issue as to the application of the *Limitation of Actions Act 1974* (Qld) (LAA) to claims by a law practice for unpaid legal costs from its client.

The client in this case made an application for assessment of the legal costs pursuant to section 335(1), *Legal Profession Act 2007* (Qld) (LPA). The costs assessor filed a certificate pursuant to rule 737 *Uniform Civil Procedure Rules 1999* (Qld) (UCPR).<sup>1</sup> The law practice sought judgment for the amount certified pursuant to rule 743H(4) UCPR.

A solicitor's cause of action in contract will arise when the work is completed, or the retainer is terminated.<sup>2</sup>

The time within which an action on a cause of action in contract may be brought is limited by section 10(1)(a), LAA. The section provides, so far as is relevant:

"(1) The following actions shall not be brought after the expiration of 6 years from the date on which the cause of action arose—  
(a) subject to section 10AA, an action founded on simple contract..."

By section 5, LAA, 'action' includes any proceeding in a court of law.

Section 335(1) LPA provides that a client may apply for an assessment of the whole or any part of legal costs. By s335(10) LPA a costs application under section 335 must be made in the way provided for under the UCPR. If, as in this case, the client has made an application for costs assessment then, by virtue of section 338 LPA, a law practice may not (*without leave of the court*) start any proceedings to recover the legal costs until the assessment has been completed.

Section 337 LPA provides that a law practice that has given a bill may apply for an assessment of the whole or any part of the legal costs to which the bill relates. By section 337(4), a costs application may not be made under that section unless 30 days have passed from when the bill was given,

a request for payment made, or the costs were paid, if there was neither a bill nor a request for payment. Section 337(5) provides that an application by a law practice under this section shall be made in the way provided for under the UCPR.

Significantly, section 337(4), unlike s335(5), does not prescribe a time by which such an application must be made by a law practice.

The Court of Appeal in *Edwards v Bray & Anor* [2011] 2 Qd R 310 (*Edwards*), and the Supreme Court of New South Wales in *Coshott v Barry & Anor* [2012] NSWSC 850 (*Coshott*) and *Preston v Nikolaidis* [2017] NSWSC 1527 (*Preston*) have each interpreted similar (but not identical) legislative schemes for the assessment of costs as between a law practice and client as:

- only an administrative mechanism for quantifying legal costs
- an aspect of the regulation of the legal profession
- not conferring a right independent of contract for the recovery of legal costs by a law practice from its client
- not immunising the recovery of legal costs from the operation of the limitation Acts.

In *Allen*, the primary judge in the District Court (Townsville) found that *Edwards v Bray* "no longer remained authoritative" in light of the scheme for costs assessment and recovery created by the LPA and Chapter 17A, Part 4 of the UCPR.

## The facts in *Allen*

The appellant engaged the respondent as her solicitors. The retainer was terminated in August 2007, and an itemised bill was delivered by the respondent in March 2008. An application for costs assessment was filed by the appellant in September 2008, and orders were made appointing the costs assessor in October 2008.

Nine years later, in July 2017, the costs assessor filed his certificate

On 12 October 2017, the registrar issued an order purporting to give effect to the cost assessor's certificate. On 6 November 2017, the appellant filed an application seeking orders, inter alia, setting aside the orders of 12 October 2017 and staying the proceeding permanently.<sup>3</sup>

## The decision of the primary judge

The application proceeded in the District Court on 13 December 2017, and it was agreed that the primary judge would deal with the limitation argument as a threshold issue. On 21 March 2018, the primary judge delivered his judgment, finding in favour of the respondent on the limitation point.

The nub of the decision of the primary judge was:

- The LPA and Chapter 17A, Part 4, UCPR establish a discrete regime for the assessment of legal costs and their recovery.<sup>4</sup> The primary judge described this as a "codified regime" and said the dispute fell to be determined under that regime and not otherwise. It was no longer a relationship based on "simple contract".<sup>5</sup>
- The "simple application of the LAA to the relationship between solicitor and client [was] no longer applicable"<sup>6</sup> and it was not necessary for the respondent solicitors to commence a "proceeding" to recover costs.<sup>7</sup>
- As a "proceeding" was not required under the "codified regime", s10 LAA did not apply.<sup>8</sup>

## The Court of Appeal

Philippides JA (with whom Henry J agreed), first looked at the legislative purpose of the LPA in general, and Chapter 3, Part 3.4, LPA in particular, and observed that an interpretation which would best achieve the legislative purpose of the LPA was to be preferred to any other.<sup>9</sup> There was nothing in sections 3 or 299 LPA indicating a purpose of establishing an alternative cause of action for the recovery of legal costs to that founded in contract.<sup>10</sup>

Chapter 3, Part 3.4, was not expressed to provide, either by itself or in conjunction with Chapter 17A UCPR, a “code for the recovery” of legal costs which stood outside the application of the LAA.<sup>11</sup> Further, as there was no ambiguity as to the legislative intention, there was no need to refer to the extrinsic material referenced by the primary Judge and the respondent.<sup>12</sup>

Her Honour went on to say that the practical effect of the finding of the primary judge would be “to remove a client’s entitlement to raise a time limitation to the *solicitor’s* claim once an application for costs assessment has been made by the *client*. That consequence does not promote the purpose of s3 LPA to regulate legal practice in Queensland in the interests of the administration of justice and ‘for the protection of consumers’.”<sup>13</sup> [*court’s emphasis*]

There is no limitation period expressed (in section 337 LPA) for the bringing of an assessment application because, her Honour observed, the scheme does not oust the operation of the LAA<sup>14</sup> and a law practice could, in any event, protect its position by seeking leave to commence proceedings pursuant to s338 LAA.<sup>15</sup>

Following *Edwards*, *Coshott* and *Preston*, her Honour found the costs assessment regime introduced by the LPA remained “of an administrative nature”<sup>16</sup> and a “procedural mechanism for the resolution of quantum”.<sup>17</sup> The costs assessment regime is an aspect of regulation of the legal profession.<sup>18</sup>

The question then arose – was an application for assessment brought either by a client (section 335 LPA) or a law practice (section 337 LPA) itself an ‘action’ for the purposes of section 10(1)(a) LAA?

Any proceeding in a court is an ‘action’ for the purposes of s10(1)(a) LAA.<sup>19</sup> An action might be commenced by application. However, her Honour observed that an action for the purposes of s10(1)(a) is an action “arising from a cause of action in contract”<sup>20</sup> and, in contrast, the costs assessment process is “one of quantification of the costs”. The recovery of the debt was a separate matter which, upon a relisting under rule 743H of the UCPR, the court might give the judgment it considers appropriate where there is “no issue in dispute”.<sup>21</sup> Her Honour noted that a relisting pursuant to rule 743H(3) would afford a client a “practical opportunity” to raise the LAA.<sup>22</sup>

Consequently, “an application to the court for assessment under the LPA is not an ‘action’ for the purposes of the LAA”.<sup>23</sup> A similar conclusion was reached in *Coshott*<sup>24</sup> and endorsed in *Preston*.<sup>25</sup> On this point, Henry J added that an application for further directions (pursuant to rule 743H) in costs assessment proceedings was itself a

“proceeding”,<sup>26</sup> so the respondent was time-barred from recovering its costs from the appellant by s10(1)(a) LAA.

Unlike McMurdo JA, who compared a law practice’s application for judgment pursuant to rule 743H(4), with a counter claim thus raising section 42 LAA, her Honour said:

“I am not persuaded that s42 LAA provides assistance to the respondent in the present case. There is an important distinction between an original action in which a claimant is vindicating rights, as contemplated by s42, and one in which an applicant uses an administrative procedure to ascertain quantum.”<sup>27</sup>

Finally, the respondent had also contended that the effect of para 10 of the October 2008 orders rendered it unnecessary for the respondent to commence recovery proceedings against the applicant. The orders appointing the costs assessor were made by consent and at paragraph 10 provided as follows:

“10. The costs certificate issued by the costs assessor to be filed in the Court within seven days of the completion of the assessment and upon filing will take effect as an order of the Court.” [*emphasis added*]

To this, her Honour found it was beyond power of a District Court judge to order that the certificate take effect as an order and paragraph 10 was thus a nullity.<sup>28</sup>

McMurdo JA determined that he would have allowed the application for leave to appeal but dismissed the appeal. The essence of his Honour’s dissenting judgment was that the regime created by Chapter 17A, Part 4, UCPR provided for a judgment to be given to the law practice in the proceeding which the client had brought under that regime, and without the law practice having to commence its own proceeding.<sup>29</sup>

The respondent’s right of action was founded in contract and of a kind within s10(1)(a) LAA.<sup>30</sup> Section 10 LAA does not affect the right of action; it acts as a procedural bar to the remedy when pleaded. That is, it affects the availability of the remedy only.<sup>31</sup> Section 10 LAA differs from s63 *Limitation Act 1969* (NSW) in that the New South Wales provision operates to extinguish the cause of action. Thus, his Honour did not regard *Coshott* and *Preston* as relevant.

Where, as in *Allen*, the application for assessment is brought by the client, his Honour said section 10 LAA was not engaged because the law practice may be given judgment in the proceeding brought by the client. That is, the law practice does not have to bring a proceeding itself, and so the LAA bar is not engaged.<sup>32</sup> His Honour noted this position would accord with s42 LAA, as the claim by the law practice for judgment was analogous to a counter claim

which, by s42 LAA, was deemed to be a separate action commenced at the time of the original action.<sup>33</sup>

In the alternative, if the position was that judgment could only be given in a proceeding commenced within six years of the accrual of the law practices right of action, then section 10 LAA would still have been no bar to the remedy, because the client had commenced the proceedings within the limitation period.<sup>34</sup>

His Honour acknowledged that section 337 LPA provided no limitation period and accepted that section 10 LAA might be raised as a bar to an application for assessment brought by a law practice outside the limitation period.<sup>35</sup>

## Conclusion

Their Honours were unanimous in finding that the regime for costs assessment established by Chapter 3, Part 3.3, LPA and Part 4, Chapter 17A, UCPR did not create a ‘codified regime’ for costs assessment and recovery which stood outside the operation of the LAA, and nor did this regime create an independent cause of action by which a law practice could recover costs from its client. A law practice’s cause of action to recover fees pursuant to its retainer lay in contract.<sup>36</sup>

Further, their Honours were unanimous in finding that the costs regime provided an alternative remedy to a law practice. That is, a practice might either commence proceedings to recover a debt due under its retainer (s326) or it might seek an assessment of its costs (s337) and then judgment pursuant to rule 743H(4).<sup>37</sup>

In essence, the point of difference between the majority comprised of Philippides JA & Henry J and McMurdo JA (dissenting) was the way in which s10(1)(a) LAA would apply to the alternate remedy when rule 743H(4) was sought to be used.

As the law now stands, when a law practice seeks judgment using rule 743H(4), after the expiration of six years from the date on which its cause of action in contract arose, it will be barred from doing so.

Accordingly, the ‘take away’ for Queensland solicitors from this case is that, if the six-year limitation period is approaching and there is no costs assessment on foot, they ought to commence proceedings, and if there is an assessment on foot, they ought to seek leave to do so.

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## Notes

- <sup>1</sup> Rule 737 is contained within Part 3 of Chapter 17A, but nevertheless applies to the assessment of costs as between a client and a law practice by virtue of rule 743 I.
- <sup>2</sup> *Edwards v Bray* [2011] 3 Qd R 310, [23] per Wilson JA, with whom White JA and Lyons J agreed.
- <sup>3</sup> In the alternative, leave was sought for an extension of time within which to review the cost assessor's certificate pursuant to rule 742 UCPR. See also *Coburn v Colledge* [1897] 1 QB 702.
- <sup>4</sup> *Allen v Ruddy Tomlins & Baxter* (unreported, District Court of Queensland, Judge Durward SC, 20 March 2018, [21].
- <sup>5</sup> *Ibid* [22].
- <sup>6</sup> *Ibid*.
- <sup>7</sup> *Ibid*.
- <sup>8</sup> *Ibid* [23].
- <sup>9</sup> *Allen v Ruddy Tomlins & Baxter* [2019] QCA 103, [44] per Philippides JA. (Applying section 14A, *Act Interpretation Act 1954* (Qld)).
- <sup>10</sup> *Ibid* [44].
- <sup>11</sup> *Ibid* [44].
- <sup>12</sup> *Ibid* [45].
- <sup>13</sup> *Ibid* [62].
- <sup>14</sup> *Ibid* [47].
- <sup>15</sup> *Ibid* [47] & [63].
- <sup>16</sup> *Ibid* [46].
- <sup>17</sup> *Ibid* [46] & [60].
- <sup>18</sup> *Ibid* [48].
- <sup>19</sup> *Limitation of Actions Act 1974* (Qld), section 5.
- <sup>20</sup> *Allen v Ruddy Tomlins & Baxter* [2019] QCA 103, [57] per Philippides JA.
- <sup>21</sup> *Ibid* [59] & [60].

- <sup>22</sup> *Ibid* [61]. Curiously, in *Coshott*, McCallum J had identified this as a problem in the NSW scheme as under that legislation a cost assessor certificate once filed took effect as a judgment of the court, thus leaving the client without an opportunity to raise the limitation issue. (See *Coshott v Barry* [2012] NSWSC 850, [32] to [34]).
- <sup>23</sup> *Ibid* [47].
- <sup>24</sup> *Coshott v Barry* [2012] NSWSC 850, [52].
- <sup>25</sup> *Preston v Nikolaidis* [2017] NSWSC 1527, [29].
- <sup>26</sup> *Allen v Ruddy Tomlins & Baxter* [2019] QCA 103 [111] per Henry J. A 'proceeding' includes 'an incidental proceeding': Schedule 5, *Supreme Court of Queensland Act 1991* (Qld).
- <sup>27</sup> *Ibid* [64].
- <sup>28</sup> *Ibid* [67]. McMurdo JA referred to this issue but did not determine whether paragraph 10 of the September 2008 orders were a nullity. See paragraph [90].
- <sup>29</sup> *Allen v Ruddy Tomlins & Baxter* [2019] QCA 103, [70] per McMurdo JA.
- <sup>30</sup> *Ibid* [72].
- <sup>31</sup> *Ibid* [73] & [75].
- <sup>32</sup> *Ibid* [95] & [96].
- <sup>33</sup> *Ibid* [99].
- <sup>34</sup> *Ibid* [98].
- <sup>35</sup> *Ibid* [97].
- <sup>36</sup> *Ibid*, [45] & [47] per Philippides JA; [71] & [97] per McMurdo JA; [106] per Henry J.

- <sup>37</sup> *Ibid*, [47] per Philippides JA; per [71] & [97] per McMurdo JA (The judgment of the Court of Appeal did not explain this issue. The appellant had submitted that s 69 of the *District Court of Queensland Act 1967* (Qld) provides that the District Court has all of the powers and authorities of the Supreme Court subject to that Act and the rules of Court. That is, the District Court does not have power to make an order which is contrary to the UCPR. An order made without power is a nullity. An order that is a nullity is of no force or effect irrespective of whether it has been set aside. In *Allen*, it was submitted that paragraph 10 of the October 2008 orders was inconsistent with the procedure set forth in rule 743H which provided for a relisting after the cost assessors certificate was filed and then the entering of judgment if there were no other issues in dispute. See *Berowa Holdings Pty Ltd v Gordon* (2006) 225 CLR 364 at 370, 11 as to the nature of orders which are a nullity.)

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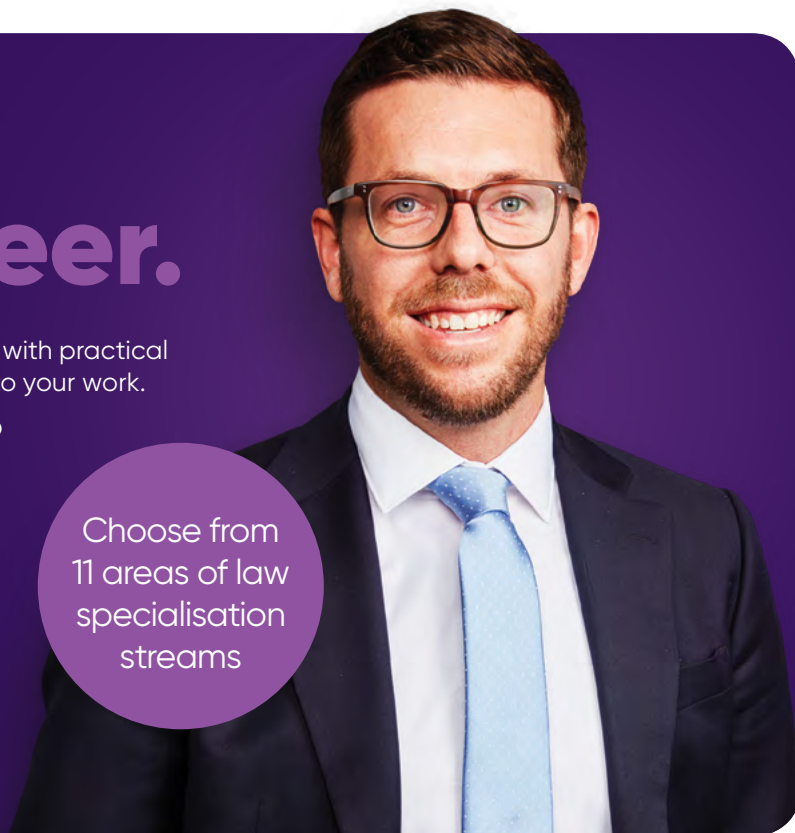
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# The ref steps up

## Amendments expand the scope for referrals to referees

BY KYLIE DOWNES QC AND ALEXANDER PSALTIS



### New provisions in the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) concerning the referral of questions in proceedings to referees commenced on 12 July 2019.

The new provisions, introduced by the *Uniform Civil Procedure (Referees) Amendment Rule 2019* (Qld) (the 2019 amendments), involve significant departures from the previous regime, not just in effecting a change in language from ‘special referee’ to ‘referee’, but also to permit the resolution of, potentially, entire proceedings by a private referee who is not bound by the rules of evidence at the cost of the parties. The 2019 amendments also seek to bring the UCPR into line with other jurisdictions.

This article explains the key changes to the referral to referees made by the recent amendments and suggests when referral to a referee may be appropriate to assist in the efficient and cost-effective resolution of a dispute.

### What is a referee?

It is first appropriate to describe what we mean by a referee. A referee is person appointed by a court to assist by providing their opinion, decision or findings on part of a proceeding referred to it by the court, usually where the proceeding (or the part referred) is of a nature not suitable for efficient and cost-effective resolution by the court. A referee is typically a person with particular expertise (whether technical or legal) to decide the question referred.

Referees have been used in civil proceedings in common law courts since at least 1854 when the *Common Law Procedure Act 1854* (UK) was introduced. That Act permitted the court to refer a matter of accounting to a referee who was either an officer of the court or a private arbitrator to decide the matter, with the decision of the referee being enforceable by the same process as the finding of a jury.<sup>1</sup>

In Queensland, rules concerning referrals to a special referee have been in place since well before the introduction of the UCPR. The referee powers are now found in Chapter 13,

Part 7 of the UCPR. The 2019 amendments have broadened the scope of operation of those provisions and expanded the powers which a referee is able to exercise.

### What has changed?

The 2019 amendments have effected substantial changes to the scope of referrals to referees and the nature of those referrals. We next describe some of the more important and interesting changes (but we do not purport to give a comprehensive overview of the new provisions).

Previously, there was a power for the court to refer any question of fact in the proceeding to a referee (a) for decision or, (b) to give a written opinion to the court on the question.<sup>2</sup> The 2019 amendments modify this practice and permit the court to refer a question in the proceeding to a referee, not for that person to decide the question, but rather so that the referee can conduct an inquiry into *and* prepare a report to the court about the question.<sup>3</sup> This amendment brings the Queensland rules into line with the rules in other jurisdictions.<sup>4</sup>

Perhaps most importantly, the scope of the referral has now been expanded. Under the previous rules, only questions of fact could be referred to a special referee.<sup>5</sup> However, under the amendments, questions of fact, law or mixed fact and law can be referred to referees.<sup>6</sup>

This means it is now theoretically possible for the court to refer to a referee the entire subject matter of a proceeding before the court.<sup>7</sup> The effect of this change is to confer on the court a power essentially to refer the parties to a private arbitration in circumstances where (unlike under the *Commercial Arbitration Act 2013* (Qld)) the parties may not have agreed to do so.<sup>8</sup> Under the 2019 amendments, just as previously, the parties are responsible for the costs of the referral and the party or parties who bear those costs is reserved to the discretion of the court.<sup>9</sup>

The conduct of a referral to a referee has also been modified by the 2019 amendments. Under the previous rules, the referee was required, unless the court ordered otherwise, to conduct the referral “as nearly as possible in the same way as a trial before a judge sitting alone”.<sup>10</sup> This meant that the rules of evidence applied as if the matter were being heard in a court.<sup>11</sup>

The new provisions are fundamentally different. New rule 503(1)(b) expressly provides that a referee “is not bound by the rules of evidence, but may obtain information about a matter in the way the referee considers appropriate”. New rule 503(1) also gives the referee broad powers to conduct the inquiry as she or he sees fit, subject to any directions given by the court.<sup>12</sup> The only substantive limitation, following the 2019 amendments, on the referee’s powers is that she or he “must observe the rules of natural justice”.<sup>13</sup>

Another fundamental shift enacted by the amendments is to the use which the court may make of a referee’s report. Previously, the court was permitted only to accept or reject all or part of the referee’s opinion, decision or findings.<sup>14</sup> However, after the 2019 amendments, the court has broader powers to deal with the report of a referee. While the court continues not to be bound by the referee’s report unless it decides to be bound,<sup>15</sup> the court is permitted to vary the decision, opinion or findings in the referee’s report (in addition to accepting or rejecting it).<sup>16</sup> Moreover, the court may also decide the question referred itself either on the evidence given before the referee or with additional evidence.<sup>17</sup>

A new section 79A has also been included in the *Civil Proceedings Act 2011* (Qld) (the CPA) to confer immunities on referees, representatives and witnesses appearing before referees. The effect of section 79A is to provide those participating in an inquiry with the same immunities as they would enjoy in court. This provision, like the other changes effected by the 2019 amendments, appears designed to encourage greater use of the referral powers.

### When will a court make a referral order?

The 2019 amendments do not contain any guidance as to the considerations which a court may take into account when exercising the discretion to make a referral.

Prior to the commencement of the CPA in 2012, section 256 of the *Supreme Court Act 1995* (Qld) provided that a referral could only be made if all parties consented to it or otherwise “in any such cause or matter requiring any prolonged examination of documents or accounts or any scientific or local investigation”.



That provision was not repeated in the CPA such that no provisions exist which limit the court's discretion to refer questions to a referee.

The 2019 amendments do not contain any guidance on when the court may exercise its discretion to make a reference. However, guidance from other jurisdictions with similar regimes indicates that the referral powers are more appropriately applied in circumstances consistent with the overarching objective (for example, rule 5 of the UCPR).

In *Park Rail Developments Pty Ltd v RJ Pearce Associates Pty Ltd* (1987) 8 NSWLR 123 at 130, Smart J of the New South Wales Supreme Court explained that the following factors may be considered when deciding whether to make a referral:<sup>18</sup>

- a. the suitability of the issues for determination by a referee and the availability of a referee
- b. the delay before the court can hear and determine the matter as compared to a referee
- c. the prejudice the parties will suffer by any delay
- d. whether the reference is likely to occasion significant additional costs or to save costs
- e. the terms of any reference including the issues and whether they should be referred for determination or inquiry or report.

It remains to be seen whether a court in Queensland will require persuasion by reference to the factors outlined above under the 2019 amendments. Recently, but prior to the 2019 amendments, Jackson J suggested that factors consistent with rule 5 are relevant to the court's discretion.<sup>19</sup>

In the light of the High Court's decision in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175

and the principles of case management enshrined in rule 5 of the UCPR, it is likely that considerations like those outlined by Smart J will continue to inform the appointment of a referee in Queensland.<sup>20</sup>

### What is the practical effect of the 2019 amendments?

The use of special referees is likely to increase as a result of the 2019 amendments and the renewed focus on those powers which the amendments have created. It is recommended that practitioners familiarise themselves with the 2019 amendments and the circumstances in which referral to a referee may be appropriate.

#### Notes

<sup>1</sup> The history of referrals was summarised in *Kadam v Miresorts Group 1 Pty Ltd (No.4)* (2017) 252 FCR 298 at [36]-[46].

<sup>2</sup> Former rule 501(1) (in this article references to 'former' rules are to those in place before the 2019 amendments commenced and references to 'new' rules are to those in place after the 2019 amendments commenced).

<sup>3</sup> New rule 501(1).

<sup>4</sup> See for example, rule 20.14(1) of the *Uniform Civil Procedure Rules 2005* (NSW) (the NSW Rules), rule 28.61(1) of the *Federal Court Rules 2011* (Cth) (the Fed Rules), c.f. rule 50.01(1) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic.) (the Vic Rules).

<sup>5</sup> Former rule 501(1).

<sup>6</sup> New rule 501(4).

<sup>7</sup> Whilst the 2019 amendments do not go as far as the Fed Rules, which expressly permit an entire proceeding to be referred to a referee for inquiry and report, it is suggested by the authors that expanding the scope of referral to permit questions of fact, law and mixed fact and law achieves that result.

<sup>8</sup> This too brings the UCPR into line with other jurisdictions; see for example rule 20.13 of the NSW Rules, rule 28.61(1)(b) of the Fed Rules and rule 1.14 of the Vic. Rules.

<sup>9</sup> New and former rule 506.

In particular, referrals are likely to be made in cases which involve complex and technical subject matter or are likely to be of a long duration. It is also likely that referrals will become commonplace in lengthy building and construction cases, as well as cases involving significant and highly technical expert evidence, such as engineering or financial evidence, which may be better determined by a specially qualified expert than by a judge.

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<sup>10</sup> Former rule 502(3).

<sup>11</sup> See, for example, *Seymour v Holm* [1961] Qd R 214 at 222, *WR Carpenter Australia Ltd v Ogle* [1999] 2 Qd R 327 at 333, and *Netanya Noosa Pty Ltd v Evans Harch Constructions Pty Ltd* [1995] 1 Qd R 650 at 657.

<sup>12</sup> As to this power, see new rule 505 which enables the court to give directions on application by the referee, or a party, or on its own initiative, about the conduct of the inquiry or a matter arising in the course of the inquiry, including about disclosure or the issuing of subpoenas returnable before the referee.

<sup>13</sup> New rule 503(2).

<sup>14</sup> Former rule 505(1).

<sup>15</sup> There are sound constitutional reasons for this: see *Buckley v Bennel Design & Constructions Pty Ltd* (1978) 140 CLR 1 at 15.

<sup>16</sup> New rule 505D(1)(a).

<sup>17</sup> New rule 505D(1)(b).

<sup>18</sup> Similar factors were considered in *Talacko v Talacko* [2009] VSC 98 at [25] and [27], though the court noted that this did not mean that special circumstances were required for a referral in the face of opposition from the parties.

<sup>19</sup> *Park v Whyte (No.2)* [2018] 2 Qd R 413 at [166]-[167].

<sup>20</sup> See, for example, *Kadam v Miresorts Group 1 Pty Ltd (No.4)* (2017) 252 FCR 298 at [48]-[50].

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# It's back to the future

## Uncertainty returns to binding death benefit nominations

WITH CHRISTINE SMYTH



About this time last year, succession lawyers breathed a collective legal sigh of relief.

Why? Because her Honour Bowskill J, through the decision of *Re Naruamon Pty Ltd* [2018] QSC 185, gave us a judicial Alka-Seltzer, easing our legal indigestion over the question of whether a power of attorney could, or could not, make a binding death benefit nomination (BDBN) in a superannuation fund.

Succinctly, the answer was yes. We finally had certainty! Bowskill J determined that a BDBN was a financial matter within the meaning of the *Powers of Attorney Act 1998* (Qld).<sup>1</sup> Accordingly, if the fund deed permitted it and there were no other prohibiting factors, such as a conflict of interest, it could be done.

Key to this conclusion was her Honour's determination that the making of a BDBN in a superannuation fund, "is not a testamentary act and so is not captured, by analogy, by the restriction against delegating to an attorney the making of a will".<sup>2</sup> This principle has since been relied on in the decisions of: *MZY v RYI* [2019] QSC 89; *Hartman v Nicotra* (unreported BS 11925 of 2017, Mullins J, 19 December 2017); and *Schafferius v Piper* (unreported BS 12145 of 2016, Boddice J, 8 December 2016).

All was well in succession law land until Western Australia weighed in on the debate through the recent decision of *SM* [2019] WASAT 22.<sup>3,4</sup> There, District Court Judge T Sharp, sitting as Deputy President of the State Administrative Tribunal, made a contrary determination that "(t)he making of a BDBN where the represented person has a beneficial interest in the funds the subject of the BDBN is a testamentary act or disposition".<sup>5</sup> And so it seems, the best of all minds can differ on fundamental things.

*SM* involved an application by a trustee for an order that they, as the administrators of the represented person's estate, be authorised to execute a BDBN on their behalf. The five issues for the court's determination were:

1. Could the tribunal confer on an administrator a power to make or confirm a BDBN?
2. Could an administrator with plenary powers make a BDBN for a represented person?
3. Could a represented person subject to an administration order make a BDBN themselves?
4. Is a BDBN a 'testamentary disposition' and thus a plenary administrator prohibited by s71(2a) of the *Guardianship and Administration Act 1990* (WA) from making a BDBN?
5. If the tribunal had power to grant the additional function to an administrator, was it in *SM*'s best interests that the tribunal grant that function to the applicant?

The bulk of the judgment considered the tribunal's powers under the *Guardianship and Administration Act 1990* (WA). It should be noted that a number of the relevant provisions differ from the *Guardianship and Administration Act 2000* (Qld), particularly the purpose of an administration order.<sup>6</sup> That discussion is beyond the scope of this article.

For this article, what is critical, is Sharp J's analysis around the question of whether a BDBN was a testamentary disposition. In reaching his conclusion that it is, Sharp J considered, at length, Bowskill J's judgment, with particular focus on the two decisions on which her Honour relied to reach her conclusion about the testamentary nature of a BDBN: *Re Application by Police Association of South Australia* [2008] SASC 299; (2008) 102 SASR 215, [75] (*Re Police*); and *McFadden v Public Trustee for Victoria* (1981) 1 NSWLR 15, 29–32 (*McFadden*).

Referring to *Re Police*, Sharp J observed that "The member had no equitable interest in the death benefit paid to the Police Association prior to death".<sup>7</sup> With respect to *McFadden*,

Sharp J noted that that Holland J's rejection of the nomination in question there, as not constituting a testamentary act, arose out of "the exercise of a contractual right not a testamentary power. Any dispositive effect that the nomination may have derives from the contract and the exercise of contractual rights *inter vivos* and not from the death of the contributor."<sup>8</sup>

He then went on to rely on *Bird v Perpetual Executors and Trustees Association of Australia Ltd*,<sup>9</sup> noting: "[T]he High Court distinguished a testamentary document from a binding agreement as: A document made to depend upon the event of death for its vigour and effect and as necessary to consummate it is a testamentary document. But a document is not testamentary if it takes effect immediately upon its execution through the enjoyment of the benefits conferred thereby be postponed until after the donor's death."

Sharp J concluded that "[t]he purpose of a BDBN is solely to enable transmission on a person's death of their superannuation benefit".<sup>10</sup>

Accordingly, "the making a BDBN is not for the purpose of carrying out his or her purpose as an administrator, namely the conservation of the estate of a person under an administration order for his or her own advantage and benefit. On this basis the Tribunal does not have power to grant the additional function to a limited or plenary administrator."<sup>11</sup> Having reached this conclusion, Sharp J noted that it was not necessary to determine the issue of the testamentary nature of a BDBN<sup>12</sup> but he did so anyway, because he considered it was important.



He found:

97. The distinguishing factors that the authorities have relied upon to determine if a nomination in a document is or is not a testamentary act or disposition is whether there is a legal entitlement to the object of the nomination and whether the nomination is binding when it is made.
98. The 'friendly society cases' and the 'nominee insurance policy cases' support the proposition that a BDBN is a testamentary disposition. In these cases, where a BDBN is made in respect of funds in which the superannuation member has a beneficial interest up to the time of death, and is not made further to a contractual right, the nomination of a beneficiary to receive the funds on the member's death is considered to be a testamentary disposition.
99. *The Tribunal finds that the authorities support a finding that a BDBN is a testamentary disposition where the member of a pension/superannuation fund has a present equitable entitlement to the money in the pension/ superannuation fund and the BDBN was not made further to a contractual right.* (emphasis added)
100. SM has a beneficial interest in the money from the Fund being paid into the Superannuation Fund.
101. The BDBN can be changed at any time up until SM's death, subject to her capacity, and does not take effect until the death of SM.

102. Therefore it follows SM has proprietary rights and powers over the subject property during her lifetime which amounts to a beneficial interest in the property until her death.

103. Any BDBN she is able to make does not take effect until her death.

104. *For the above reasons the Tribunal finds that the proposed BDBN is a testamentary disposition.* (emphasis added.)

So where does this leave us? Only the ratio decidendi of a judgment binds a lower court; views in dissent on tangential matters are but mere obiter.<sup>13</sup>

Here we have a lower court in another jurisdiction concluding in obiter, that a BDBN is testamentary in nature. Nevertheless, Sharp J did undertake a detailed analysis of the law to reach his entirely opposite conclusion. In doing so he threw shade over the certainty of Bowskill J's finding. Some might be forgiven for thinking this is 'judicial activism' at work, taking us back to the future?

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#### Notes

<sup>1</sup> At [59].

<sup>2</sup> At [71].

<sup>3</sup> My thanks to Andrew Smyth, Managing Partner at Robbins Watson for bringing this judgment to my attention.

<sup>4</sup> Note this decision was delivered a week after *MZY v RYI* [2019] QSC 89 was delivered

<sup>5</sup> At [108] (4).

<sup>6</sup> See s6 *Guardianship And Administration Act 2000* (Qld):

"This Act seeks to strike an appropriate balance between—

(a) the right of an adult with impaired capacity to the greatest possible degree of autonomy in decision-making; and

(b) the adult's right to adequate and appropriate support for decision-making."

<sup>7</sup> At [72].

<sup>8</sup> At [80] citing Jollan J in *McFadden*.

<sup>9</sup> At [86] citing Stake J at 144–145.

<sup>10</sup> At [90].

<sup>11</sup> At [92] cf s6 *Guardianship and Administration Act 2000* (Qld).

<sup>12</sup> At [93].

<sup>13</sup> International Academy Of Comparative Law Conference, Utrecht, The Netherlands 17 July 2006 Precedent – Report On Australia The Hon Justice Michael Kirby AC CMG citing *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, per Kirby J at 417; *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303, per Mason CJ, Wilson, Dawson and Toohey JJ at 314.

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# Lapsed Bills frustrate migration law practice reform

BY SONIA CATON



For the last couple of years it has looked like Federal Parliament might pass two Bills which would finally remove the need for Australian legal practitioners to be registered as migration agents under the *Migration Act 1958* (Cth) (the *Migration Act*).<sup>1</sup>

The Migration Amendment (Regulation of Migration Agents) Bill 2017 and the Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2017 were seen as welcome reforms, as the professional and practice conduct of Australian legal practitioners is already heavily regulated.

Migration law is the only jurisdiction subject to stringent dual regulation (state and federal) requirements. However, on 1 July 2019 the Bills lapsed, and the reform will not proceed until they are formally re-introduced into Parliament.

Unfortunately, there appears little impetus for this. The removal of lawyers from oversight mechanisms within the *Migration Act* now appears unlikely in the near future.

In practice, this means that the regulatory status quo continues. Namely, s280 of the *Migration Act* states that “a person who is not a registered migration agent must not give immigration assistance”.

A ‘registered migration agent’ is a person registered with the Office of the Migration Agents Registration Authority (MARA) under the s280 of the *Migration Act*.

‘Immigration assistance’ is defined under s276 of the *Migration Act* as:

- help to prepare a visa application or cancellation review application
- providing advice to a visa applicant about their application
- helping prepare a document in connection with the sponsorship of a visa applicant, or to advise the sponsor
- preparing for proceedings, before a court or a merits review tribunal such as the Administrative Appeals Tribunal, or representing someone at those proceedings
- helping to prepare a request to the Minister to exercise certain powers under the *Migration Act* in relation to a visa applicant.

The above functions are similar in kind to those carried out by solicitors/Australian legal practitioners in many other jurisdictions, so the imposition of an additional registration and disciplinary framework under the *Migration Act* has been a cause of agitation for reform by the Law Council of Australia for decades. As previously stated, solicitors will continue to be required to register under the *Migration Act* if they wish to provide services as defined by s276 of the *Migration Act*.

Despite the above definition, many are left confused by what services one can and cannot offer in the migration jurisdiction, and there are a number of legally qualified migration agents who do not run legal practices yet are holding themselves out to be specific migration lawyers, or intimating that they are running legal practices.

The barriers to entry and requirements attaching to running a migration practice under the *Migration Act* and regulations fall far below the standards that apply to running legal practices. Some of these legally qualified registered migration agents are holding themselves out to be solicitors, yet they are not running legal practices.

There are also a small number of solicitors with practising certificates running legitimate migration law practices that are holding themselves out to be migration law specialists, when they have not been duly accredited as such. In either case, the definition of ‘solicitor’, ‘Australian legal practitioner’, ‘law practice’ and advertising rules are relevant, but do not provide complete clarity.

The glossary of the Australian Solicitors Conduct Rules (ASCR) defines a ‘solicitor’ as:

- (a) an Australian legal practitioner who practises as or in the manner of a solicitor.

Schedule 2 of the *Legal Profession Act 2007* (Qld) (LPA) defines ‘solicitor’ as:

“solicitor” —

for part 7.3—see section 620 ; and

for part 7.5—see section 658 ; and

otherwise means—

- (i) a local legal practitioner who holds a current local practising certificate to practise as a solicitor; or
- (ii) an interstate legal practitioner who holds a current interstate practising certificate that does not restrict the practitioner to engaging in legal practice only as or in the manner of a barrister.

There is no guiding definition of practising ‘in the manner of a solicitor’ in the ASCR. The LPA defines ‘law practice’ as a law firm, an incorporated legal practice, a multi-disciplinary practice or an Australian legal practitioner who is a sole practitioner.

‘Law firm’ is defined as being comprised of only Australian legal practitioners, or one or more Australian legal practitioners and one or more Australian-registered foreign lawyers.

The meaning of the terms ‘incorporated legal practice’ and ‘multi-disciplinary practice’ are set out in s111 and s144 of the LPA.



Queensland Law Society has settled on the view that “engaging in legal practice in a structure outside the definitions contained in the Act is not permissible and may involve a breach of s24 of the Act (prohibition on engaging in legal practice when not entitled)”.

Clearly, a breach of s24 would carry a number of consequences.

QLS ethics notes also provide a guide as to what one might call themselves given their qualification – search for ‘What’s in a name’ at [qls.com.au](http://qls.com.au).

Rule 36 of the ASCR offers the following information on advertising:

- 36.1 A solicitor or principal of a law practice must ensure that any advertising, marketing, or promotion in connection with the solicitor or law practice is not:
- 36.1.1 false,
  - 36.1.2 misleading or deceptive or likely to mislead or deceive,
  - 36.1.3 offensive, or
  - 36.1.4 prohibited by law.

Further,

- 36.2 A solicitor must not convey a false, misleading or deceptive impression of specialist expertise and must not advertise or authorise advertising in a manner that uses the words ‘accredited specialist’ or a derivative of those words (including post-nominals), unless the solicitor is a specialist accredited by the relevant professional association.

Hopefully this reminder of regulatory definitions and requirements will assist some to adjust their advertising to better reflect relevant professional requirements.

In conclusion, the failure of the deregulation reform is a real blow to the legal fraternity as it has been recommended by numerous reviews over many years. It is also a blow to community legal centres (CLC) that provide free legal advice to asylum seekers and refugees, in particular.

At present, all volunteers at CLCs that provide immigration assistance must be sponsored by the CLC to become a registered migration agent under the Migration Act for the purpose of volunteering. This involves unfunded application fees and administration time. Dual regulation is also a disincentive for

some lawyers who would otherwise be inclined to volunteer as it is perceived as a high-risk operating environment. The reality is that volunteer training and supervision within CLCs mitigate this risk.

At this point in time, many asylum seekers are having to re-apply for temporary protection visas. I take this opportunity to encourage QLS members to consider volunteering via services such as the Refugee and Immigration Legal Service, Salvos Humanitarian Legal, St Vincent de Paul Society, Townsville Community Legal Service and Robina Community Legal Centre, and make a contribution to assist an exceptionally disenfranchised and marginalised group of people.

Sonia Caton was formerly a Director of the Refugee and Immigration Legal Service, Chair of the Refugee Council of Australia and member of the ministerially appointed advisory board to the Migration Agents Registration Authority. She now lectures in law, is a Fellow of the Migration Institute of Australia, volunteers with Salvos Humanitarian Legal and is a member of the QLS Pro Bono Access to Justice Committee. For inquiries about the committee, email [elizabeth.shearer@shearerdoyle.com.au](mailto:elizabeth.shearer@shearerdoyle.com.au).

#### Note

<sup>1</sup> See ‘New era for migration law practice’, *Proctor*, October 2018 p12.

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# UQ centre's decade of service

WITH MONICA TAYLOR



**Dedicating time to providing pro bono services to the most disadvantaged and marginalised groups in our society, such as asylum seekers and domestic violence survivors, is a proud professional tradition and a pillar of legal education.**

Yet even amidst this teaching practice, the Pro Bono Centre at the University of Queensland (UQ) – which celebrated its 10-year anniversary last month – is unique.

Of all the students who have spent week after week, hour after hour, night after night, of their spare time working to help deserving causes, culminating in thousands of combined volunteer hours, none have received any course credit or material benefit.

Their work has truly been done all *pro bono publico* – ‘for the public good’.

The last decade has seen hundreds of students partner with legal practitioners through the UQ Pro Bono Centre to help vulnerable individuals and populations.

What many people don't realise is that our students receive no quantifiable benefit for what they give – they are doing it in their own time to help those in need.

Though not a substitute for an adequately funded public legal system, pro bono legal services help bridge the justice gap, and the students involved develop a greater social conscience and gain practical experience.

Professor Tamara Walsh and Dr Paul O'Shea officially established the UQ Pro Bono Centre in early 2009 with the support of then Head of School Professor Ross Grantham.

Over the past decade their vision has grown into a centre that provides an invaluable resource to the local, state, federal and international community.

“It's not easy work — clients are often caught in crisis, and trying to help them can be demanding and difficult work,” Professor Walsh said.

“The vision was always for the centre to become cross-disciplinary, connecting law students with other emerging professionals like medicine and social work, and we will continue to actively work towards facilitating more multidisciplinary pro bono projects.”

Students, such as recent graduate Famin Ahmed, work on a variety of projects, including international human rights initiatives.

“Coming from a migrant background, the ability to help people contribute to legislative changes to protect the rights of women was personally and professionally rewarding,” Ms Ahmed said.

“If you're fortunate enough to have the means and time to help others, you really have a duty to – your position is a privilege you should use it for the greater good.”

This article appears courtesy of the Queensland Law Society 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 Access to Justice Pro Bono Committee, contact committee Chair Elizabeth Shearer via [elizabeth.shearer@shearerdoyle.com.au](mailto:elizabeth.shearer@shearerdoyle.com.au).



# Keep an eye on supervision

BY STAFFORD SHEPHERD



**Supervision is a challenge for all of us, but it is a key tool for effective law management.**

Rule 37 of the Australian Solicitors Conduct Rules 2012 (ASCR) provides that:

"A solicitor with designated responsibility for a matter must exercise reasonable supervision over solicitors and other employees engaged in the provision of the legal services for that matter."<sup>1</sup>

Getting it wrong not only exposes us to unhappy clients, civil claims and endless discussions with our insurers, but may also lead to a regulatory investigation.

Supervision begins with asking ourselves whether we should act for a particular client or act for an existing client in a specific matter.

When we ask these questions we should think about whether:

- We have the capacity to deliver the requested legal services.
- We have the time and resources to devote to the task.

There is no right or wrong answer to these questions.

We should take on work only when we can:

- competently, diligently and promptly deliver the service, and
- for a fair and reasonable fee, that is also profitable.

Making the right decision will only enhance our reputation by ensuring the client or the client matter is the right fit for the firm. There is nothing that requires a solicitor to accept a retainer.

Part of supervision is delegation, which may be the whole or part of the representation to others within the firm. In delegating, we need to look at how best we can serve our client's interest. Will it add value?

Trust and confidence with defined processes are at the heart of reasonable supervision.

See also Guidance Statement No.16 – Supervision and clause 2.9 of the QLS Guide to appropriate management systems, which are both available at [qls.com.au/ethics](http://qls.com.au/ethics).

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

## Note

<sup>1</sup> The glossary of terms to the ASCR defines the terms 'solicitor with designated responsibility', 'legal service' and 'matter'.

## ELECTRONIC MONITORING

**A bail support that helps keep people connected to employment, family and community**

### What's changed?

Changes to the Bail Act (1980) in 2018 allow GPS electronic monitoring as part of a bail undertaking (Section 11).

### How it works

The condition is usually requested by the Defence Lawyer or Police Prosecutor and supported by the Magistrate. The GPS device is fitted the same day at any 24-hour Watchhouse. Queensland Police manages GPS electronic monitoring, and has engaged Broadspectrum as its service provider.

### Benefits of electronic monitoring

- Reassures victims
- Encourages compliance
- Doesn't impede employment, family life or recreation



For further information, contact:  
Belinda Farrell, Contract Manager  
[GPSQuestions@broadspectrum.com](mailto:GPSQuestions@broadspectrum.com)



# More concerns on youth justice reform

BY DEBORAH KIM



On 13 May 2019, the ABC's *Four Corners* aired 'Inside the Watch House', a report on children in Queensland watch houses and the abhorrent conditions to which children as young as 10 were being subjected.

What followed was unprecedented media coverage of the youth justice crisis in Queensland. After intense pressure from key stakeholders across the country to 'get children out of watch houses' as a matter of priority, the Queensland Government leapt into action. A new Department of Youth Justice was announced and a historic commitment of \$550 million was made towards youth justice initiatives.

This may all seem like old news. After all, it was only in June that *Proctor* featured a comprehensive four-page spread on the 'youth justice crisis' and the relevant statistics, painting a bleak picture of the reality Queensland is facing.

However, the newest development in this space is the recent Youth Justice and Other Legislation Amendment Bill 2019 (the Bill), which was introduced into Parliament on 14 June 2019 and referred to the Legal Affairs and Community Safety Committee for consultation. The Bill seeks to significantly amend provisions in the *Youth Justice Act 1992*, the *Bail Act 1980* and the *Police Powers and Responsibilities Act 2000*.

In its submission to the committee, QLS welcomed several positive aspects of the Bill, for which the Government must be commended. These included the timely finalisation of legal proceedings, removal of legislative barriers to bail, and the use of detention as a last resort.

But the Bill contains significant issues, which QLS identified in its submission. Clause 4 aims to amend section 150 of the *Youth Justice Act 1992*, so that in sentencing a child convicted of manslaughter of a child under 12 years of age, the court must treat the age of the victim as an aggravating factor. QLS strongly urged the removal of clause 4 from the Bill.

Clause 4 seeks to implement the recommendation of the Queensland Sentencing Advisory Council (QSAC) and its final report on sentencing for criminal offences arising from the death of a child. However, the purpose of QSAC's recommendation was to recognise the defencelessness and vulnerability of child victims by virtue of their age. It was intended to target adult offenders who are convicted of child homicide, and make clear that violence against children will not be tolerated. QLS opposes the application of this provision to children charged with such an offence.

Further, what clause 4 fails to consider – highlighted by QLS President Bill Potts during the public hearing on 19 July – is that children convicted of such an offence are most likely victims of abuse and/or neglect themselves, and might be in need of the same kind of protection as their victims. It is also likely that the proposed amendment is likely to be redundant and unnecessary, given that, to date, there has only been one previous incident involving a young offender where the proposed subsection would have been applicable.

QLS also raised concerns with clause 43, which seeks to amend section 421 of the *Police Powers and Responsibilities Act 2000* (PPRA) to place a duty upon Queensland Police Service officers who are questioning a child to arrange prompt access to legal representation. However, there are several reasons why the proposed section 421(1A) is problematic. It only applies to summary offences; the reference to a 'legal aid organisation' under the PPRA does not capture Legal Aid Queensland; and the phrase 'attempt to notify' is undefined and fails to adequately oblige officers to record their attempts at contact.

The committee tabled its report on the Bill on 9 August 2019. While QLS was extensively acknowledged for its submission, the committee recommended that the Bill be passed. The Government passed the Bill on 22 August.

Youth justice is not uncharted territory for QLS. For years, QLS has advocated for the fundamental rights of children in the criminal process, under the charter of youth justice

principles in the *Youth Justice Act 1992* and section 33 of the soon to commence *Human Rights Act 2019*.

QLS has always focused on the importance of preventative measures in reducing offending and reoffending in young people. Research demonstrates three things. First, child offenders are often born into, and grow up in, situations of unimaginable disadvantage. Second, placing such vulnerable individuals into watch houses strips them of access to health, education and supervision. Third, exposure to the criminal justice system at a young age *will* increase the likelihood of criminal conduct at an older age and does *not* address the underlying social causes of youth crime.

Mr Bob Atkinson AO's 2018 'Report on Youth Justice' refers to the 'Four Pillars' for youth justice reform, which have since been adopted by the Government. These are:

1. intervene early
2. keep children out of court
3. keep children out of custody; and
4. reduce reoffending.

Based upon its long-standing position, and these Four Pillars, QLS continues to call for:

- an increase to the minimum age of criminal responsibility to 14 years
- a prohibition on children being detained in Queensland watch houses
- more strategies to reduce the numbers of youth held on remand
- ongoing funding for the legal assistance sector, Legal Aid Queensland and the Aboriginal and Torres Strait Islander Legal Service.

In short, QLS urges the Government to make a genuine commitment to creating long-term, sustainable solutions for youth justice in Queensland.

Deborah Kim is a Queensland Law Society policy solicitor.



# QLS policy targets aged care, cultural heritage

BY PIP HARVEY ROSS



**With the assistance of the 26 Queensland Law Society standing policy committees, and more than 350 volunteer committee members, over 167 submissions advocating for legislative and policy reform were delivered during the last financial year.**

The dedication of our committee members ensures sound and balanced submissions that have a positive impact on both the legal profession and the community.

Some notable submissions in recent months include one to the inquiry into aged care, end-of-life palliative care and voluntary assisted dying, and another for the review of the Cultural Heritage Acts.

In April, QLS contributed to the inquiry into aged care, end-of-life and palliative care and voluntary assisted dying. The Society sought input from members on a number of occasions and the final submission, curated with the support of the QLS Elder, Health and Disability and Succession Law Committees, reflected evidence-based law and the views of our members. The submission highlighted a number of issues facing aged care in Australia (including standards of care, facilities and practices) and the need for improved access to palliative care.

QLS recognises that voluntary assisted dying is a sensitive and personal issue which attracts divergent views. In response to the inquiry, the Society provided a framework of good law, should the Government introduce laws enabling voluntary assisted dying in Queensland. On 5 July, QLS Health and Disability Law Committee Chair Simon Brown and Deputy Chair of the Elder Law Committee Rebecca Anderson represented QLS at a public hearing of the inquiry, which is being conducted by the parliamentary Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee.

The committee, which received more than 2000 submissions and hosted over 15 public hearings and forums, is due to report by 31 March 2020.

The Department of Aboriginal and Torres Strait Islander Partnerships is currently undertaking a review of the *Aboriginal*

*Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003*.

The review intends to examine whether the legislation is still operating as intended, is achieving outcomes for Aboriginal Torres Strait Islander peoples and other stakeholders in Queensland, is in line with the Queensland Government's broader objective to reframe the relationship with Aboriginal and Torres Strait Islander peoples, and whether the legislation should be updated to reflect the current native title landscape.

The QLS response to a related discussion paper, compiled with the assistance of the Mining and Resources Law Committee, addressed the adequacy of the current definition of 'cultural heritage' and the need for that definition to be properly interpreted so that its scope is not restricted, the process for identification of Aboriginal and Torres Strait Islander parties and the possibility of changing the 'last claim standing' provision, land user obligations, compliance mechanisms, and updating the system of recording cultural heritage.

The Mining and Resources Law Committee and the Reconciliation and First Nations Advancement Committee look forward to making further submissions as the review progresses.

QLS and its representatives have also appeared at a number of parliamentary inquiries this year. At the end of August, President Bill Potts, Ken Mackenzie of the Criminal Law Committee, and members of the legal policy team appeared at the public hearings on two private members' Bills: the Criminal Code (Trespass Offences) Amendment Bill 2019 and the Weapons and Other Legislation (Firearms Offences) Amendment Bill 2019.

The Criminal Code (Trespass Offences) Amendment Bill 2019 was introduced by Dale Last MP, with the aim of protecting legitimate and legal businesses in Queensland from unlawful trespass activities. The Bill introduces three new criminal offences to Queensland's trespass laws. QLS submitted that the new offences were arbitrary, captured an exceptionally broad range of conduct and imposed excessive penalties. Overall, QLS considered that the explanatory notes to the Bill were insufficient to justify such amendments.

The Weapons and Other Legislation (Firearms Offences) Amendment Bill 2019, introduced by Trevor Watts MP, seeks to increase penalties for certain weapon and firearm offences and introduce a firearm prohibition order framework. QLS raised a number of issues with the Bill, including that the proposed discretion conferred on the Police Commissioner to impose firearm prohibition orders ought to instead be conferred on a judicial officer.

The Bill also fails to comply with a number of fundamental legislative principles by having insufficient regard to the rights and liberties of individuals, including by reversing the onus of proof, imposing disproportionate penalties, not being sufficiently clear and precise, and not containing adequate rights of review.

Both of these Bills are being examined by the Legal Affairs and Community Safety Committee, which is due to report by 1 November this year.

Finally, the QLS legal policy team is also keeping members updated on the progress of the Civil Liability and Other Legislation Amendment Bill 2018. QLS and its representatives (from the Accident Compensation and Tort Law and Not for Profit Law Committees) attended the public hearing on the Bill on 11 February 2019.

We are pleased to note that, during the second reading speech debate on 12 June 2019, the Attorney-General identified a number of changes to be moved during consideration in detail to "strengthen and clarify the Bill" as a result of the submissions received, including the QLS submission and appearance at the parliamentary hearing.

This is an excellent acknowledgement of the hard work of our committees in carefully identifying the issues and potential consequences of proposed legislation and in recommending workable solutions which might be adopted by government instead.

For more details and updates on developments in the personal injury law space, members and non-members can register to attend the annual QLS Personal Injuries conference on 11 October. See [qls.com.au/events](http://qls.com.au/events).

At the time of writing, Pip Harvey Ross was a Queensland Law Society legal policy clerk. This article was prepared under the supervision of solicitors on the QLS legal policy team.

# Mother's 'wrong beliefs' lead to appeal loss

WITH ROBERT GLADE-WRIGHT



## Property – no error in court's treatment of non-commutable military pension as a financial resource (income stream)

In *Carron & Laniga* [2019] FamCAFC 115 (8 July 2019) the Full Court (Aldridge, Kent & Austin JJ) considered a property case where the wife had been made redundant from the Australian Defence Force and had interests in the Military Superannuation Benefits Scheme. The first was in the growth phase and the second was in the payment phase as a non-commutable pension of \$520 per fortnight.

At trial, neither party sought a splitting order. The wife's expert provided a notional capital valuation of the pension interest of \$230,148, but otherwise confirmed that this amount could not be 'cashed out' in any way. Judge Egan treated the wife's growth phase interest as property, but found that the pension interest was a financial resource. The husband appealed, arguing that both interests were 'property'.

The Full Court said (from [29]):

"The wife opposed her MSBS pension being attributed any notional capitalised value because it could not be commuted and the husband did not seek any...splitting order in relation to it, as the trial judge correctly recognised. (...)

[36] In property settlement proceedings, there is no need to ascertain the capitalised value of a superannuation interest, much less one in the payment phase being paid in the form of a non-commutable pension, unless a...splitting order is sought in relation to the interest (*Welch & Abney* [2016] FamCAFC 271...) At trial, neither party sought a...splitting order in respect of the wife's MSBS pension.

[37] The Act only provides that a superannuation interest must be valued before it is amenable to a splitting order (s90XT(2)) (...)

[39] Relevantly, the wife's entitlement to the MSBS pension crystallised in 2000 following her redundancy from employment in the armed services, shortly after the parties' marriage in 1998. She is entitled to receive the pension for life, during which time it cannot be commuted or alienated. While it will continue to be a modest income stream for her, it will not be enough alone to sustain her and she will always need to supplement it with other income from paid work. Such features of the pension made it readily identifiable as a financial resource rather than an asset. ..."

## Children – judge erred by restraining overseas travel without considering relevant matters set out by Full Court in *Line & Line*

In *DeLuca & Farnham and Anor* [2019] FamCAFC 100 (13 June 2019) Le Poer Trench J had ordered that neither party remove the children from Australia without the written consent of the other or an order, and that the children's names be placed on the watch list. The mother appealed so as to facilitate visits to family in Europe by the children.

The Full Court (Strickland, Kent & Watts JJ) said (from [34]):

"...The primary judge had an obligation to give adequate reasons which allowed the parties to understand why his Honour assessed the risk of flight as being too great...(Bennett...[1990] FamCA 148...)

[35] In *Line & Line* [1996] FamCA 145...the Full Court set out...relevant matters...:

4.49 The...degree of risk that the departing parent...will...choose not to return. In assessing that...considerations are the existence (or otherwise) of continuing ties...the existence and strength of possible motives not to return (...)

4.50...[W]hether the country...is...a signatory to the [Hague Child Abduction Convention]...[although] there may be little to prevent him or her...travelling on to a non-convention country.

4.51 [T]he financial circumstances of both parties,...hardship...the departing parent would suffer by the imposition of security at a particular level as compared with the hardship which the non-departing parent would suffer if the security were fixed at a lower level. ...

[36] The primary judge did not discuss why he assessed the risk of flight of the parties...as too great, and why he put the travel restriction in place until 2027. Most of the considerations referred to in *Line* were not explored. (...)"

The Full Court re-exercised discretion, making an order for overseas travel.

## Child support – paternity declaration under s106A CSAA made four years after refusal of mother's application for child support assessment

In *Calafiore & Netia* [2019] FamCAFC 132 (2 August 2019) the parties' child was born after separation. The mother's application for child support assessment in May 2013 was

refused, the father (who was not named on the birth certificate) disputing paternity. Four years later the mother applied for a paternity declaration under s106A of the *Child Support (Assessment) Act*. The respondent submitted to a paternity test which confirmed that he was the father. A judge of the FCC declared paternity but declined to order that child support be backdated to the child's birth, saying that it was "the CSA's decision as to when the father pays child support from" ([9]).

On appeal, Kent J (with whom Tree and Hogan JJ agreed) said (from [23]):

"Following the making of an assessment application, if the registrar refuses the application on the grounds that the registrar 'was not satisfied under section 29 that a person who was to be assessed...is a parent of the child', the applicant may apply to the Court under s106A of the CSAA seeking a declaration that the 'person should be assessed in respect of the cost of the child because the person is a parent'.

[24] Then, as occurred here, if the Court grants that declaration, s106A(6)(a) provides:

'(a) If the reason referred to in paragraph (1) (b) was the only reason for the Registrar refusing the application – *the Registrar is taken to have accepted the application for administrative assessment of child support.*' (*emphasis added*)

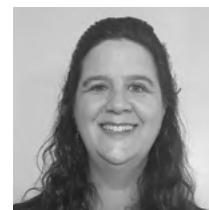
[25] It follows, then, that the declaration granted by the trial judge...operated retrospectively, pursuant to s106A, to render the father liable for child support from the commencement of the 'child support period' being the day the mother made her application on 2 May 2013. (...)

[40] Her Honour's conclusion...that it [was] a matter for the CSA to determine the date upon which the assessment would commence was an error of law."

The appeal was allowed and the case remitted for re-hearing.

Robert Glade-Wright is the founder and senior editor of *The Family Law Book*, a one-volume loose-leaf and online family law service ([thefamilylawbook.com.au](http://thefamilylawbook.com.au)). He is assisted by Queensland lawyer Craig Nicol, who is a QLS Accredited Specialist (family law).

# Great benefits for regional members



WITH KATHERINE GRAFF, PRINCIPAL LIBRARIAN RESEARCH AND EDUCATION

## Supreme Court Library Queensland serves the legal profession across the whole of Queensland.

Although our core users have historically been based in Brisbane and the south-east corner of the state, we are constantly looking at ways to expand our coverage and ensure that legal practitioners in regional Queensland are both aware of our services and easily able to access them.

Our regional library collections in some of the larger Queensland courthouses (see table below) help to meet the demand of our regional users. Each location offers free use of public computers as well as free wi-fi, printing and photocopying facilities.

Being able to access our services anywhere in Queensland is a priority for us, which is why we are continually improving and expanding our range of online offerings. Here are a few of the services you can access wherever you are:

## Free legal research and document requests

Did you know you don't need to be in Brisbane to access two of our most popular services? Our experienced library staff can help with your legal research and document requests whether you're in Cairns or Coolangatta.

QLS members can have up to 30 minutes of free research assistance and 10 free documents every day. To make a request, go to [sclqld.org.au/research](http://sclqld.org.au/research).

## Virtual Legal Library (VLL)

VLL is an online resource that can help you with your legal research and case preparation. QLS members who are sole practitioners or in small firms of five or fewer practising certificates are eligible to apply for this free resource.

VLL provides free online access to a large number of key legal publications from leading publishers LexisNexis, Thomson Reuters, OUP, Federation Press and CCH. Available publications span civil, criminal and family law, and include core commentary services, law reports, textbooks and journals.

If you haven't signed up yet, visit [sclqld.org.au/vll](http://sclqld.org.au/vll) and join members across Queensland who are already enjoying the benefits of this ground-breaking online resource.

## Online training and support

You don't need to be in Brisbane to access training and support in using our wide range of legal resources.

Our research and training librarians offer free training to regional members via Skype. Get training in legal research skills, using VLL or CaseLaw basics – sessions can be tailored to your needs. To learn more, discuss your training needs or to book an online session, email us at [informationservices@sclqld.org.au](mailto:informationservices@sclqld.org.au) or phone 07 3247 4373.

Katherine Graff is Supreme Court Library Queensland Principal Librarian, Research and Education.

## Regional courthouse libraries

Location	Address	Opening hours and access
<b>Cairns</b>	Level 3 Courts Complex 5 Sheridan Street Cairns	8.30am–4.30pm, Monday to Wednesday 9.30am–1.30pm, Thursday to Friday Closed on weekends and public holidays Please sign in at security on arrival.
<b>Rockhampton</b>	Ground floor Supreme and District Courts Corner East and Fitzroy streets Rockhampton	8.30am–4.30pm, Monday to Friday Closed on weekends and public holidays Please sign in at security on arrival.
<b>Townsville</b>	Level A Supreme Court Townsville 31 Walker Street Townsville	9am–5pm, Monday to Friday Closed on weekends and public holidays Please sign in at security on arrival.

## Selden Society lecture three

Join us for the third and final Selden lecture of 2019: 'Using and proving history in constitutional cases', presented by Dr Caitlin Goss of the TC Beirne School of Law.

5.15 for 5.30pm,  
Thursday 7 November  
Banco Court  
Queen Elizabeth II Courts of Law  
Level 3, 415 George Street, Brisbane

Registration opens later this month.  
Visit [sclqld.org.au/selden](http://sclqld.org.au/selden) for details.



# Federal Court casenotes

WITH DAN STAR QC



## Administrative law and contempt of court – findings of contempt set aside – primary judge denied procedural fairness to convicted

*Jorgensen v Fair Work Ombudsman* [2019] FCAFC 113 (8 July 2019) was an appeal from orders made in the Federal Circuit Court of Australia (FCCA) which had the effect of convicting the appellant (Mr Jorgensen) of contempt of court and sentencing him to a period of imprisonment. In late 2014, the Fair Work Ombudsman commenced proceedings against Jorgensen and one of his companies alleging that the company had contravened s716(5) of the *Fair Work Act 2009* (Cth) because it had failed to comply with compliance notices which required the company to pay \$29,956.75 for outstanding wages and entitlements of three of its employees. The company was ordered to pay a pecuniary penalty of \$55,000 and to comply with the compliance notices and Mr Jorgensen was ordered to pay a pecuniary penalty of \$12,000. In 2015, the Ombudsman obtained freezing orders which had the effect of restraining the company from disposing of or dealing with any of its assets other than in certain specified circumstances. In 2017, the Ombudsman commenced proceedings against Mr Jorgensen in the FCCA alleging that he was in contempt of court by causing the company to breach the freezing orders. In 2018, the primary judge convicted Mr Jorgensen of nine counts of contempt of court. On 10 May 2018, the primary judge sentenced Mr Jorgensen to imprisonment for 12 months, but ordered that he be released on 20 May 2018 if he paid a sum of money to the Ombudsman which represented the amount that the company had initially been ordered to pay the Ombudsman in the underlying proceeding. Mr Jorgensen appealed both his conviction and the sentence imposed on him by the primary judge. The orders made by the primary judge were stayed pending the hearing and determination of the appeal and Mr Jorgensen was released on conditional bail.

The conviction appeal raised three issues (at [8] and [88]-[92]):

- whether Mr Jorgensen was denied procedural fairness during his trial in the FCCA by reason of the primary judge's excessive and inappropriate interventions during the course of his evidence
- whether the primary judge misdirected himself in relation to the proper interpretation of the "ordinary and proper course of business" exception in the freezing orders and the relevant mental element of the contempt charges which had been brought against Mr Jorgensen
- the primary judge's use of a particular documentary exhibit in making what, at least on his Honour's view of the contempt charges, was an important finding against Mr Jorgensen.

The court first considered the ground of a denial of procedural fairness by reason of the primary judge's excessive interventions. Greenwood, Reeves and Wigney JJ explained at [93]: "Where, as here, an appeal involves grounds involving allegations of apprehended bias or denial of procedural fairness along with other substantive or discrete grounds, the appeal court should first deal with the issues of bias or procedural fairness. That is because those grounds, if made out, would strike at the validity of the trial and require the matter to be remitted for retrial: ...[citations omitted]. If the bias or procedural fairness ground is made out, it may then be inappropriate to determine the remaining grounds of appeal".

However, the Full Court held that this was a case where it should consider and determine the remaining grounds of appeal even though Mr Jorgensen succeeded on the procedural fairness ground of appeal (at [161]-[165]).

Mr Jorgensen succeeded on all issues (at [235]-[240]). The proviso that an appeal may be dismissed where there is no substantial miscarriage of justice (s28(1)(f) of the *Federal Court of Australia Act 1976* (Cth)) did not apply to any of the errors made by the primary judge. The Full Court made orders setting aside the declarations and order that had the effect of convicting Mr Jorgensen

of contempt and remitting the matter to the FCCA for retrial by a different judge.

On the main ground of procedural fairness, the Full Court held that a detailed review and analysis of the trial transcript clearly supported a finding that the trial judge's interventions were such that both the 'disruption ground' and the 'dust of conflict' ground were made out (at [105]). The 'disruption ground' is made out when the interventions unfairly undermine the proper presentation of a party's case (at [99]). The 'dust of conflict' ground is made out when the questioning or intervention is "such an egregious departure from the role of a judge presiding over an adversarial trial that it unduly compromises the judge's advantage in objectively evaluating the evidence from a detached distance" (at [99]): *R v T* at [38]. There were 12 features of the primary judge's interventions that concerned the Full Court (at [109]-[141]).

In summary, Greenwood, Reeves and Wigney JJ said at [148]: "The primary judge significantly interrupted and disrupted the orderly flow of Mr Jorgensen's evidence concerning what turned out to be the determinative issues. His Honour was also sarcastic, disparaging and dismissive of significant parts of Mr Jorgensen's evidence. His Honour's aggressive and, at times, unfair questioning appeared on occasion to confuse Mr Jorgensen and cause him to make concessions he may not otherwise have made. His Honour also frequently cut Mr Jorgensen off while he was endeavouring to explain critical aspects of his case, in particular his belief that the impugned transfers fell within the 'ordinary and proper course of business' exception. The extent and nature of the primary judge's interventions were such that it is impossible to avoid the conclusion that Mr Jorgensen was relevantly impeded from 'giving his account in such a way as to do himself justice': cf. *Lockwood v Police* (2010) 107 SASR 237 at [16]".

### Administrative law and migration law – ground of proper, genuine and realistic consideration – whether the primary judge should have drawn a *Jones v Dunkel* inference from the failure of the Minister or a member of his staff to give evidence

In *Chetcuti v Minister for Immigration and Border Protection* [2019] FCAFC 112 (2 July 2019) the appellant appealed from the dismissal of his judicial review application by a single judge of the Federal Court. The underlying decision was a decision by the respondent (the Minister) personally under s501(3) of the *Migration Act 1958* (Cth) to cancel the appellant's visa on character grounds.

The first ground of appeal, which succeeded, was that the Minister committed jurisdictional error by failing to give proper, genuine and realistic consideration to the merits of his decision to cancel the appellant's visa. Central to this ground was whether the Minister considered the material before him for a time too short to allow an active intellectual process to be applied to the merits of the decision. The appellant's primary contention was that the Minister spent no more than 11 minutes considering the material before making his decision. The Minister contended that the evidence demonstrated that he could have taken up

to 1 hour, 9 minutes. The majority (Murphy and Rangiah JJ) accepted the appellant's case that the Minister spent only up to 11 minutes considering the materials, while O'Callaghan J dissented on this point. The Minister accepted that if the court were to find that his consideration was for the time period contended by the appellant, the Minister could not have engaged in the active intellectual process in respect of the material that was necessary to discharge his statutory function.

In determining this first appeal ground, the majority considered the application of the rule in *Jones v Dunkel* (1959) 101 CLR 298, as neither the Minister nor any member of his staff gave evidence as to when he began his consideration of the decision (at [82]-[91]).

The Full Court rejected the second ground of appeal that the primary judge failed to accord procedural fairness to the appellant as a self-represented litigant by not informing him that he could seek further discovery from the Minister concerning how or when the decision was made; ask the court to draw inferences from the Minister's failure to put on evidence about what the Minister did to consider the decision; and ask the court to issue subpoenas to the Minister and/or others to give evidence (at [102]-[111]).

### Evidence – appeal of ruling excluding line of questioning in cross-examination – importance of 'explicit clarity' in pleadings

In *Oztech Pty Ltd v Public Trustee of Queensland* [2019] FCAFC 102 (21 June 2019) the Full Court dismissed an appeal from a ruling excluding a line of questioning in cross-examination for lack of relevance. Central to the Full Court's judgment was the manner in which the case was conducted prior to and at trial. Middleton, Perram and Anastassiou JJ considered the parties' obligation to plead all causes of action and defences explicitly (at [28]-[35]).

Dan Star QC is a Senior Counsel at the Victorian Bar, phone 03 9225 8757 or email [danstar@vicbar.com.au](mailto:danstar@vicbar.com.au). The full version of these judgments can be found at [austlii.edu.au](http://austlii.edu.au).

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# Your month-end reality check

BY GRAEME MCFADYEN



**All managing partners – regardless of firm size – should regularly step back from client work and carefully assess where their practice is going in terms of both budget and operational goals.**

Larger firms enjoy the benefit of a finance team which provides regular and informed oversight across the practice and whose monthly financial reports highlight any unbudgeted or unusual activity. However, operational oversight has strategic, as well as financial, implications and it is necessary to keep an eye on the business model of the firm.

Many smaller practices, on the other hand, operate without the benefit of a finance person who can dissect the monthly financial statements generated by the firm's practice management system into meaningful management reports. These smaller practices can frequently be at risk of overlooking or misinterpreting key data. For smaller practices, in particular, the success of the legal practice is at least as dependent on the principal's practice management skills as their legal skills.

Below is a checklist of relevant financial and operational information that should be reviewed each month end to ensure that the managing partner, as a minimum, is informed on the key financial and operational metrics.

## Key financial metrics

1. Net profit should be at least 25%. To achieve this, gross profit should be at least 65% of revenues – which means fee earner salaries (excluding equity partners) plus superannuation should not exceed 35% of revenues. If the return is less than 25%, then principals need to critically assess whether their low profitability is a consequence of the areas of law in which they practise (perhaps too much reliance on low-value work), the staff mix utilised (perhaps the work is priced on the basis it is done by paralegals but in fact solicitors are doing it to achieve their chargeable time targets), the fees charged are too low, or the level of overheads is too high. The harsh commercial reality is that,

unless principals are earning more than 25% of revenues, they are just buying themselves a job and/or lifestyle.

2. Ensure all work in progress (WIP) balances greater than \$500 – and preferably all balances, regardless of size – and older than 90 days have been billed, excluding only contingent fee matters. WIP is usually the largest asset on the practice balance sheet, yet more often than not there are no policies governing the management of WIP. Sensible cash flow management requires that most of the previous month's WIP should be billed at month end. To achieve this, principals need to ensure that their practice mix will allow for monthly invoicing on the majority of files.
3. Review WIP write-offs at time of billing to ascertain the reasons. You need to ascertain whether the problem is fee earner seniority (charge rate), too much time charged to the matter, or excessive caution on the part of the responsible partner.
4. Debtor terms should be seven or 15 days, not 30 days. For all balances older than 30 days you need to know why the balance is unpaid. Was the client kept informed? If the balance is older than 60 days, you need to determine whether the client is worth keeping. Email clients a copy of the invoice once the debt is seven days overdue. Statements are a waste of time.

## Key operational metrics

1. Analyse monthly WIP production by fee earner to assess productivity across the firm. Production should represent in aggregate better than three times fee earner salary costs including superannuation. If there is a consistent shortfall, then you need to ascertain whether the problem is salary, chargeable hours produced or charge rate. If the work does not justify the charge rate, then you need to address the staffing, the technology employed and the desirability of the work.
2. Compare monthly revenue by area of practice with budgeted revenues. This will provide insight as to which areas are meeting budget and which are not. You need to understand why not.

3. Where did you receive your new business from that month? Was it via direct enquiries based on your marketing or was it through a referral network? Knowing where your business is coming from each month assists you with understanding what is working and what is not. If you don't know the answer, start asking all new clients where they heard about you.
4. Request your IT manager/provider to confirm weekly that your files are being backed up on the cloud at least twice daily.

However, merely reviewing financial and operational key performance indicators will not assist law firm performance unless remedial action follows in respect of identified areas of non-performance.

The question is: how long do you wait before taking the necessary action? And if an area continues to under-perform, do you replace the staff or cease practising in that area altogether?

This is where law firm leadership is required. And this is where many firms struggle because such decisions are going to be disruptive, uncomfortable and contentious. However, those firms prepared to address the weaknesses in their business model stand to significantly improve their profitability, whereas those firms not prepared to adapt are seriously jeopardising their future.

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](mailto:graeme@misso.edu.au).



# Basic entitlements – long service leave

BY ROB STEVENSON



## There is a National Employment Standard dealing with long service leave, but there is no uniform national scheme.

The result is that long service leave currently remains under the coverage of state law (which varies from state to state). The *Industrial Relations Act 1999* (Qld) provides that full-time employees become entitled to 8.6667 weeks of long service leave after 10 years of service. Part-time and long-term casual employees are also entitled to accrue a proportional long service leave entitlement, calculated on their actual hours of service.

When long service leave is taken is a matter for agreement between an employer and employee. However, when there is no agreement, an employer can direct an employee to take at least four weeks long service leave by giving at least three months written notice.

From an employer perspective it is wise to encourage employees to take their long service leave. It is desirable for employees to be able to take a break after a lengthy period of employment and come back to work refreshed. It is also desirable for employers to avoid the accrual of significant unpaid entitlements. Employers should be careful to diary note when long service leave is due so that large amounts of accrued leave do not accrue on their books.

What about pro rata entitlements? Employees are entitled to pro rata payment of long service leave if their employment ends after seven years but less than 10 years if:

- the employee's service is terminated by their death
- the employee terminates their service because of their illness or incapacity, or because of a domestic or other pressing necessity
- the employer dismisses the employee for a reason other than the employee's conduct, capacity or performance (for example, redundancy), or
- the employer unfairly dismisses the employee.

If an employee has medical evidence of a significant illness, then that will usually satisfy this requirement. Other circumstances that have given rise to a pro rata entitlement are:

- a new parent resigning to look after their child, a sick partner or children
- family relocation due to the employee's partner getting a new job in another town
- the employer relocating and the employee being required to travel substantial distances to attend work each day.

An employer is able to ask for reasonable evidence before agreeing to make a pro rata payment. If the employer is not satisfied, the employee can apply to the Queensland Industrial Relations Commission for a payment order.

If employment ends for any reason after 10 years and long service leave has not been taken, the employee is entitled to payment of their long service leave as of right. If employment continues after the 10-year mark, the entitlement continues to accumulate and is payable on termination of employment.

Further long service leave can be taken (as opposed to being paid on termination) after 15 years of service. After that, long service leave can be taken as it accrues.

Some final points:

- Unpaid leave, such as parental leave, does not count towards long service calculations, but does not break a period of service.
- It is the same if employment ends but the employee is re-employed with the same or a related employer within three months.
- Payment is made at the employee's ordinary rate of pay.
- Long service leave cannot generally be cashed out. However, the Queensland Industrial Relations Commission can order payment on genuine hardship or compassionate grounds after the 10-year mark has been reached.
- Long service leave should under no circumstances be paid in advance.

Rob Stevenson is the Principal of Australian Workplace Lawyers, [rob.stevenson@workplace-lawyers.com.au](mailto:rob.stevenson@workplace-lawyers.com.au).



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GPO Box 834, Brisbane QLD 4001,  
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other testamentary document of the late **LOIS  
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Buderim QLD 4556 who died on 21 July 2019  
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DEVEREAUX** late of Sunbird Cottage, Hope  
Street, Cooktown, Queensland and formerly of  
Howard Street, Cooktown, Queensland, who  
died on 25 July 2016, please contact Katrina  
Winmill of the Official Solicitor  
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Ph: (07) 3564 2885, Fax: (07) 3213 9486,  
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the whereabouts of any Wills, or any other  
testamentary document of the late **LORETTA  
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# Queen of whites

BY MATTHEW DUNN



**Chardonnay is a noble grape variety and, despite some bad press, it has always ranked as the queen of white wines.**

Wine fashions may come and go, but for centuries the world's greatest and most expensive white wines have quietly relied on chardonnay to shine.

In terms of pedigree, chardonnay is an ancient creature of Burgundy in eastern France and has been the mainstay of fine white wines there across the years. Despite some colourful legends about origins in the Middle East and transport by returning Crusaders (much like shiraz), boffins at the University of California Davis (UC Davis) have done a DNA fingerprint of chardonnay to trace its origins to an interbreeding of the royal pinot noir and the humble gouais blanc in the vineyards of the Burgundian aristocracy.<sup>1</sup>

This matching is peculiar, as pinot is the great indigenous red grape of Burgundy and its crowning glory. The gouais is the complete opposite, a lesser white wine reportedly brought to Burgundy by the invading Romans from Dalmatia. The UC Davis news of this genetic discovery characterised the humble parent by saying:

"Gouais blanc is quite another story. It was considered so mediocre as a wine grape that several unsuccessful attempts were made to ban it in the Middle Ages, and it is no longer planted in France. Because vineyard owners in the United States adopted only Europe's finest wine-grape varieties, gouais blanc also is not grown in this country. Even gouais blanc's name, derived from the old French adjective 'gou' – a term of derision – reveals its position of low esteem."

Derision of the gouais may be a little unfair, judging by the lovely aged gouais produced by Chambers Rosewood in Rutherglen, which is normally sold with 10 years in bottle.

Despite the mixed parentage, chardonnay has risen to the child-counterpart of pinot noir in the great wines of Burgundy. There it gives rise to a number of different expressions from the steely minerality of petit chablis and chablis to the full throttle white burgundies of the various Montrachet and Charlemagne vineyards. These white burgundies are considered to be the finest chardonnays of all, and also have the distinction of being in the cohort of the most expensive dry white wines you can buy.

Given the reference status of the white burgundies, it is little wonder that Penfolds in Australia turned to chardonnay when it wanted

to make a stablemate for its Grange Hermitage. Penfolds Yattarna was launched in 1998 amid huge hype claiming it was one of the most comprehensive wine development projects ever conducted in Australia, and saying: "The aspiration and independence of mind across generations of Penfolds winemakers inspired the winery to embark on a program to create a white wine that stands alongside Grange".<sup>2</sup>

Penfolds' longer term ambitions were probably evident in the name Yattarna, being a First Nations word meaning 'little by little, gradually', a commitment to raising the bar of quality every harvest at about \$150 a bottle.

Australian chardonnay has vacillated in fashion and also in style. We have followed the white burgundy style and turbo-charged with oak and secondary buttery fermentation, and we have followed the chablis style and left it unoaked and crisp from cooler climates.

Sadly too often misunderstood, our chardonnay is under-appreciated and ready to be rediscovered as both noble and the perfect basis for talented winemaking to shine.

## Notes

<sup>1</sup> [ucdavis.edu/news/dna-fingerprinting-reveals-surprise-wine-grape-family-tree](http://ucdavis.edu/news/dna-fingerprinting-reveals-surprise-wine-grape-family-tree).

<sup>2</sup> [penfolds.com/en-au/wines/the-penfolds-collection/yattarna/2015](http://penfolds.com/en-au/wines/the-penfolds-collection/yattarna/2015).

## The tasting Three chardonnays were examined to give a view of the field.



The first was the accessible **Frog Belly Margaret River Chardonnay 2016**, which was palest gold in colour and had a distinct citrus lime, granite and honeysuckle nose. The palate was straightforward white peaches with a fruity attack, some subtle oaking and a subtle lingering minerality as it went on.



The second was the **Domain des Hâtes Pierrick Laroche Petit Chablis 2017**, which was straw colour and had a nose of mineral quartz and a touch of ripe peach. The palate was firm with a mineral cut accompanied by warm summer peaches rising to a mid palate of quartz and white nectarine. Oak was not evident, but the acid drive made the package refreshing.



The last was the **Serrat Yarra Valley 2018 Chardonnay**, which was pale straw colour and had straw also on the nose with ripe stonefruit and oak apparent. The palate was fulsome with buttery secondary fermentation coming through with oak initially, quickly followed by minerally nectarine coming to a crescendo of fruit acid. It was mouth-filling intensity of fruit and artistic winemaking on a mineral acid core.

**Verdict:** The Petit Chablis was much favoured but the Serrat, in the bigger bolder style, carried the day.

Matthew Dunn is Queensland Law Society policy, public affairs and governance general manager.

# Mould's maze



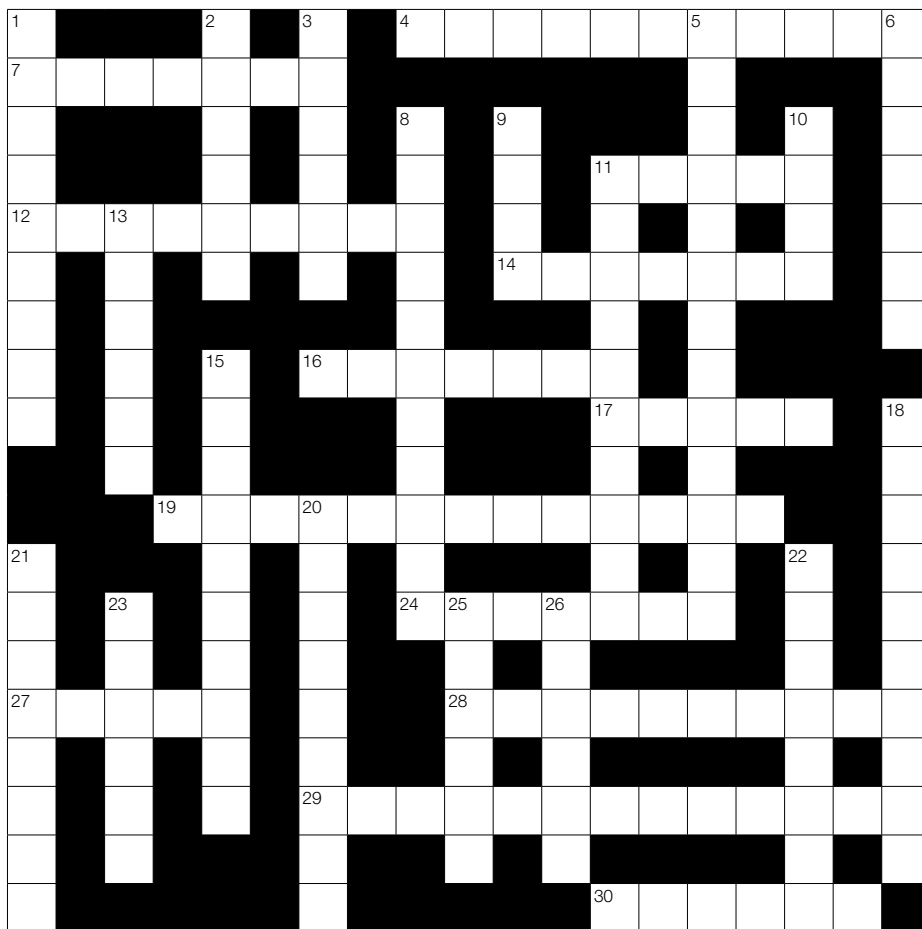
BY JOHN-PAUL MOULD, BARRISTER AND CIVIL MARRIAGE CELEBRANT | JPMOULD.COM.AU

## Across

- 4 Describing a will that has been entirely handwritten and signed by the testator. (11)
- 7 Equitable remedy commonly used in cases of breach of fiduciary duty, ..... of profits. (7)
- 11 Surname of Mackay barrister Phillip and solicitors Leslie, John, Peter, Lavinia, Ashley, Michaela, Clarissa and Jessica. (5)
- 12 Reduction or removal of a nuisance. (9)
- 14 Heir. (7)
- 16 An unwelcome person, for example, a diplomat, '..... non grata'. (Latin) (7)
- 17 Body of rules governing conduct of members of a particular religious faith, ..... law. (5)
- 19 Potential ..... are 'objects' of a trust. (13)
- 24 Employee. (7)
- 27 A minor or a person of unsound mind is not generally 'sui .....'. (Latin) (5)
- 28 Russian prison labour camp for political prisoners. (5)
- 29 Equitable remedy by which a court orders a change in a written document reflecting the parties' mutual intent. (13)
- 30 Dispute the truth, validity or honesty of a statement or motive. (6)

## Down

- 1 A ..... final offer must remain open for a period of 14 days in personal injuries pre-proceedings. (9)
- 2 Process by which land is measured or a ship is inspected for seaworthiness. (6)
- 3 Made amends for. (6)
- 5 Process of dividing liability for an injury among multiple tortfeasors. (13)
- 6 A disposition to do things impulsively. (7)
- 8 Relevant cases. (11)
- 9 Voting procedure in which both the number of creditors voting a particular way and the value of their debts is considered in deciding if a company resolution is approved or not. (4)
- 10 The extent of an equitable interest of a beneficiary under a discretionary trust is a '..... expectancy'. (4)



- 11 Originally known as the Charter of Liberties and written on parchment made from dried sheepskin, this important legal document was not issued in English until over 300 years later. (two words) (10)
- 13 Pleading in response to a counterclaim. (6)
- 15 Contact centres are utilised by parents to assist them when ..... time has been ordered. (11)
- 18 Garnishee, ..... of earnings. (10)
- 20 A female appointed to administer a deceased estate. (9)
- 21 High Court decision involving whether the *Public Service Act* imposed an unjustified burden on the implied freedom of political communication, *Comcare v .....* (8)

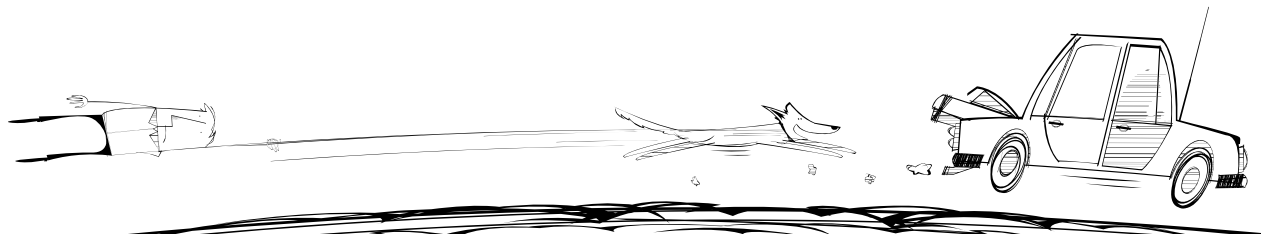
- 22 Money-laundering scheme the subject of two special leave hearings in the High Court recently, 'cuckoo .....'. (8)
- 23 A bond ordered by the Federal Circuit Court may be made with or without a ..... or security. (6)
- 25 The rule against perpetuities requires any trust to vest no later than ..... years after it has come into existence. (6)
- 26 Communicate about in an abusively disparaging manner. (6)

Solution on page 64

# Off the leash

## Will this lead us into recession?

BY SHANE BUDDEN



There have been recent warnings that we are about to enter a recession, although you never can tell because those warnings have been happening pretty much constantly since John Howard left the stage.

Who is at fault depends on who you ask – ask News Limited and it is the ALP, ask the ABC and it is the Coalition, and ask me and I will tell you that the problems probably start with dog lead manufacturers. That may sound like a stretch, but stick with me on this.

Actually, it is probably not so much the manufacturers as the people who buy the leads, or more accurately don't buy them. Based on a quick survey of my area, the people who purchase (or at least use) dog leads include me and my mate Gerard, and that is about it.

Everyone else, it seems, has opted for the Jedi Mind Control method of dog control, which never works because – and follow me closely here – Jedi Mind Control requires the subject to have a mind, and that cannot be said of most dogs.

Indeed, I regard the least credible films in history to be the *Benji* films that were popular when I was a kid, possibly because people had largely had their brains fried by watching the old-style televisions we had back then.

These produced pictures of such poor quality that we had to sit almost as close to them as teenagers sit to their iPhones, thus dosing ourselves in levels of radiation usually associated with Chernobyl. I am quite surprised that none of my friends developed super powers from this exposure (one of my friends did develop the power to burp the

alphabet, but that isn't really the sort of thing that gets you invited to join the Avengers).

In any event, the *Benji* films were a series of films – *Benji Fetches the Paper*, *Benji Saves the Day*, *Benji Solves Fermat's Last Theorem*, etc. – based on the laughable premise that dogs are extremely intelligent and can fix complex problems.

The only complex problems dogs can solve involve accessing food that is not intended for their consumption. Our dog, for example, has not yet worked out how to lift his leg when he relieves himself, such that he often wees on his own feet. The same dog, however, can open the fridge given enough time and some seriously expensive steak inside.

In any event, when I walk our dog I have him on the lead, because without it he might get onto the road and knock over a school bus. Other people, it seems, do not have the same concern and let their dogs run wild, which would be fine except that sometimes their dogs run up to my dog, who often presumes that anything that small and yappy must be breakfast, and he seems unpersuaded by any argument to the contrary.

Inevitably this leads to the other dog owner running up and grabbing their dog, all the while somehow and undeservedly occupying a lofty moral high ground that you usually only ever see in road cyclists.

Just as a road cyclist can weave the wrong way down the freeway while texting a friend, be saved from certain death by your reflexes and yet still scream obscenities at you as if you were the most evil person on Earth now that Osama Bin Laden is dead, some dog owners can hold you personally responsible for their lack of courtesy, respect for law and love of small yappy dogs.

Wait a minute, you might be saying (after all, how would I know?) don't you live in Kenmore? Aren't they all lawyers out there? Surely they respect the rule of law? Well, I hate to burst your bubble, but while it is true that Kenmore has more lawyers per square foot than an ambulance parade, I think some of these owners of unleashed dogs may be lawyers.

There is a lady who must surely be one of us, as she does have her dog on a lead but she doesn't hold the other end of it. The picture on the sign about keeping your dog on a lead only shows a seated dog with a lead and no owner. Technically, she is complying with this, but it is a distinction only a lawyer would make.

Indeed, these people might all be lawyers, who are prepared to argue that as the dog on the sign is *seated*, it is only *seated* dogs who must wear leads. This sort of thing might be why people hate us.

Strangely, there is a dog off-leash area directly beside the park through which people let their dogs run leadless, but it apparently has no appeal. Possibly the off-leash area does not have enough old people and children for their dogs to knock over, and some dog guru on Instagram has advised that healthy dogs need to knock over a certain number of people to maintain good mental health.

My point is that people have obviously stopped buying dog leads, and this may well be affecting the economy in a negative way. To be sure, we will need to round up all people who allow their dogs to run around without leads, and send them (the people) to a place where insensitivity and boorish behaviour are the norm.

So it looks like the road cycling community is about to get a boost.

© Shane Budden 2019. Shane Budden is a Queensland Law Society ethics solicitor.



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## Crossword solution

From page 62

**Across:** 4 Holographic, 7 Account, 11 Moore, 12 Abatement, 14 Legatee, 16 Persona, 17 Canon, 19 Beneficiaries, 24 Servant, 27 Juris, 28 Gulag, 29 Rectification, 30 Impugn.

**Down:** 1 Mandatory, 2 Survey, 3 Atoned, 5 Apportionment, 6 Caprice, 8 Authorities, 9 Poll, 10 Mere, 11 MagnaCarta, 13 Answer, 15 Supervision, 18 Attachment, 20 Executrix, 21 Banjerji, 22 Smurfing, 23 Surety, 25 Eighty, 26 Vilify.

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<b>Sunshine Coast</b>	Pippa Colman	07 5458 9000
	Michael Beirne	07 5479 1500
<b>Nambour</b>	Mark Bray	07 5441 1400
<b>Bundaberg</b>	Anthony Ryan	07 4132 8900
<b>Gladstone</b>	Bernadette Le Grand	0407 129 611
	Chris Trevor	07 4976 1800
<b>Rockhampton</b>	Vicki Jackson	07 4936 9100
	Paula Phelan	07 4921 0389
<b>Mackay</b>	Brad Shanahan	07 4963 2000
<b>Cannonvale</b>	John Ryan	07 4948 7000
<b>Townsville</b>	Chris Bowrey	07 4760 0100
	Peter Elliott	07 4772 3655
	Lucia Taylor	07 4721 3499
<b>Cairns</b>	Russell Beer	07 4030 0600
	Anne English	07 4091 5388
	John Hayward	07 4046 1111
	Mark Peters	07 4051 5154
	Jim Reaston	07 4031 1044
	Garth Smith	07 4051 5611
<b>Mareeba</b>	Peter Apel	07 4092 2522

# Chester & Ella Development – Newstead, Brisbane

For 22 years, Kokoda Property has prided itself on the customer-centric approach it takes to developments. Understanding that they're innately making a difference in people's lives, it's vital they choose legal partners that think as innovatively and as customer focussed as they do when it comes to settling.

There's significant anticipation for homebuyers in the lead-up to settlement and ensuring the client has a seamless experience on the big day is critical.

"With off the plan purchases our customers wait for construction to complete before getting the keys to their new home. The excitement when we're getting closer to settlement day is palpable. We've even had clients grabbing a coffee and standing outside the door of their new apartment, waiting for the keys. It's such a significant time in their lives," said Philippa Allan, Head of Marketing at Kokoda Property.

"LNG Legal shares our values when it comes to settling developments and through its use of PEXA we've seen some fantastic benefits for our customers and our business."

Lynn NG, Principal Director at LNG Legal said, "PEXA has been used on multiple of our development deals in Victoria and we are very excited to participate with PEXA for our client's Queensland projects. The main benefits we've seen are efficiency, assurance and timeliness.

**In our experience, we've had funds cleared within ten minutes, meaning funds are where they need to be in minutes,** the buyers get their keys quicker and funds are disbursed to developers and key stakeholders quicker. The biggest benefit in partnering with PEXA is **it enables LNG Legal to settle large volume at the same time.** This allows us to increase our settlement rates on a daily basis."

"We have an upcoming development in Queensland, Chester & Ella, in Newstead, of over 300 lots, and **we are excited that it will be settling on PEXA, via its developer solution PEXA Projects.** We are confident that PEXA will work with us to ensure the errors that arise in the paper process won't be an aspect and that our client, key stakeholders and buyers get the best service and experience available to them."



"...through its use of PEXA we've seen fantastic benefits for our customers"

— Philippa Allan

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