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LIJ 89.1/2

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ROSIE BATTY ON FAMILY VIOLENCE

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Rosie Batty on family violence

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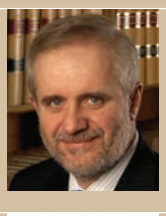

THE HON JUSTICE EMILIOS KYROU is a judge of the Victorian Court of Appeal and the Victorian patron of the Hellenic Australian Lawyers Association.

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RICHARD FLEMING is the principal at Benelex where he practises commercial and technology law. He has been a member of the LIV Ethics Committee since 2002 and its chair since 2005.

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MICHAEL DOLAN is the acting manager of the LIV Ethics Department.

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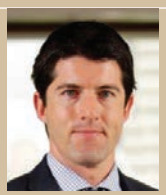

JONATHAN KING is a lawyer in the TAC department of Maurice Blackburn. He is an LIV accredited personal injury specialist.

Into the future

KATIE MILLER
president@liv.asn.au

Seize opportunities technology can bring to your legal practice.

Welcome to 2015. Children of the 1980s have been waiting for this year since we first caught a glimpse of it when Marty McFly travelled to 2015 in the movie *Back to the Future Part II* (*BTTF* in Twitter-speak).

In *BTTF*, Marty travels to 2015 to stop his future son taking part in a robbery. As part of the plan, Marty poses as his future son and, by doing so, allows the audience to get a sneak peak of life in the future.

The features of future life that attracted most of the audience's attention were, of course, the technological "advances" – flying cars, 3D holograms advertising the latest incarnation of *Jaws*, robot petrol station attendants and, of course, the hoverboard, a levitating version of the skateboard.

Yet for all the excitement it generated, the 2015 portrayed in *BTTF* was not that much different to the 1985 we were then living (that, of course, being the point of the whole movie trilogy). The devices seen in Marty's 2015 were no more than the devices used in the 1980s with a technological add-on. Kids still rode skateboards, but now they levitated. People still drove cars and suffered traffic congestion, but now the cars flew. And, bizarrely, people still used dot matrix faxes – although their speed and proliferation around the home had increased impressively.

In preparing for the new year, I have reflected on how much legal practice in 2015 differs from that of 1985. We now communicate electronically rather than by snail mail and typewriter. We have vast databases to store and code documents in discovery. We use electronic precedents and advertise on the internet and through social media. Some of us are outsourcing more routine tasks to lawyers in other countries.

However, as in *BTTF*, most of what we do is similar, if not the same, as it was in 1985. The dreaded billable hour is still with us. Clients, lawyers and courts alike are still largely bound by geography – clients attend lawyers' offices and lawyers attend courts in cities and regional centres. For all its promise, "virtual appearances" through Skype are still the exception, not the rule. The business model of many legal practices is still based on document-intensive tasks and practices, such as discovery or conveyancing. Although it seems that there is a new technological change to learn about every other week, technology has largely been used by lawyers to increase the efficiency of what we do, rather than changing what it is that we do.

In the United States, the future has arrived. Technology is changing the way legal practice is done – and, perhaps just as significantly, by whom it is done. Venture capitalists are investing in companies that will help clients to find, rate and compare lawyers more easily, as well as deliver legal services in new ways – and not necessarily by lawyers.

Technology is changing how services such as discovery and legal research are performed and the need for lawyers to provide such services. Technology is also helping lawyers to "make money while they sleep"; ie using computer programs to provide routine advice or legal documents (such as forms or contracts) to clients whenever they need them and without direct input from an individual lawyer. Such an approach frees lawyers to focus on more complex and, hopefully, more professionally and financially rewarding work and, more excitingly, frees lawyers from the bonds of the billable hour.

The LIV recognises that these technological changes present both challenges and opportunities for lawyers and their business models. To support members of the legal profession to grasp the opportunities and make technological change work for them, the LIV has established a Technology and the Law Committee. If you are interested in these issues, the committee will be developing a plan of action – keep an eye out for further details in *Law in Brief*. Also, see "IT in Practice" p82.

On an individual level, as you plan your 2015, ask yourself: Are you getting the most out of technology that you possibly can? Are there existing technologies you could use more effectively or new technologies that you need to learn more about? How could technology help you to change your business model to take advantage of new or under-utilised markets? Could technology help you to remove a part of legal practice you really don't like, such as the billable hour or routine advices?

As Marty McFly is told in *BTTF*, the future isn't written yet – so make it a good one. This year is your opportunity to build a legal practice that will still be around when Marty McFly's son takes his journey back to the future. ●

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- Administrative Law (Judicial Review)
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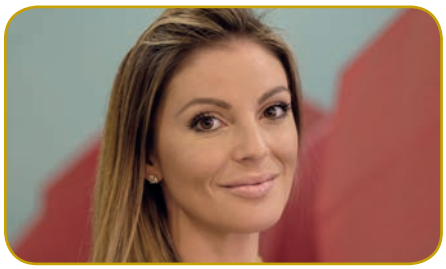

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Putting ethics first

NERIDA WALLACE
ceo@liv.asn.au

This year will be full of new challenges for the legal profession.

I was reminded recently of how important and unique our ethical framework is not just for our profession but for our clients and the community. The decisions that our members make every day are made in an ethical framework. How highly regarded this is by others was brought home when the LIV's Ethics Department presented to the Australian Crime Commission to great acclaim. This aspect of legal work is often taken for granted and we should talk about it more often outside our professional discussions. It is a key reason LIV members are sought after in many fields. I hope you find this special issue a continuing useful resource in reinforcing that message every day.

2015 offers many challenges not least a new Victorian state government with a mixed cross bench and a need to rely on respected community voices to get legislation through. The LIV is already being called on for advice and I urge you to get involved on matters important to you. I have recently been told by government representatives how highly respected the LIV committees are, a message I passed on to those attending annual general meetings of each of the LIV's expert sections. The LIV has proven capacity to make confidential submissions to proposed legislation by assembling some of the best lawyers to offer technical advice often with very little notice.

This shows that in these times of government restraint, professional bodies such as the LIV have great access, and are an invaluable link to government and opposition, with regular catch-ups. They seek our opinion, they come to us wanting our expertise. The profession's interests are put forward as well as those interests important to all Victorians and through the Law Council of Australia (LCA) those on the national front. For example, on data retention the LIV is assisting the LCA, offering legislative solutions to government to get the balance right between privacy concerns and changing security needs.

The big issue for members already on the agenda is the Legal Profession Uniform Law, including new solicitors conduct rules all due for implementation on 1 July (see www.lsc.vic.gov.au). E-conveyancing is another and powers of attorney and succession changes are already underway with more professional training planned.

The 2014 Productivity Commission report on access to justice (http://tinyurl.com/oelrj7m) included recommendations for contingency fees. Supported by the LIV Council, these fees more readily allow members to act for the "missing middle" otherwise blocked by costs. The LIV has proposed working with the Victorian government on this recommendation.

Change may not be brought about by legislation alone and direct approaches are also necessary. The LIV has taken the initiative to research and work on practical outcomes for legal aid and family violence. PriceWaterhouseCoopers has been engaged by the LIV to work with the Criminal Law and Family Law Sections to develop better business models for our members. These will form the basis of ongoing discussions with Victoria Legal Aid and in turn will inform the government's promised review.

The LIV was also asked by Chief Magistrate Peter Lauritsen to support the Family Violence Taskforce which is working on recommendations for practical solutions to increasing caseloads.

On members' issues, 2015 has brought up two challenges that will have a big impact on the day to day work of practitioners. These are the new e-conveyancing rollout and the short form costs disclosure mandated form required under the new Uniform Law.

The e-conveyancing rollout is being met with specialist training from the LIV and this year online access to this training will be available. In addition, the Legal Services Board (LSB) is seeking to clarify the impact on the Public Purpose Fund of the new e-conveyancing processes and has advised that trust account holders may continue to direct trust monies into the general account. This will mean continued interest flowing into the fund which in turn supports legal aid, law reform and community legal centres, Victoria Law Foundation initiatives and LIV programs, including the referral service, and Justice Connect. Further details are expected from the LSB shortly and I would ask that you carefully review these.

Of great importance to members is the short form costs disclosure that under the new Uniform Law covers every transaction between legal practitioners and clients of a value between $750 and $3000. This month you will have been asked to communicate with the Uniform Legal Services Commissioner on how this will affect your business. The LIV continues to make these representations, including concerns by incorporated legal practitioners. Your input is invaluable and I thank the members who have already written in on this issue.

I wish you all the very best for this year and as always, do not hesitate to contact me. ●

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Vote of confidence

Last November the state election showed that the democratic system in Australia works. There are many that disagree. I canvassed a wide range of people ranging from a professor at a Victorian university who voted for the sex party to an 18-year-old who voted but would not tell me who for.

The 18-year-old was the far more interesting voter. Not only did he register to vote but actually did so and thought about what his vote might mean before he voted. This person goes against the media's wide held view that the youth are selfish, don't care, don't take an interest in democracy and are disenfranchised.

The seat I vote in is Prahran. Prahran is the most complicated in the state at around 12 square kilometres. Traditionally a Labor seat, electoral boundary changes have complicated things. The sitting member, Clem Newton-Brown had a healthy margin. One of the most knife edge seats, the vote at 100 percent count had Mr Newton-Brown with 40 votes ahead. The final check was the preferences. He lost.

As a member of the LIV I cannot speak for our peak body itself. However I watched as the previous government systematically changed law after law.

The electorate dismissed it. The LIV defended basic human rights during its tenure.

In the end, it is us that protects you against the state, corporations and other countries. In Victoria, this is particularly so. Senior counsel again and again give pro bono advice and appear in complex human rights cases launched from our Supreme Court.

As a lawyer, I can only thank my peak body and the Bar for extraordinary efforts to protect fundamental rights.

Finally, I have supported the PNET Cancer Foundation for five years. PNET is a charity that raises awareness of brain cancer in children – the single biggest killer of children. When taking instructions for a will, I urge all practitioners to consider this charity.

The 18-year-old survived to vote. Many do not.

STEPHEN WILCOX
WILCOX AND ASSOCIATES

Whitlam's legacy

Of particular interest to me is Professor Williams' discussion on the family law reforms implemented by the Whitlam government ("Whitlam's legacy of law reform" *LIJ* December 2014).

I agree with Professor Williams that changes to the *Family Law Act* 1975 "altered the basis upon which a marriage can be dissolved . . . The law was changed to a single, no fault ground for divorce . . ." In eliminating the requirement for divorce to be fault-based, the Whitlam government enabled the introduction of a system whereby married persons could now apply for divorce without the need to find blame. I often wonder what it must have been like to practise as a family law solicitor in an era where divorce required an element of and proof of fault. It must have been a difficult process for not only clients wanting to obtain a divorce but their legal representatives who would have had to deal with the evidentiary requirements in relation to the fault element.

Nowadays, divorce is an accepted norm within our society. Section 48(1) of the *Family Law Act* 1975 (Cth) sets out one ground of divorce being that "the marriage has broken down irretrievably". The court only has to be satisfied that the parties have been separated and lived separately and apart for a continuous period of not less than 12 months immediately following the filing of the divorce application (*Family Law Act* 1975 (Cth) s48(2)). Even if parties have lived under the same roof, they can still be seen to be separated under the one roof as long as they have lived as a separated couple (*Family Law Act* (cth) s49(2)).

I believe that there is no longer the focus that may once have existed on the divorce aspect of a relationship breakdown. Indeed, it is other issues that are at the forefront of practice as a family law solicitor. Often, divorce is seen as the last step to be taken in a process where other issues such as property and children's issues play a more important role. It is these long-term issues that are most relevant to the resolution of any family law matter. ●

LOREDANA GIARRUSSO
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LIV ADVOCACY

To represent the interests of members and the wider community, the LIV actively seeks to influence policy and legislation through lobbying and submissions to government, the courts and other bodies.

Country and Suburban Law Associations representatives at a forum with the LIV.

Annual general meetings

LIV 2014 president Geoff Bowyer and LIV CEO Nerida Wallace attended the LIV AGM. Ms Wallace attended the AGM for the LIV's Litigation Lawyers Section, Administration and Human Rights section, Young Lawyers section and Property and Environmental Law section. Mr Bowyer and Ms Wallace also attended the Law Council of Australia directors meeting and AGM.

Asia Pacific Law Forum

Mr Bowyer spoke at the opening of the conference alongside LIV past president Reynah Tang. Delegates from one of China's biggest law associations the Sino-Global Lawyers Association attended, with representatives from Australia and New Zealand. The recent signing of the Australia-China Fair Trade agreement and its impact on legal practice was discussed, as well as the evolving business structures of law firms.

LIV Diversity Taskforce chair Stuart Webb with Disability Services deputy commissioner Miranda Bruyniks and Geoff Bowyer.

Country & Suburban Law Associations

Mr Bowyer worked closely with the Country and Suburban Law Associations in 2014. In November he attended the Bendigo, Geelong and the Southern Solicitors group meetings. The LIV also held a council meeting in conjunction with the Goulburn Valley Association in Shepparton which Mr Bowyer and Ms Wallace both attended. The LIV also held a forum with the presidents of the Country and Suburban Law Associations to discuss more opportunities for collaboration between the LIV and associations.

Courts

Mr Bowyer met with Court Services Victoria director of asset planning and management jurisdiction services Brian Stevenson, regarding Bendigo and Geelong Courts. Ms Wallace met with County Court Chief Judge Michael Rozenes. She also met with Chief Magistrate Peter Lauritsen, who is chairing the new Family Violence Taskforce. Other members include Victoria Police, LIV criminal and family lawyers, Victoria Legal Aid, Victorian Bar, Federation of Community Legal Centres, Domestic Violence Victoria and Women's Legal Service Victoria. For more see page 20.

LIV Disability Action Plan launch

Ms Wallace and Mr Bowyer attended the launch of the LIV's revised Disability Action Plan (DAP). Speakers included LIV Diversity Taskforce chair Stuart Webb and deputy commissioner, Disability Services Commissioner Miranda Bruyniks who said the LIV DAP addressed inequality and lack of opportunity for people with disability.

Membership associations

Ms Wallace met with CPA Australia executive general manager commercial/general counsel Craig Laughton to discuss synergies and mutual interests between the LIV and CPA. Ms Wallace also met with Australian Physiotherapy Association CEO Chris Massis to discuss membership associations.

Melbourne Commercial Arbitration and Mediation Centre Advisory Committee

Ms Wallace attended a meeting of directors where they discussed development and promotion of the centre to further facilitate international and domestic commercial arbitrations and mediations.

Monash Law School

Ms Wallace met with Monash University law school professor Adrian Evans to discuss executive education.

Refugee and Immigration Legal Centre

Mr Bowyer attended the annual dinner alongside former Chief Justice of the Family Court of Australia Alastair Nicholson. *The Age* political editor Michael Gordon discussed the current asylum seeker situation in Australia and the media discourse around the issue.

Regulation

Ms Wallace attended her regular meeting with Legal Services Board CEO and

Commissioner Michael McGarvie. Ms Wallace also spoke with LSB chair Fiona Bennett. Ms Wallace met with CEO of the Professional Standards Council Dr Deen Sanders to discuss the Professional Standards Scheme which the LIV operates under.

Slater and Gordon

LIV president Katie Miller and Ms Wallace attended the launch of the Slater and Gordon Health Projects and Research Fund, which will support initiatives focused on the improvement of care for people with asbestos related illnesses, occupation-caused cancer or a catastrophic injury. The Alfred department of Neurosurgery director Professor Jeffrey Rosenfeld gave the keynote address and spoke with Ms Miller and Ms Wallace about social policy.

Victorian Attorney-General

Mr Bowyer and Ms Wallace met with new Attorney-General Martin Pakula to discuss law and order priorities for 2015.

Wyndham Committee

Ms Wallace and Mr Bowyer attended the Wyndham Committee gala dinner in Werribee with Supreme Court Justice Betty King, Julian Burnside QC and St Vincent's Private Hospital CEO Ian Grisold. The theme was social justice in Melbourne's west and included a presentation from Wyndham Legal Service about its work.

SUBMISSIONS

Submissions made by the LIV may be viewed at www.liv.asn.au/For-Lawyers/Sections-Groups-Associations/Practice-Sections/Submissions.

Funds in Court

In a submission on the *Courts Legislation Amendment (Funds in Court) Bill* 2014 the LIV welcomed the measures in the Bill to require further transparency and accountability measure for Funds in Court. However, it expressed concerns about other aspects of the Bill, in particular clause 5 which states that there is no presumption that funds should be administered by Funds in Court rather than another administrator. The LIV is concerned that this change may result in funds being moved away from Funds in Court to other administrators who are not bound by the same standards of accountability and transparency and who do not offer comparable terms for management of funds.

Limitation of Actions – Criminal Child Abuse

The LIV's submission on the *Exposure Draft of the Limitation of Actions Amendment (Criminal Child Abuse) Bill* 2014 strongly supported removing time limits that prevent victims of child abuse from accessing civil justice. The submission provided a number of suggested amendments to clause 3 of the draft Bill that would broaden the scope of the Bill to ensure that limitation periods are abolished for physical, sexual, emotional and psychological abuse of children and that plaintiffs are not required to prove that a crime was committed.

Rights and responsibilities

The LIV's submission to the Australian Human Rights Commission's Rights and Responsibilities 2014 National Consultation congratulated the Commission's wide engagement with community groups and individuals across Australia. It reiterated the LIV's stance that federal human rights legislation is necessary to ensure that human rights are sufficiently protected in Australia and focused on the *Victorian Charter of Human Rights and Responsibilities* which has been an important first step towards improved protection and promotion of human rights in Victoria. ●

Out of the shadow

Victoria's new Attorney-General is looking forward to working with the LIV and its members after Labor's resounding victory at the state election.

Keysborough MP Martin Pakula was appointed the state's Attorney-General after the Napthine Coalition government was ousted at the November poll.

Mr Pakula said the LIV does important work in helping legal professionals with resources, education, information, support services and networking opportunities. "The LIV has helped Victoria's legal profession earn and maintain its reputation as a leader in Australia and in the region," he said. "I wish LIV's Council, executive and members all the best for the legal year."

Mr Pakula had been shadow Attorney-General since 2010 while Labor was in opposition.

He studied law at Monash University and served articles at Macpherson and Kelley Solicitors before entering politics.

One of the biggest upsets of the election was the victory of independent Suzanna Sheed, a family lawyer, who achieved a staggering 32.5 per cent swing to take the seat of Shepparton from the National Party for the first time in 47 years.

Ms Sheed, who is married to local paediatrician Peter Eastaugh, is well known in the Shepparton community as a director of SMR Legal, with more than 30 years legal experience.

But Ms Sheed admitted her win – after just four weeks campaigning – surprised even she.

"When you start a campaign like this, you have to have in mind that we're doing this to win but our goal absolutely was to try and make it a marginal seat. It would be fair to say that we exceeded our expectations," Ms Sheed said.

She said her involvement in numerous community organisations, committees and boards led her to believe that Shepparton was being neglected compared to nearby marginal electorates such as Geelong, Ballarat and Bendigo.

WINNERS: Attorney-General Martin Pakula and new MP Suzanna Sheed

"Being a safe seat does not necessarily serve you well when you look at what the marginal seats seem to achieve by way of attention and investment and services."

Ms Sheed's campaign, which centred on making Shepparton marginal with the slogan "Stand Up Shepparton. It's our turn", struck a note with voters.

She said she believed her long-term legal career would help her navigate and understand legislation while listening to constituents and pursuing their concerns could be likened to a lawyer receiving instructions from a client.

Ms Sheed was pivotal in helping the Goulburn Valley Law Association secure representation on the committee overseeing the redevelopment of the Shepparton Court House.

She said there had been a campaign for decades for an overhaul of the court building.

IBA appointment

On 1 January, Minter Ellison partner Peter Bartlett became assistant treasurer of the International Bar Association (IBA).

It is a two-year appointment, at the end of which Mr Bartlett is in line to become treasurer of one of the largest professional membership bodies in the world.

The IBA has more than 100,000 members, including 55,000 individuals, law firms and 206 bar associations and law societies (including the LIV and the Law Council of Australia). It has 140 specialist committees and organises 35 specialist conferences a year.

"It is the voice of the global legal profession," Mr Bartlett said, adding he was also on the IBA's management board, council, audit committee and risk management committee. Australian lawyers Margery Nicoll (LCA) and Stephen Macliver (Sparke Helmore) are also IBA executives.

"It's recognition of Australia's position in the international legal community, and also recognition of our contribution to the IBA."

Mr Bartlett heads the media and communication practice at Minter Ellison and is a former chairman of the firm. He is a former chair of the LIV Litigation Section and the LIV Defamation Committee.

The IBA annual conference was held in Tokyo in 2014. It was attended by 6300 delegates from 130 countries. A highlight for Mr Bartlett was meeting 82-year-old Japanese Emperor Akihito who, with Empress Michiko and Prime Minister Shinzo Abe, opened the conference.

"I was among 20 people selected to meet the Emperor and have eight minutes talking to him. It was a fascinating experience.

GLOBAL: IBA assistant treasurer Peter Bartlett

We talked about the differences between Melbourne and Sydney and the relationship between Australia and Japan."

Last held in Melbourne in 1989, the IBA annual conference will be in Vienna this year, Washington DC in 2016 and Sydney in 2017.

"We are hoping for a great turnout at the Sydney conference. It will be an important opportunity for Australian lawyers."

OUTSTANDING CONTRIBUTION: Former LIV president Mark Woods

LIV elder statesman retires

Former LIV president Mark Woods has retired from LIV Council after a record 23 years.

To mark his departure, Mr Woods was presented with a 23-year-old bottle of Grange, arguably Australia's most celebrated wine, at the LIV Council meeting in December.

Immediate past-president Geoff Bowyer commended Mr Woods for his "outstanding service to members of this profession" since 1991.

"He is a go-to person for this organisation," Mr Bowyer said.

Mr Woods was the longstanding chair of the Access to Justice committee, and has played a leading role in legal aid campaigns. He represented the LIV at the Law Council of Australia and contributed on numerous committees with the LIV and other legal stakeholders.

The remodelling of the LIV library during his term as president in 1995 was a key achievement, Mr Woods said.

"The LIV introduced online borrowing and research for our members, which was a first for the profession nationally," Mr Woods said.

He is also proud of the Legal Assistance Scheme which has referred many Victorians to member firms to undertake pro bono work for them; the reasonable legal aid system in Victoria after battles with state and federal governments over funding; the LIV's maturing relationships with interstate and overseas law societies over the past 10 years; and the introduction of the law aid funding scheme that allows small firms to do pro bono work on a contingency basis.

Mr Woods will stay on a number of LIV committees this year.

"I will continue my work on access to justice nationally and internationally, and I might have a little bit more time to devote to my practice," Mr Woods said.

Former LIV president Reynah Tang and LIV councillor Tracey Smail also retired from Council after joining in 2007 and 2011 respectively.

Call for $200 million boost to legal aid

An urgent fiscal response to the Productivity Commission's wide-ranging report on access to justice is needed, say Australia's legal service providers.

Providers are calling for the federal government to promptly implement the report's sweeping recommendations, including a $200 million per annum increase in funding for legal assistance services around Australia, with a focus on civil matters, including family law.

The 980-page report (http://tinyurl.com/oelrj7m) also recommended a review of the means test for legal aid eligibility, legal insurance for the public, recovery of costs for pro bono services, a single contact point for legal assistance and referral, consistently applied protective costs orders deemed to be in the public interest and a reversal of $40 million-plus in proposed cuts across the legal services sector nationally. The National Family Violence Prevention Legal Services Program for battered Aboriginal women is set to be axed on 30 June under the proposed cuts.

Convenor of the National Family Violence Prevention Legal Services Forum Antoinette Braybrook said Aboriginal women remain the most legally disadvantaged in Australia today. "The defunding of this program is very concerning. The annual cost of violence against Aboriginal women has been projected to reach $2.2 billion in the next seven years and this does not include the flow-on of the impact on their children," Ms Braybook said.

The Forum joined with National Legal Aid, the National Association of Community Legal Centres, the National Aboriginal and Torres Strait Islander Legal Service, the Law Council of Australia (LCA) as well as the LIV in welcoming the report which was released on 3 December.

In its report, the Productivity Commission said disadvantaged Australians are "more susceptible to, and less equipped to deal with, legal disputes" and that "numerous studies show that efficient government funded legal services generate net benefit to the community".

A funding injection of the magnitude recommended would see an extra 400,000 Australians able to access legal aid, said National Legal Aid's Bevan Warner, adding the Commission was independent and had provided a credible economic analysis of the value of legal aid.

"It's not a report by legal academics or the sector itself talking about the work that we do. It's a landmark report, a blueprint for the future. This is the country's premier economic think-tank saying it makes economic sense and provides fairer access to justice . . . [and] practical legal help.

"Practical legal help keeps people safe, it keeps people in their homes. It helps people to obtain and keep income support. It provides practical everyday support to help people resolve issues. Lawyers are part of the solution, not the problem."

LCA spokesperson Fiona McLeod SC said delivering justice was compromised while legal aid was underfunded. "The report indicates that every dollar spent on legal aid results in a benefit downstream of $1.60 to $2.25 in savings."

National Association of Community Legal Centres chair Michael Smith said: "The jury is in. There is a huge crisis in legal help across the country. There are state and territory governments not pulling their weight and the Commonwealth can do far more. We need a real national partnership to deal with this crisis in legal help".

National Aboriginal and Torres Strait Islander Service chair Shane Duffy said: "We support the report's recommendation of reversal of proposed cuts of $40 million. There is a huge level of unmet legal need out there, rather than cutting funding the government should be increasing it".

The LIV has lobbied for greater access to justice for individuals to meet unmet legal need in a number of submissions and when appearing before the Productivity Commission inquiry. It will give the report a detailed review.

2014 LIV president Geoff Bowyer said: "The LIV urges the federal and state governments to consider the best way forward. One thing is clear. It is unfair to exclude more and more people each year from access to justice because they cannot afford access to justice or do not qualify for legal aid".

Accredited specialists celebrate milestone

There will be a price to pay for the rollback of regulatory and welfare regimes advocated by Australia's major political parties, according to former Supreme Court judge the Hon Frank Vincent QC.

"A resurgent 19th century liberalist approach is increasingly being advocated and can be seen to be reflected in many policy proposals by our major political parties as we see regulatory and welfare regimes rolled back. There will be a price to pay for that approach," Justice Vincent said.

The veteran of 24 years on the bench, which included presiding over a record 200-plus murder trials, made the remarks during his keynote speech at the LIV's Accredited Specialisation 25th anniversary event on 14 November 2014.

The LIV's specialist program, started in 1989 with family law, has seen more than 950 lawyers accredited across 16 areas of law.

LIV president Katie Miller said it was a significant opportunity for lawyers to demonstrate their specialist skills. "It recognises the depth and breadth of high level, expert skills within the legal profession and assists clients to choose a solicitor with the skill level appropriate to their legal issue," she said.

Justice Vincent told the assembled specialists that lawyers today face a broader range of problems than in the past.

"No longer are we insulated against the turmoils of external strife. Although the notion has some superficial attractiveness, and certainly it seems to appeal to some of our political leaders, we cannot pull up the drawbridge against the external world.

SPECIALIST RECOGNITION: Retired Supreme Court judge the Hon Frank Vincent with Lu Cheng

"An aspect of particular concern is the potential of many of the changes occurring in this country and internationally upon the effective operation of the rule of law.

"Questions are being raised concerning the extent to which governments should be involved in the setting and maintenance of standards of a wide range of areas. The resolution of these questions will impact on the work of legal practitioners . . . the answers will determine the kind of society that will result.

"If, as I accept, the primary role of the legal system in a genuinely democratic society is to act as a safeguard against the exercise of arbitrary power, . . . the legal profession has a crucial role to play."

Justice Vincent said lawyers need to understand changes and their implications, continue education and accumulate expertise.

When Justice Vincent practised "there was the view that work in the criminal law required few legal skills and little more than a particular type of salesmanship.

"The human rights questions and complex character of the issues in criminal proceedings were not recognised for a long time.

"Criminal law is only one area in which continuing education and expertise are required if we are to maintain the respect of the community, properly advise our clients and play our part in upholding the rule of law," he said.

YOUNG LAWYER RECOGNISED

Robinson Gill lawyer Lu Cheng (commercial litigation) was one of 55 new specialists conferred at the event. Also, 25 25-year family law specialists were recognised.

Ms Cheng, 30, came to Melbourne from Shanghai in 2001 when she was 16. Dux of her high school, Nazareth College in Noble Park, and with a VCE score of 99.7 and a Premier's language award under her belt, Ms Cheng headed straight to the University of Melbourne to study law.

With Robinson Gill for almost four years, Ms Cheng said gaining specialisation was part of the firm's culture – she is one of eight accredited specialists including founding partner and former LIV councillor Tim Robinson (family, commercial litigation). As soon as she had the required five years experience she sought accreditation.

"At the first opportunity I grabbed it, it was a goal of mine. It gives me confidence but it also gives clients confidence that I hold the relevant expertise. As a young professional it is always a challenge when you meet a client and they see you are young and ask about your experience. So confidence plays an important role," said Ms Cheng who leads the commercial litigation team at her firm.

New High Court judge

Victorian Court of Appeal judge Geoffrey Nettle has been appointed to the High Court of Australia.

Federal Attorney-General George Brandis QC said Justice Nettle QC was regarded as "one of the Australia's finest jurists".

"His judgments are marked by analytical clarity and deep legal scholarship. He will be an outstanding addition to the High Court," Senator Brandis said.

Justice Nettle studied at the Australian National University, Melbourne University and Oxford University.

He began his legal career, which Senator Brandis described as "brilliant", at Mallesons Stephen Jaques in 1977 and became a partner at the firm four years later.

As a barrister, Justice Nettle specialised in commercial law, equity, taxation, constitutional law and administrative law and in 1992 became a QC.

He was appointed to Victoria's Supreme Court in 2002 and, two years later, joined the Court of Appeal.

He is the first appointment to the High Court by the Abbott government.

Justice Nettle will replace Justice Susan Crennan AC who will retire in February, five months before her term is due to end.

Justice Kenneth Hayne will also retire in 2015, after serving 18 years on the High Court, when he turns 70 – the mandatory retirement age for High Court judges – in June.

Following Justices Hayne and Crennan's departures, Justice Nettle will be the only Victorian judge on the High Court.

The Good Lawyer

THE ETHICAL WAY: Monash University professor Adrian Evans

Technical and moral challenges need to be considered equally by lawyers, according to Monash University professor of law Adrian Evans, who has just published *The Good Lawyer*, a book on legal ethics.

"Good lawyering, looked at as a moral and a technical task, is best seen as a thoughtful process. We spend a lot of time thinking through our technical legal challenges to try to reduce the number of unforeseen dramas for our clients. But somehow, there is less pre-emptive thinking about ethical challenges which can be as painful as any negligence. If you are already a lawyer, this book may be of interest where it focuses on improving our framework for ethical thought," Professor Evans said.

The Good Lawyer was launched at Monash Law Chambers on 13 November by Legal Services Commissioner Michael McGarvie.

"This book analyses what it takes to be a good lawyer and where the fault lines might be found. Halfway through the book the author makes a profound point – the need for you to be a better lawyer will never be satisfied. Better lawyering is best done by good lawyers, but a lawyer's goodness can be nurtured and developed," Mr McGarvie said.

The book includes examples of ethical failures by lawyers including the cases of Mullins (failure to reveal), Meek (rank demotion concealed by expert witness) and James Hardie (advice to shift to the Netherlands). Other examples of active and passive deceit in the book are the Australian Wheat Board case (lawyers advising deceit) and that of McGee (South Australian DPP in hit-and-run concealment).

"These cases epitomise the erosion of the public's long-held view that there should be a privileged role given to lawyers in the community," Mr McGarvie said, adding the book was aimed at the next generation of lawyer leaders.

"Fully aware of the high incidence of depression and burnout among lawyers, Professor Evans suggests vaccinating law students against depression and apathy by injecting them with ethical awareness and washing them with justice.

"A good lawyer for Professor Evans is one who stays engaged with practice, seeks justice and avoids exhaustion or disillusion. Better lawyers, he argues, need an exciting, compassionate and justice-focused workplace where character development, judgment and resilience are prioritised and where ethics are valued, not just as a creed to live by but as a business strategy itself."

See a review of *The Good Lawyer* on page 70.

To order a copy visit the LIV Bookshop online at www.liv.asn.au.

Expert advice free

A free ethics CPD video featuring experts from the legal profession is to be released by the LIV in March.

It will be available to all practising and new solicitor members and can be viewed remotely.

The video is an ethics panel discussion moderated by acting manager of the LIV Ethics department Michael Dolan. The panel features Monash University adjunct professor and former Family Court judge the Hon Nahum Mushin, Clayton Utz special counsel Nicole Ryan-Green; Riordan Legal director and past LIV president Danny Barlow; and Galbally & Rolfe founding partner Bob Galbally.

Topics covered in the video are based on calls to the LIV ethics advice line, which receives more than 80 calls a week from lawyers seeking advice.

"Several typical real-life ethics scenarios such as conflict of interest, confidentiality, duty to the court and recording telephone conversations are covered. These are the very sorts of questions we receive from practitioners every day on the LIV ethics advice line." Mr Dolan said.

He said the video is of particular use to rural, regional and remote (RRR) practitioners, and they would recognise the scenarios discussed.

"RRR members often find it difficult to travel long distances for face to face seminars. The video allows members of an office to watch it together and discuss among themselves what they think about the scenarios and how they would handle those situations." Mr Dolan said.

The ethics video is worth 1 CPD point and can be streamed from your computer.

New YLS president

DAVID JOHNS

CREATING OPPORTUNITIES: YLS president Joel Silver.

New Young Lawyers Section (YLS) president Joel Silver spent one year applying for jobs before opting for the Victorian Bar and working for himself.

The 26-year-old signed the Bar Roll in May 2014. The experience influenced his main priority this year – to help law graduates find jobs and create new employment opportunities.

"I want to do my best to reduce the number of people who are going through the despair of not being able to work." Mr Silver said.

"What I went through was a very difficult experience. I banged on a lot of doors, most of which didn't get an answer, and I don't want to think about the number of applications that I sent out. As I understand the situation, going into 2015 is worse than in 2013 when this happened to me.

"There was no other way I could get into legal practice than to go to the Bar."

Mr Silver wants to communicate the benefits of hiring law graduates in other industries and propose a service whereby law graduate candidates would be reviewed and vetted to help law firms.

Mr Silver gave his tips for YLS members:

- assess what you hear in the current job market cautiously;
- make sure you get as much experience as you can during your law studies;
- take every opportunity that comes your way; and
- don't be a book worm.

Mr Silver said he is available to members of the YLS and can be contacted via email (younglaw@liv.asn.au).

M+K Lawyers senior associate Nathanael Kitingan is YLS vice president this year.

LIV CPD INTENSIVE

Sessions on ethics aimed at personal injury and family lawyers as well as legal executives are key components of the LIV CPD Intensive on 26-27 March.

The multi-disciplinary conference will cover nine streams of law, with a special stream for legal support staff. More than 700 delegates are expected to attend the conference to hear from a range of speakers about the latest developments and issues affecting the law.

Other sessions will cover costing under the new Legal Uniform Profession Law, sentencing reform, alternative law firm models, e-conveyancing, family violence and litigation funding.

The impact social media is having on the law will also be covered with sessions on how it can be used as an awareness and research tool and how it is affecting copyright and family law.

For more information about the conference go to www.liv.asn.au or call 9607 9473.

SUSAN GORDON-BROWN

DEDICATED: Jennifer Batrouney QC (centre) with some of her mentees including Angela Lee (second from left).

Mentoring in focus

MENTOR

Angela came to the Bar with a fair bit of experience under her belt in both the legal and accounting world. She is keen to develop her practice in the tax field and I have been a tax barrister for nearly 25 years. Angela and I have a very symbiotic mentoring relationship. I have sought to include her in all my professional networks as the occasion arises and she has been a fabulous junior counsel in many of my cases. I am energised by Angela's enthusiasm and am keen to ensure that she capitalises on her enormous talent for research and writing. I think that we each get a lot out of our mentoring relationship and now we both mentor other younger practitioners together. This works well as I am able to provide a "rose coloured glasses" nostalgic view of life at the Bar (as well as a few war stories) and Angela is able to share a more recent practical perspective. I look forward to a lifelong mentoring relationship with her as I do with all the fantastic people I mentor.

JENNIFER BATROUNEY QC

MENTEES

I first met Jennifer at a work function. Though I was new to the Bar, I knew she was an eminent tax silk. While I was working up the courage to introduce myself, she approached me first and warmly introduced herself.

Since then, she has generously afforded me so many opportunities – to shadow her, work as her junior, meet her networks and attend (at times, invitation only) professional events. She has also provided me with so much support, guidance and encouragement as I find my feet at the Bar. It has been a phenomenal privilege to be mentored by her.

The icing on the cake has been connecting with Jennifer's other mentees (she mentors around 35 people at last count) – a fun and dynamic group of students and professionals who have equally flourished from Jennifer's guidance and support through the years.

Jennifer's mentoring has instilled in me a passionate dedication for excellence in my work, keeping a great attitude, and imparting the experiences gained to those more junior, as she has done for myself and so many others before me.

ANGELA LEE

Jennifer has been a wonderful role model and support for me throughout my legal career.

In 2008, Jennifer involved me and another of her mentees in her legal research and invited us to accompany her to a landmark taxation case in the High Court of Australia in Canberra. As a young law student, being provided with the opportunity to witness Jennifer appear in the High Court cemented my desire to become a lawyer and highlighted to me the types of opportunities available to women in the legal profession.

The most valuable thing that I have learnt from Jennifer (if I have to pick just one) is to open yourself up to as many opportunities and experiences as possible so that you can continue to develop professionally, expand your networks and never stop learning.

BONNIE PHILLIPS
FARRAR GESINI DUNN FAMILY LAWYER

I see endless benefits in having a mentor – not least having someone to bounce ideas off. Jennifer has supported me throughout my degree, offering me guidance and support that has led me to finding the path to my current role. Her generosity in introducing me to her vast network has enabled me to gain experience in a variety of different areas of law. The most valuable thing that I have learnt from the mentoring experience is that there are many people in the legal field who are willing to give you their time – you should use the resources around you.

EMILY ARCHER
MINTER ELLISON INSURANCE AND CORPORATE RISK LAWYER

Change at the Bar

Improving the relationship between barristers and private firms, in-house counsel and government solicitors is a priority for 2015 Victorian Bar chair Jim Peters QC.

Furthering the legal profession's understanding of the value of briefing counsel early and appropriately is another.

"Costs are saved if skillful specialist advocates are briefed at an early stage," Mr Peters said.

To improve access to justice, he urged government organisations to engage experienced advocates at the Bar "for the benefit of those who are particularly vulnerable in the criminal process".

Mr Peters also expressed concern over the "growing absence of junior counsel in criminal matters in the lower courts".

Mr Peters takes over the role of leading the 21-member council from Will Alstergren QC. He will be assisted by senior vice chairman Paul Anastassiou QC and junior vice chairman David O'Callaghan QC. Jennifer Batrouney QC was appointed treasurer.

Mr Peters signed the Bar roll in 1987 and specialises in complex commercial litigation.

COURT ON CAMERA


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LIV Members Christmas Party

LIJ contributors and LIV members attended the annual event at CQ functions on 4 December.

1 *LIJ* contributors Susan Gatford and Thomas Hurley, Victorian Bar.

2 Louis Vatousios and David Hildebrand, both from the Office of the Small Business Commissioner, Sarah Rey, Justitia, and LIV president Katie Miller.

3 LIV CEO Nerida Wallace and husband Michael Hall, Transformation Management Services.

4 David Stratton, Nevett Ford Melbourne, former LIV CEO Michael Brett Young, Philip Brewin, Nevett Ford Melbourne, and Mark Dobbie, K&L Gates.

5 Marina Leikina, Ryan Carlisle Thomas, YLS president Joel Silver and Julia Freidgeim, Victorian Government Solicitor's Office.

6 Don Ritchie, Sentencing Advisory Council and LIV Council member Simon Libbis, Subdivision Lawyers.

7 Rebecca Dahl and *LIJ* contributor Keturah Sageman, both from Nicholes Family Lawyers.


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PHOTOS: DAVID JOHNS

COURT ON CAMERA


PETER GLENANE

1 President's Dinner

Geoff Bowyer's year as president and his contribution to the LIV was celebrated on 26 November.

Mr Bowyer with his family: back row, Dr Alex Kerridge, Jack Bowyer, Charlie Bowyer; front row: Sara Bowyer, Barbara Bowyer, Geoff Bowyer, Judy Bowyer, Georgie Henshall and Tess Bowyer.

2 Government Lawyers Section AGM

Victorian Equal Opportunity and Human Rights Commissioner Kate Jenkins, pictured with LIV president Katie Miller and Government Lawyers Section Committee chair Dahni Houseman, spoke about women in the law and public service.

3 Awards

Arnold Bloch Leibler senior partner Mark Leibler AC (left) was awarded the University of Melbourne's highest honour, the degree of Doctor of Laws *honoris causa*, conferred by the deputy chancellor Ross McPherson on 12 December.

Institute of Legal Executives CEO Roz Curnow with winner of the Ellen Dickeson Memorial Fund inaugural Legal Executive of the Year Award Anthony Gauci and Institute of Legal Executives president Denise McConville at the Institute's AGM on 2 December.

4 Women In Crime

Kate Ballard, Jessica Willard, County Court Judge Lisa Hannan, Jessie Smith and Peta Smith at the launch of Women In Crime, an association to support female practitioners in criminal law.

5 Former LIV CEOs and presidents

Bill O'Shea, Frank Paton, Ian Dunn, Cathy Gale, John Corcoran, John Cain junior, Jonathan Mott, Rod Smith and James Syme were some of the former LIV CEOs and presidents at a lunch held on 17 November.


PETER GLENANE


DAVID JOHNS

ON A MISSION TO END FAMILY VIOLENCE

Victoria's legal profession with police and community groups have established a Family Violence Taskforce in response to the pleas of mother and campaigner Rosie Batty. By Carolyn Ford

Luke Batty was murdered by his father, Greg Anderson, one year ago. The Tyabb schoolboy was belted with a cricket bat and then stabbed with a knife in the nets at cricket practice on 12 February 2014. He was 11.

The next day his mother Rosie Batty faced the media, calmly beseeching the community to stop rising family violence – the phenomenon that in Australia affects one in three women and one in four children; that kills at least one woman a week and 27 children a year; that constitutes 40 per cent of police work and 75 per cent of all assaults against women; and that costs Victoria $3.4 billion annually.

Ms Batty's message resonated. In the 12 months since the brutal death of her only child, the issue of domestic violence has gained momentum with much – and many – committed to fight it.

Former Governor-General, head of a Queensland government taskforce on domestic violence, Quentin Bryce has called it the gravest human rights issue in the world today. The federal government has allocated $100 million to an action plan to combat violence against women. The Victorian government has appointed the state's first Minister for the Prevention of Family Violence, Fiona Richardson, and announced a Royal Commission into family violence. It will be led by Supreme Court Justice of Appeal Marcia Neave AO. Justice Neave will retire from the bench before the Governor's appointment.

Justice Neave was foundation chair of the Victorian Law Reform Commission, conducting inquiries into sexual offences, homicide and disability.

"Justice Neave is a celebrated judge, academic and lawyer who has devoted so much of her professional life to keeping women safe – on the streets, in the workplace, and now, in their homes," Ms Richardson said.

Also, Victoria Police is set to appoint its first Assistant Commissioner for Domestic Violence.

Victoria's legal profession has also responded. With police and community groups, it has established a Family Violence Taskforce, which was launched at the LIV's annual White Ribbon event last November.

The taskforce, a high-level interdisciplinary group, includes Chief Magistrate Peter Lauritsen, Victoria Police, LIV criminal and family lawyers, Victoria Legal Aid, No to Violence, the Victorian Bar, the Federation of Community Legal Centres, Domestic Violence Victoria and Women's Legal Service. The LIV is providing policy and administrative support. The taskforce will review family violence services, recommend improvements across criminal, civil and child protection jurisdictions and may make recommendations for legislative or funding changes.

An issue already identified is the provision of "safe places" in magistrates and children's courts for victims. Some victims and children will be able to give evidence via video.

Also, all magistrates in Victoria will do two-day family violence training courses, including best practice in hearing domestic violence matters and how to deal with perpetrators in court, at the Judicial College of Victoria. Registrars who answer queries at court counters will also get training. A website with information on family violence intervention orders will be launched and time frames for responding to family violence-related criminal charges will be improved.

In a new Practice Direction effective 1 December 2014 (see p65), the Magistrates' Court of Victoria will introduce staged fast tracking of the hearing and determination of criminal offences arising out of family violence incidents. Chief Magistrate Lauritsen said the rate of recidivism for crimes of violence against intimate partners is much greater than crimes of violence against strangers, and that usually the violence increases in number and intensity, and accordingly, fast-tracking of these cases has been introduced, initially in the Dandenong Magistrates Court.

"The taskforce is a round table discussion between many of the organisations involved in family violence in this state. The discussions attempt to develop new ways of dealing with family violence in order to reduce its incidence in the community," Chief Magistrate Lauritsen said. "To date, the taskforce has met on four occasions and its discussions have been most useful."

2014 LIV president Geoff Bowyer said the [taskforce] idea originated with lawyers who were concerned with the lack of coordination between services dealing with family violence offences. "The consequences of an inconsistent and confusing legal system can be extremely serious, as we have seen with the tragic death of Luke Batty," Mr Bowyer said.

Taskforce founding member and former LIV president Caroline Counsel said the importance of the taskforce could not be underestimated.

"Given the alarming number of family violence incidents and the adverse impact on children, the family and the community, it became obvious to me that those of us in the justice system, at the coal face, could help by sharing our knowledge to improve the impact of the system and create better outcomes for families," Ms Counsel said.

She congratulated the state government and the LIV for tackling the complex and difficult area.

Since her son's death, Ms Batty, nominated for 2015 Australian of the Year, has rarely been out of the public eye advocating for an end to family violence. She fronted several of the more than 1000 White Ribbon Day (25 November) events nationwide last year, including the LIV's annual lunch dedicated to the male-led campaign to end men's violence against women.

In a panel discussion with then Chief Commissioner Ken Lay and social commentator Phil Cleary that was moderated by Women's Legal Service CEO Joanna Fletcher, Ms Batty tearfully urged the legal profession to "understand that family violence is an epidemic. You need to make yourselves very aware of the complexities . . . we need our court system and processes and everybody involved to be fully aware that these are complex issues that affect people's lives".

PUTTING FAMILY VIOLENCE IN THE SPOTLIGHT: Outgoing Victoria Police Chief Commissioner Ken Lay with Rosie Batty and Chief Magistrate Peter Lauritsen

Ambivalence on the issue must stop, appropriate funding of women's legal services must start, she said, and women needed to be believed when reporting abuse, which could happen if you were a judge or a street sweeper. "We are in a victim-blaming society. As victims, we have to work so hard to be believed. So, on top of all the abuse that we navigate every day, we fight the systems that are supposed to be supporting and protecting us. How can this be?"

Chief Commissioner Lay agreed. "We tend to find a reason not to believe the victim. The first response is, why doesn't she leave, why did she pick this bloke, what did she do to deserve a belting? We know the vast majority, when they tell us a story about pain, hurt and violence, are true."

He said the system was complex, difficult and not supportive of domestic violence victims when it needed to "wrap itself around these people".

"Women often face years and years of abuse before they find the courage to speak to their GP, a lawyer or local police. All too often they are met with a response which is inconsistent, non-believing and not supportive."

Ms Batty's story was, he said, "one of hundreds out there where the police response has been inconsistent, where it depends on who you speak to or what station you call. And sometimes a response is different if you go into a particular court or talk to a particular lawyer".

The system was not integrated – "we work in these stove pipes" – and an enormous investment was needed, as was support for perpetrators.

"It's fine to say let's lock them up, increase jail sentences, make bail restrictions tighter and put bracelets on people. But unless there is primary prevention it will keep occurring."

The 41-year police veteran has championed the fight against family violence. On news he was stepping down as Chief Commissioner from 31 January, the Minister for Police Wade Noonan said, "Central to his proud legacy will be his action on family violence. He, above all others, put this squarely on the public agenda."

Ms Fletcher pointed out family violence was more likely in a society where gender roles are rigid and the sexes are unequal. In Australia, the gender wage gap is 18 per cent, the gender wealth gap is 14 per cent and 30 per cent support men making decisions in relationships, she said.

Ms Batty said: "This is about gender inequality, about a man's sense of entitlement, seeing his woman and family as possessions. I am a classic example of the worst kind. Greg, as the ultimate act of control, to make me suffer for the rest of my life, took our son's life.

"I wanted my little boy to have the best chances in life. I can't see that through. So I'm doing what I'm doing, I'm on a mission." ●

PHOTO **SUSAN GORDON-BROWN**

COMMITTED TO FAIRNESS

Katie Miller has always had an instinct for fairness. As 2015 LIV president, the 34-year-old government lawyer is taking on the role of chief advocate for the organisation and the profession.

The federal government first came across Katie Miller when she was eight years old. The western suburbs primary school student wrote then Prime Minister Bob Hawke a letter arguing against tax reform.

She told the Labor leader that increasing the levy on flavoured milk, muesli bars and bread, Miller family staples, was not fair.

Around the same time, it was pointed out to her bookkeeper mother and accountant father at a parent-teacher interview that the bright young student had a preoccupation with being fair and would get very upset if the wrong miscreant got the blame. Come Year 12, in time out from the debating team, she umpired the softball season.

"I have always had a really insane sense of fairness. I thought my sister should go to bed earlier than me because she was younger. Looking back it was procedural fairness not substantive fairness I was interested in," said Ms Miller.

"Mum and Dad had views on the proper way to act. They were big on fairness, ethics. As kids, doing the right thing, following through on a commitment, was part of our lives."

The federal government next met Ms Miller when she joined its ranks, starting her career with the Australian Government Solicitor (AGS) in 2005 and eventually winning an Australia Day award in recognition of her diverse and outstanding contribution to the development and promotion of AGS' legal practice in Melbourne.

Just on a decade later, Ms Miller becomes the 2015 president of the LIV, the state's peak body for lawyers. The 34-year-old government lawyer is believed to be the second youngest LIV president (Victoria Strong was 33 in 2005) and its sixth female president since 1859. She is also the first practising government lawyer to lead the LIV.

It was no surprise that Ms Miller became a lawyer and went straight into the government sphere. Although, for a while her career choice wasn't clear. Science (maths and statistics) was done alongside law (with honors) at the University of Melbourne. Dux of her year at Westbourne Grammar, the prize-winning student was interested in politics – she met her husband, high school teacher Matthew Thomas at a YMCA youth parliament camp where she was elected youth premier – but that settled into a keen interest in government processes which led to an accredited specialisation in administrative law.

"I was more interested in the business of government than the business of politics," said Ms Miller.

"I've always been interested in what's happening in society, the public interest. I click with what's happening in public rather than private."

Ms Miller is now managing principal lawyer with the Victorian Government Solicitor's Office (VGSO), although on leave for the duration of her LIV presidential year.

"I just love administrative law. I love writing advices. I love breaking open the puzzle and figuring out the answer, the process of weighing. You can feel it synthesising into place in your head. I love all that thinking. You have to be nimble, you have a lot of considerations as a government lawyer. It's not enough to be right. But I also love litigation, going to VCAT, it's exciting. I call myself a cruise director.

"I think I've been really lucky in the nine years. I've had four secondments, really interesting work. I could count on one hand the number of dull days I've had. It's a collaborative environment, a great place to learn.

"I'm not ambitious. I wanted to work in government and got a role. Once there, I wanted to do different things so you do them. But a lot of it has just been opportunity and falling into something."

Ms Miller's commitment to the LIV began in 2007. She has been on at least a dozen sections, committees and taskforces including administrative and human rights law, refugee law reform, constitutional law, government lawyers, audit, corporate governance, social media, membership, future focus and the new technology law committee, getting up an hour earlier on weekdays to read LIV material.

"As a government lawyer you can be really narrow. But at the LIV you can tap into everybody else's professional experience and knowledge. It makes you a better lawyer. I have developed interests here that I would never have thought of. For example, I love corporate governance."

Part of Ms Miller's new role at the LIV is chief advocate for the organisation on current issues for the profession and the community.

Alongside LIV CEO Nerida Wallace, Ms Miller has begun establishing relationships with new Attorney-General Martin Pakula and new Shadow Attorney-General John Pesutto, and following up on pre-election promises outlined in September *LIJ* in response to the LIV's *Call to the Parties* document, with a focus on:

- review of legal aid;
- review of the Charter of Human Rights and Responsibilities;
- legislating for advance care directives;
- Royal Commission into family violence prevention.

In terms of legal profession and LIV core issues, the 2015 LIV Conference of Council on 9 February, and in turn Ms Miller, will focus on:

- the law business – changing how we do the business of law;
- workplace cultures and driving change – who'd want to be a lawyer?; and
- professional membership bodies – why would you want to join?

"The change the legal profession is going through is really interesting," Ms Miller said.

"There are challenges but there's also opportunities. For a long time the legal model hasn't been working for anyone. Clients hate part of it, lawyers hate part of it. So there is a great opportunity to jettison the stuff that nobody likes.

"If we don't change we will get wiped out. It's classic natural selection. It can be scary but we should be saying let's build something better.

"The sustainability of the profession has always worried me a bit. How do you value lawyers? We need to understand our value, not just in hours billed, and get more

NAVIGATING CHANGE:
LIV president Katie Miller

WHAT THE PRESIDENT THINKS

KATIE MILLER ON:

Billable hours: "Everybody hates the billable hour. Let's get rid of it."

The workplace: "The way we cling to offices is funny . . . working from home is great, you don't have to get into a suit and onto a tram. And why don't lawyers go out to clients?"

Social media: "You always want what's new . . . I enjoy engaging and having the discussion. It's very democratising, everyone can have a say."

Technology: "It's key to how the profession is going to change and survive."

Women in the law: "I've never suffered discrimination but that's not to say it's not there. People judge women on how they look, the hair, the nails. It's not enough to be good at your job. Law is still gendered. Maternity maths is always done. We still talk about senior women because it is still exceptional. We are not there yet."

Valuing lawyers: "It's easy (for non-lawyers) to say you are pampered, spoilt, you charge high fees, take a pay cut. It's just not that simple."

Succession: "We need to make sure we are bringing up the next generation, it's succession of the profession."

Law graduates: "We need to be honest with them – it's not like it used to be. It is a hard slog now. Perhaps some will become part of the solution for greater access to justice."

Access to justice: "The Productivity Commission report will be the game-changer for legal services. The challenge for us is to ensure changes implemented are sustainable for the profession and clients."

Flexibility: "We still expect a large pound of flesh. The new start-ups with their own models are really exciting. Trust is a big part of it but trust is our game. It's important to talk about it to normalise it."

Mentoring: "I will have a coffee with anybody who asks."

Pro bono: "I did a rotation at Brimbank Melton CLC. I helped a woman with an infringement notice. Then I helped her get her car back. It was nice being useful. I loved it. She gave me a hug."

sophisticated about how we express our value, otherwise we are just going to be competing on price and we are going to lose. That's one of the challenges.

"I've got a job to do and I hope in 12 months I leave the LIV and the profession in better shape than it is now. That's success to me."

Beyond the law, this self-described nerd – "At uni I would order a pot of tea at the pub" – does yoga, reads (Hugh Mackay, Manning Clark and Kerry Greenwood are on the night-stand), rides her bike, watches Bulldogs games (AFL tribunal is dream job), takes piano lessons (plays classical, listens to Taylor Swift) and travels overseas.

The latter gives her a chance to learn new languages – Italian and Mandarin so far, adding to the two – German and Japanese – she did as VCE subjects.

(Fun fact – the 2008 China trip to the Beijing Olympics was won in a box of breakfast cereal.)

She does karaoke for a lark. She also bakes – directors at the December LIV Council meeting enjoyed her Christmas fruitcake. And then there's her four-hour a day social media habit which sees her reach for the iphone first thing every morning to get a Twitter hit.

Over the Christmas break, she apprenticed for Shane the builder, filling cracks in the walls of the house she and her husband are renovating. Come April, she will give up something for Lent because she likes the idea of some restraint in today's have-it-all culture.

The Victorian legal profession might never have seen the likes of Kathryn Elizabeth Miller before. ●

CAROLYN FORD

PHOTO **DAVID JOHNS**

BRINGING IN THE NEW UNIFORM

Commissioner for Uniform Legal Services Regulation Dale Boucher explains the new Uniform Law regime in the first of a two-part *LIJ* Q&A .

What does the new uniform legislation mean for the small practitioner in the suburbs?

The Uniform Law introduces benefits for small, suburban practitioners including:

- a standard costs disclosure form making it simpler for lawyers to meet their disclosure obligations in matters up to $3000; no disclosure is required under $750;
- the form will help lawyers manage their client's expectations early in the relationship and establish clear communications that may assist any dispute resolution without regulatory involvement;
- local regulators will be able to resolve service complaints in new ways and cost disputes will be resolved quickly and informally;
- suburban lawyers will benefit as software and services are developed to meet the needs of most lawyers working in participating jurisdictions (rather than having to be tailored to suit eight regulatory environments).

What are your aims for the first 12 months and is one aim that other states and territories join the scheme?

The primary aim of the Council for the next five months is to ensure the Uniform Law can commence for the participating jurisdictions on 1 July 2015. To achieve this, the Council has prepared draft general Uniform Rules and is currently consulting on them. At the same time the Council has approved consultation being undertaken by the Law Council of Australia (LCA) and the Australian Bar Association about draft legal practice, legal profession conduct and continuing professional development rules. The Admissions Committee is also consulting about proposed admission rules.

An important part of the Council's work is to encourage other jurisdictions to join the Uniform Law scheme. We have already undertaken consultations with stakeholders and that will be a continuing part of the Council's work. The Council wants to work towards a unified legal profession for Australia.

BENEFITS FOR PRACTITIONERS: Legal Services Council CEO Dale Boucher

When will detailed rules for solicitors be introduced and will there be an opportunity for submissions regarding amendments to the Australian Solicitors Conduct Rules once introduced?

The proposed draft general Uniform Rules were released by the Legal Services Council for comment on 28 November 2014. Comment is sought. Proposed legal practice, legal profession conduct and continuing professional development rules have also been released by the LCA and Australian Bar Association for comment and submissions. The Legal Services Council will see all submissions that are made and will also be able to make comments of its own.

Uniform trust rules and forms will most likely change timelines for Victorian practitioners – will there be a staged introduction or grace period to enable trust accounting software to be updated?

The Council is considering the need and opportunities for harmonisation of timelines under the Uniform Law in relation to trust

accounting. Such harmonisation will only be considered after consultation with lawyers, consumers and the community. If a period is required to enable trust accounting software to be updated, I would encourage submissions to be made to the Council on that point.

Will some Victorian law firms need to restructure to come into line with the new regulations?

The Uniform Law is intended to facilitate, rather than restrict, the structures that may be adopted by legal practices. That approach is endorsed in, for example, section 32.

The Council is aware that the current Victorian statute recognises partnerships of incorporated legal practices (ILP) as "law firms" and that, while the Uniform Law does not prohibit such partnerships, it also does not specifically recognise them as "law firms". Therefore, if Victorian law firms identify a need to restructure under the Uniform Law, I encourage them to submit associated problems to the Council for its consideration.

I also note that an entity that was an ILP or a multi-disciplinary partnership (MDP) under the old law is taken to be an ILP or MDP under the Uniform Law. The Council would like to know if those transitional provisions will adequately address any issues that are perceived.

Do you support the ability of firms to deliver bills of costs electronically, if the client consents?

It is important for the Uniform Council and Commissioner to make it easier for firms to do business and not restrict their activities unnecessarily. The ability of firms to deliver bills electronically seems sensible to me. The Council is consulting on a rule to that effect, proposed Uniform General rule 69, and will make a decision based on any submissions it receives on the matter.

Will there be new rules for costs assessors making assessments?

Costs assessments will be conducted in accordance with the Uniform Law and local legislation (including the *Uniform Law Application Act* in each participating jurisdiction). General Uniform Rules may also apply. The Council may make general Uniform Rules with respect to costs assessments.

The Council is, for example, consulting on a proposed general Uniform Rule 71 which provides that, for the purposes of section 199 of the Uniform Law, if, after receiving notice under section 198(8) a party to the costs assessment does not participate in the assessment, assessment may proceed and be determined, in the absence of that party. The Council is seeking comments on this proposed rule.

Whether that rule or any other rules should be made in relation to costs assessments is something on which the Council would welcome submissions and the outcome will depend on the consideration of the comments made in the consultation process and the Council's own views.

How will you approach the issue of mental health of lawyers in the regulatory context?

Mental health is an important issue for the community and for people in all walks of life and it is of course an issue of particular relevance to the legal profession.

While I understand that applicable policies have been developed by some local regulators, the Council invites submissions on the role it should play in developing Uniform Rules, policies or guidelines on it and on other important issues. ●

Part two of the Q&A with Dale Boucher will appear in March *LIJ*.

DALE BOUCHER: CAREER AT A GLANCE

"I was born in Bairnsdale and have a law degree from the University of Melbourne. Much of my legal career has been with the Commonwealth. In all, I worked for 28 years with the Attorney-General's Department. I was appointed Australian Government Solicitor in 1993 and led the organisation through the early stages of commercialisation. In 1997, I was designated CEO of AGS. In 1999, I undertook a short review as an associate member of the former Australian Communications Authority, before becoming a partner with Minter Ellison in Canberra.

From 2003 until 2009, I operated my own legal and consulting business before being appointed as the inaugural chairman of the Tax Practitioners Board. I completed my term in that role in January 2013. After a further period consulting I started as the CEO of the Legal Services Council and Commissioner for Uniform Legal Services Regulation on 29 September 2014. While my office is required to be in Sydney, I anticipate spending more time in Victoria in 2015."

MEET THE LIV COUNCIL

2015

COUNCIL EXECUTIVE

Katie Miller
president

As president, I will work for all members to ensure that the LIV continues to be the peak provider of services to members of the legal profession. During my four years on Council, I have supported members to adapt to the changes facing the profession, including those posed by social media and privacy. During 2015, I will be on leave of absence from my role as a government lawyer and accredited specialist in administrative law, so I can devote myself fully to the task of serving the LIV and its members.

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Council member since November 2010

Steven Sapountsis
president-elect

In 2015, the LIV should listen even more to the profession; assist the new CEO with practice support materials; seek to influence the new regulatory scheme to work in the interests of lawyers and their clients; continue its work in diversity, reconciliation, access to justice and the wellbeing of lawyers; strengthen its relationship with suburban, country and regional associations; identify opportunities for all practitioners; continue its work with the role and expectations of law graduates; and maintain its strong advocacy of the rule of law.

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Council member since November 2009

Belinda Wilson
vice-president

After being a Gippsland practitioner since 2002, predominantly in the area of business, property and estate planning, I have embarked on a new career challenge as the chief executive and corporate counsel for Port Phillip Bay Scallops. I have had a long standing involvement with the LIV including as a committee member of the Business Law Section, a founding member of the Mentoring Program and the immediate past president of the Gippsland Law Association.

Over the remaining period of my term I will continue to advocate for premium member services.

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Council member since January 2014

Geoff Bowyer
immediate past president

I look forward to assisting Katie Miller and the Council tackling the challenges facing LIV members. While I am returning to full-time practice, I will continue to identify more sophisticated solutions to access to justice and making the practice of being a lawyer a viable opportunity. Challenges include increased competition and encroachment from non-lawyers into previously solicitor exclusive areas. I will continue to build on the vital relationships we have with city, suburban and regional associations and to drive the clinical education program we are developing with La Trobe and Deakin universities.

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Council member since November 2009

Sue Kee
5th executive member

I am a member of Arnold Bloch Leibler's litigation and dispute resolution practice. My goals as a member of the Council's executive include promoting LIV best practice governance; supporting the LIV in taking a leadership stand on important social justice and public interest issues; working to ensure that the LIV effectively represents all members' interests; encouraging city based practitioners to be active LIV members; advocating for the adoption of policies to promote opportunities for increased Aboriginal and Torres Strait Islander involvement and representation in the legal profession.

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COUNCIL MEMBERS

Megan Aumair

I am a criminal lawyer with 11 years experience and have been the sole director of my firm in Bendigo since 2009. I am committed to the LIV's advocacy and lobbying efforts for additional funding for Victoria Legal Aid and to agitate for changes to the strict VLA guidelines that currently preclude vulnerable Victorians from qualifying for legal representation. I am delighted to have been nominated the LIV's representative on the Law Council of Australia's rural, regional and remote lawyers advisory group, a role I will take up in 2015.

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Council member since November 2013

Gerry Bean

I am a partner in the DLA Piper corporate team with a focus on investment in the real estate, infrastructure and health sectors. 2014 saw many changes at the LIV and in legal services markets, which challenged Council members to be responsive to members' needs. In 2014 I was on the Membership Taskforce, Future Focus Committee, the Commercial Law Executive Committee and the *LIJ* Editorial Committee. I have also worked with the LIV in dealing with the ATO on firm structures. As an *LIJ* Editorial Committee member I encourage practitioners to contribute articles.

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Council member since November 2012

Caroline Counsel

Together with the LIV, I have been helping the profession face challenges in relation to physical and mental health issues, succession planning, making the shift from time-costing to value added billing, the red tape associated with regulation and the perpetual crisis in relation to legal aid funding. I am an accredited family law specialist, family dispute resolution practitioner and collaborative lawyer and have been in practice for 30 years. I have served on the Family Law Section executive and sub-committees and will be chairing the Collaborative Practice Section in 2015.

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Council member since February 2006

COUNCIL MEMBERS

Cameron Forbes

I am a senior associate in the tax group at King & Wood Mallesons specialising in indirect tax and was the 2013 president of the LIV Young Lawyers Section. In my second year on Council I will continue my passion and enthusiasm for building an alignment between the profession and the LIV. My key focus areas are engagement and promoting participation by all lawyers in the LIV, particularly through social media, advocacy and pursuing community issues such as wellbeing, professional development and improving accessibility through innovation.

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Council member since November 2013

Michael Holcroft

A change in government always represents new opportunities and challenges for the LIV to lobby and influence change. We are hoping to convince the Labor government to wind back the mandatory and baseline sentencing legislation of the previous government. Increasing legal aid funding will again be a priority. The LIV will continue to pursue the best outcome from the Uniform Legal Profession reforms for the profession. The biggest challenge for the LIV is to continue to show its membership value and prove its relevance in a changing legal environment.

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Council member since May 2008

Simon Libbis

Having had a number of roles over my 37 years as a legal practitioner, I am now the principal of Subdivision Lawyers, a boutique property law practice. I have been accredited as a property law specialist since 1994 and have a keen interest in the specialist accreditation scheme. My position on the specialisation board provides an opportunity to make a contribution in this area. I see the main role of the LIV as providing services and support to members and will strive to ensure this is of the highest standard.

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Council member since March 2013

Tom May

I practise mainly in taxation law, have been involved in voluntary organisations within and outside the legal profession and have an interest in the agricultural sector. It is essential the LIV provides members with value for money by keeping down membership fees as much as possible and charging appropriately for services on a user-pays basis. The LIV should also help members become more comfortable with changing technologies and work patterns, continue to place emphasis on the sections and take steps towards creating a strong national lawyers' organisation and the national profession project.

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Council member since April 2001

Pasanna Mutha-Merennege

I am the policy and campaigns manager at Women's Legal Service Victoria. My experience includes working in several community legal centres (CLCs) as well as in commercial law and government. I will, in 2015, focus on promoting diversity and equality within the LIV and the broader profession. I am passionate about access to justice and will continue to advocate for a strong legal assistance sector.

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Council member since November 2012

Sam Pandya

I am the founder and managing principal of OpusRed, a law firm specialising in corporate and personal insolvency. After 17 years in insolvency law, I was inspired to start my own practice with an inclusive and client-focused culture. In my first term on Council, I will be a passionate advocate of cultural and gender diversity within the profession and will promote opportunities for young lawyers to empower them to face an ever-changing, increasingly globalised profession. In 2015, I will promote greater grassroots involvement of members in the activities and initiatives of the LIV.

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Council member since January 2015

COUNCIL MEMBERS

Misty Royce

I have practised in the southern region and been an LIV member since 2004. In 2013 I established my own practice focusing on property and estate planning matters. I am keen to ensure the LIV is connected to its members on a practical level, assisting those of us at the forefront in appropriately managing ethical and risk management issues and embracing progressive technologies. E-conveyancing, women's issues and wellbeing of lawyers are of particular interest. I welcome member input.

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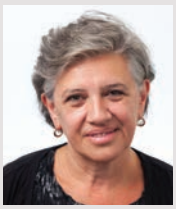
Council member since January 2015

Angela Sdrinis



My major focus on the Executive and on Council has been personal injuries law. The LIV has continued to be actively involved in this area and has made submissions to the government on the proposal to abolish limitation periods in child abuse claims, the *Wrongs Act* (asbestos regulations and VTEC Inquiry) and in many other areas related to personal injuries law including aspects of the Productivity Commission's Access to Justice Report. I hope to continue to focus on this area in the next 12 months.

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Council member since November 2012

Stuart Webb

I am an experienced administrative law practitioner, appointed to the Migration and Refugee Review Tribunals in July 2012. Previously I worked at Victoria Legal Aid in civil and human rights law. I am looking forward to advocating for in-house lawyers to ensure that our voice on important issues is heard. I will ensure that the LIV continues its fine tradition of speaking boldly and bravely for those unable to do so. This lifts the standing of lawyers in the community. I will continue to ensure that diversity in our profession is respected and encouraged.

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Council member since November 2006

Jing Zhu

I am a solicitor with Russell Kennedy defending common law claims and statutory scheme entitlement disputes on behalf of the Victorian WorkCover Authority. I am passionate about promoting greater diversity within the profession, including greater ethnic diversity, particularly at senior levels. As a committee member of the Asian Australian Lawyers' Association, I believe we are making progress on this cause and as a Councillor I hope to create greater understanding of this issue among the LIV membership. I also look forward to deepening the ties between the Council and the Young Lawyers Section.

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SUPPRESSION ORDERS AND OPEN JUSTICE

Victorian Law Reform Commission chair the Hon Philip Cummins reflects on excepting the *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 (Vic)[1] from the *Open Courts Act* 2013.

Supported across party lines, the *Open Courts Act* 2013 (Vic) was introduced on 1 December 2013. In his second reading speech, then Victorian Attorney-General Robert Clark said the purpose of the Act is to reinforce "the primacy of open justice and the free communication of information in relation to proceedings in Victorian courts and tribunals".[2] The Act provides for a general presumption in favour of disclosure of information and of holding hearings in open court.[3] Significantly, the Act eschews the public interest test proposed in the *Model Court Suppression and Non-publication Orders Bill* 2010 (Standing Committee of Attorneys-General) for the making of suppression orders;[4] rather, it provides the test of necessity for the making of such orders.[5] This test is clearly the correct general test.

The rationale of the open courts principle is well known at common law. It is seen as a "fundamental aspect of the common law and the administration of justice" and is demonstrated through procedures being conducted in open court, presenting information and evidence publicly to all those in the court and allowing the fair and accurate reporting of proceedings by the media.[6] The principle of open courts is also enshrined in the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) which provides for a "fair and public hearing" for accused persons.[7]

Significantly – and relevantly for this article – the *Open Courts Act* 2013 (Vic) excepts from its operation the *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 (Vic) (CMIA).[8] In so doing, Parliament acknowledged that there is a limited and special category of persons who may not be responsible for their otherwise criminal actions because of mental impairment, or who may be unfit to be tried at all. Parliament acknowledged that for such persons, because of their incapacity or mental impairment, and because they have not been and may never be found guilty of a crime, very different considerations apply. Legally, they are a distinct category; medically, they are a vulnerable cohort.

Further, in contrast to the principle of necessity for issuance of suppression orders provided by Parliament in the *Open Courts Act* 2013, in the CMIA Parliament provided a public interest test.[9] Again, such provision proceeds from a recognition by Parliament of the special legal category of persons who come under the CMIA, and their medical vulnerability.

I stated the rationale for this differentiation in *PL*:[10]

"It must be remembered that applicants found not guilty by reason of mental impairment (or previously insanity) have not been convicted of a crime. Characteristically, they have suffered from a mental illness. The court's jurisdiction in that respect is protective. It should be remembered that ultimately the best protection for the community is that persons found not guilty by reason of mental impairment are able to return to the community as useful citizens".[11]

I stated that CMIA suppression orders should not be granted lightly, and that to justify a suppression order "[T]he degree of likely negative impact [on the person] needs to be examined in each case".[12]

A suppression order presently can be made under the CMIA to prevent the publication of any evidence given in the proceeding, the content of any report or other document put before the court in the proceeding, or any information that might enable an accused or any person who has appeared or given evidence in the proceeding to be identified. A party to the proceeding may apply for a suppression order or the court may make it on its own initiative.[13] This has been so since 1997.

The Victorian Attorney-General, pursuant to s5(1)(a) of the *Victorian Law Reform Commission Act* 2000 (Vic), in August 2012 referred the CMIA to the VLRC for examination and report. This the VLRC did. It was the first comprehensive review of the CMIA since its introduction in 1997. The issues of unfitness to stand trial and of mental impairment arise only in some 1 per cent of criminal cases coming before the Victorian Supreme and County Courts. However, these cases usually involve very serious offences, which understandably cause terrible harm to those affected and legitimate and widespread concern about community safety.

The VLRC undertook a substantial review and delivered its report to the Attorney-General in June 2014. It was tabled in Parliament in October 2014. The recommendations in the report were informed by four key principles: protection of the community; respect for victims, accused and their families; due process; and, importantly, therapeutic outcome. The report was the subject of an article in the October 2014 *LIJ*.

In its submission to the CMIA review, the Victorian Institute of Forensic Mental Health (Forensicare) stated that open proceedings may have "significant negative consequences" for a person subject to a supervision order under the CMIA and also for the community. Forensicare submitted that these negative consequences may result from mental illness being a "highly stigmatising diagnosis" and that this poses challenges to persons subject to the supervision order in their recovery from mental illness and their reintegration into the community, and make it more difficult for persons to "engage with community services, gain employment and form relationships".[14]

The VLRC, guided by the four key principles above, concluded that it was appropriate to extend to a limited degree the capacity of the courts to make suppression orders under the CMIA. By its recommendation 63, the VLRC proposed that a statutory principle be added to the CMIA stating that the purpose of a suppression order under that Act is recovery and community reintegration. By recommendation 64(a) the VLRC proposed a presumption, which can be rebutted, in favour of suppression of the accused's name and identifying information (in the CMIA presently, the power to suppress is provided, but there is no presumption in its favour); and by recommendation 64(b) the VLRC proposed extension to any time during the CMIA process of the right to apply to the court for a suppression order.

MAXIMISING RECOVERY AND REHABILITATION: The Hon Philip Cummins

On the tabling of the CMIA report in August 2014 there was substantial support for many of the recommendations, particularly from the medical and legal professions and the service sector. A leading advocate against domestic violence was reported as saying: "Any implementation of the proposed changes needs to be very careful not to attribute family violence to mental illness in the absence of a thorough and professional risk assessment."[15] Indeed so, if the reference to "risk assessment" means established diagnosis of mental impairment as recommended by the VLRC.[16]

There was also criticism relating to recommendations 63 and 64. Such criticism should be given full and fair consideration. One leading and respected victims rights advocate was reported as saying: "It's part of their punishment. They should be named and shamed".[17] While identification of accused who have been convicted, and denunciation of their conduct, are appropriate sentencing principles, they do not apply to a person unfit to stand trial or who has been found not guilty of a crime because of mental impairment. Such persons have not been found guilty of a crime.

Another criticism was that offenders could gain, or seek, anonymity by falsely claiming mental illness. However, if a claim to mental illness is rejected by a court – as it has done in a number of cases – the basis for a suppression order lapses. If a court grants a suppression order under the CMIA, and then determines that the case was not one of mental impairment, it would revoke the order unless there were established grounds for an order in accordance with the *Open Courts Act* 2013. Such a revocation would permit publication, although not contemporaneously with the initial hearing, a matter understandably of concern to the media, which relies on contemporaneous reporting for relevance and impact. On the other hand, if the suppression order were not made and the accused is found unfit to stand trial or not guilty because of mental impairment, there is substantial medical evidence that the accused's rehabilitation – and thus community protection – could be jeopardised.

A leading media lawyer was reported as saying that the public interest in the community understanding court processes – particularly where issues of mental impairment are concerned – overrides concerns for the accused and could promote a better understanding of mental illness.[18] The VLRC in its report acknowledged and supported the "powerful principle of open courts".[19] But having addressed the relevant considerations, the VLRC concluded that the vital interests of the community would best be secured through maximising the opportunity for recovery and rehabilitation of persons subject to the CMIA. Indeed that is the conclusion reached by the Victorian Parliament in excepting the CMIA from the *Open Courts Act* 2013.

You be the judge. ●

THE HON PHILIP CUMMINS is a retired Supreme Court judge and chair of the VLRC.

1. This is the third of three articles published in the *LIJ* in relation to the 2014 Report of the VLRC of its review into the *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997. The first was published in the September 2014 issue and the second in the December 2014 issue.
2. Victoria, *Parliamentary Debates*, Legislative Assembly, 27 June 2013, 2417.
3. *Open Courts Act* 2013 (Vic), ss 4, 28.
4. Clause 8(1)(e).
5. *Open Courts Act* 2013 (Vic), s 18(1)(a),(c).
6. Jason Bosland and Ashleigh Bagnell, "An empirical analysis of suppression orders in the Victorian Courts: 2008-2012" (2013) 35 *Sydney Law Review* 671, 674.
7. Section 24.
8. *Open Courts Act* 2013 (Vic), s 8(2). Likewise the *Serious Sex Offenders (Detention and Supervision) Act* 2009 (Vic). The *Protecting Victoria's Vulnerable Children Inquiry* in its Report (2012) by recommendation 50 recommended that ss182 to 186 of the *Serious Sex Offenders (Detention and Supervision) Act* 2009 (Vic) (the power to make suppression orders under that legislation) should be repealed (p384). This has not yet occurred. Unlike the CMIA, the cohort under the *Serious Sex Offenders (Detention and Supervision) Act* 2009 are legally responsible for their criminal acts.
9. CMIA, s75(1).
10. [1998] VSC 209 (15 December 1998).
11. Note 10 above. at [15].
12. Note 10 above, at [27].
13. CMIA, s75(1),(2).
14. Forensicare, submission 19 to *CMIA Review* (2014).
15. Steve Lillebuen, "Fears new law will shield killers", *The Age*, Melbourne, 22 August 2014 p10.
16. Recommendation 24.
17. Note 15 above.
18. Note 17 above.
19. Report para 8.235.

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ETHICS
SPECIAL ISSUE

LAWYERS AND ETHICS

"Ethics are the hallmark of a profession, imposing obligations more exacting than any imposed by law and incapable of adequate enforcement by legal process." So said former High Court of Australia Chief Justice Sir Gerard Brennan AC KBE QC in describing the importance of ethics to a meeting of the Queensland Bar Association in 1992.

This special issue of the *LIJ* is dedicated to lawyers' ethics. Interesting and insightful contributions have been received from a Supreme Court judge of Appeal, an academic lawyer and ethicist, a litigation solicitor, the acting manager of the LIV Ethics Department and the chair of the LIV Ethics Committee. They should serve as a useful reminder to all lawyers of their ethical duties and obligations and be an invaluable resource for future reference.

As officers of the court, lawyers play an integral role in the administration of justice.

Lawyers owe paramount ethical duties to the court, the law, and the administration of justice to act both honourably and honestly, as Justice Emilios Kyrou of the Court of Appeal describes in his article "A lawyer's duty". These duties include the obligation not to mislead the court or allow it to fall into error and are owed to the court irrespective of any contrary instructions given by a client to the lawyer.

The University of Melbourne's Professor Rufus Black has written a thought provoking article on the ethics of choosing clients. He challenges law firms to consider the ethics of clients and their activities when deciding whether or not to act in matters where those activities may be morally questionable. He concludes that there are few areas of ethics as complicated as involvement with the ethics of others, but that navigating these issues successfully will repay the law firm positively in many ways.

Litigation solicitor Jonathan King reports on a recent ruling of the LIV Ethics Committee giving guidance on the ethics of potential plaintiff lawyers having pre-filing witness discussions with drivers of motor vehicles involved in transport accidents to ascertain whether or not negligence may be a factor in the accidents, thereby entitling certain classes of injured people to sue for common law damages.

Acting manager of the LIV Ethics department Michael Dolan writes on two topics – the ethics of communications and undertakings, and a lawyer's ethical ability to terminate a client engagement before completion of the agreed professional services.

Finally, LIV Ethics Committee chair Richard Fleming writes about the work of the Committee which continues to provide ethical guidance and rulings for the benefit of the profession.

The LIJ thanks the authors and reviewers for contributing their expertise and time to this special edition and hopes that all lawyers will find the articles to be a valuable resource when confronted with ethics issues in daily practice.

SPECIAL ISSUE ILLUSTRATIONS BY **CAROLYN RIDSDALE**

A LAWYER'S DUTY

Lawyers have many duties to uphold, not least of which is to act honourably, and with honesty and candour.

By The Hon Justice Emilios Kyrou*

DUTY TO ACT HONOURABLY

Every lawyer has a duty to fellow practitioners, opposing parties and witnesses to conduct themselves honourably. This duty may require a practitioner to refrain from taking unfair advantage of an obvious mistake by another practitioner.

For example, in litigation where issues of privilege are hotly contested, if a lawyer finds a sensitive letter of advice which is not listed in the opponent's affidavit of documents and which was obviously provided in error, the lawyer must return the letter to the opponent unread. The lawyer should inform their client of what has occurred, as part of the lawyer's duty to keep the client informed of developments in the litigation, but the lawyer would be acting improperly if he or she complied with any instructions from the client to read the document or forward a copy of the document to the client.[1]

If a lawyer deliberately reads a document which is clearly privileged and has obviously been provided in error, then, depending on the nature of the document and its importance to the litigation, the lawyer may face an application by the opponent that the lawyer cease to act.

The same standard of behaviour is expected when a lawyer is dealing with unrepresented parties or individuals who are potential witnesses in litigation.

In *Hodgson v Amcor Ltd [No 4]*[2] the solicitors for Amcor, Corrs Chambers Westgarth, served a subpoena on the widow of one of Hodgson's associates directing her to attend the Supreme Court on the first day of the trial to give evidence and to produce nominated documents. In response, the widow delivered documents not to the Court but to Corrs a week before the trial. Among the documents was a copy letter of legal advice that Hodgson had received. Corrs examined the documents and did not immediately produce them to the Court. When the issue of the subpoena was raised on the first day of the trial, the production of the documents was ordered, and they were then given to the Court. Questions of privilege and waiver of privilege arose when Amcor sought to admit the letter of advice into evidence.

Vickery J held that it was at the very least improper for Corrs to have inspected the documents before obtaining any order from the Court permitting this to occur. If the documents were hand-delivered to Corrs, they should have advised the widow to deliver the documents to the Court. Alternatively, if the documents had been posted by the widow to Corrs, it was their duty either to return the documents to the widow with appropriate instructions as to how she should comply with the subpoena, or take immediate steps to have the documents delivered directly to the Court. Vickery J held that under no circumstances is it permissible for lawyers to examine documents delivered to them in response to a subpoena or make use of them in any way, without first obtaining a court order to do so.[3] His Honour concluded that, as the documents had come into the hands of Amcor improperly, there had been no loss of privilege.[4]

It is self-evident that lawyers should not breach the criminal law in pursuing their clients' interests. What is less obvious, but nevertheless just as important, is that lawyers must not commit any civil wrong in

pursuing their clients' interests. For example, a lawyer should not defame an opposing party on the steps of the Supreme Court in the middle of a trial with a view to gaining a tactical advantage for the client.

Another example is a lawyer committing trespass to obtain evidence to use on behalf of a client. In a case involving the issue of whether the defendant actively engaged in a business, it may not be a trespass for the plaintiff's lawyer to enter an open shop owned by the defendant and observe how well it is stocked. This is because the law recognises an implied licence to enter business premises for the purposes of that business.[5] However, it would be a trespass if the lawyer proceeded to take photographs of the stock in the shop, as the implied licence does not extend to this activity.

In a case involving the issue of whether a shop sold a particular item, it would not be unethical for a lawyer to enter the shop and purchase the item without uttering a word. Likewise, it would not be unethical for a lawyer to telephone the shop and ask whether that item was available for sale. However, it would be unethical if the lawyer expressly or impliedly misrepresented his or her identity or the purpose of the enquiry. For example, it would be improper for the lawyer to introduce himself or herself as a collector of the item who is interested in purchasing it, or to represent this in response to a question as to why the enquiry was being made.

The above discussion assumes that the shop owner is not legally represented. If litigation is already afoot against the shop owner and the shop owner is legally represented, the plaintiff's lawyer must not have any communication with the shop owner. All communications must be with the shop owner's lawyer.

Lawyers must take particular care when communicating with those who are not legally represented. Lay people are susceptible to being confused and intimidated by lawyers' letters. Accordingly, lawyers have a responsibility to ensure that any statements they make are not only literally accurate but also do not convey a misleading impression. A lawyer must not use their superior knowledge of the law in communications with lay people for the purpose of securing an unfair advantage for their client. It is always a good idea to include in your letter a recommendation that the addressee seeks legal advice.

DUTY TO THE COURT

A duty of honesty and candour, both in presentation of the law and presentation of the facts, is owed to the court. As with all other duties to the court, it will override a lawyer's duties to the client in the event of inconsistency.

First, lawyers must not mislead the court as to the law. All relevant law must be disclosed to the court even if it is against the interests of the client.

Second, lawyers must not present any evidence to the court that is known to be false or misleading, including concealing a material fact. A lawyer who is a party to the presentation of evidence or the making of a statement to the court that is partly true, but which does not amount to the whole truth, can create a misleading impression to the court and breach their duty to the court.

A lawyer has an obligation to correct a misleading impression as soon as they become aware of the true position. That obligation continues until judgment is given.

A lawyer must not be a party to the presentation of evidence or make allegations that lack an evidentiary foundation. Where the client's instructions involve serious allegations against another person, the lawyer must take reasonable steps to verify the client's allegations.

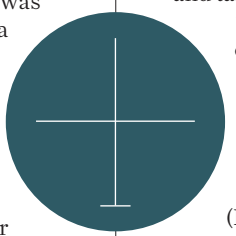
The duty of candour does not require a lawyer to disclose information that is protected by client legal privilege. Nor does it require a lawyer to volunteer information which is against the client's interests. However, there is a clear distinction between not volunteering information and being a party to conduct which actively misleads the court. This distinction is well illustrated by the English case of *Meek v Fleming*.[6]

Meek, a press photographer, claimed damages against Fleming, a chief inspector of police, for assault and wrongful imprisonment. The parties' credit was of critical importance and by the time the case was heard, Fleming had been demoted to the rank of station sergeant for being a party to an arrangement that had the effect of deceiving a court in another proceeding. Fleming's lawyers knew these facts, but took deliberate steps to conceal them from Meek and the court.

During the trial, Fleming appeared in plain clothes so as not to reveal his rank of sergeant, whereas the other officers who gave evidence appeared in uniform and their rank was evident. When Fleming entered the witness box, he was not asked his name and rank in the usual manner. Fleming's counsel addressed him by the title "Mr" rather than his rank. Meek's counsel and the judge, however, addressed Fleming as "inspector" and nothing was done to correct this. In cross-examination, when Fleming was asked: "You are a chief inspector . . .?" he answered, "Yes, that is true".

After the jury found for Fleming, Meek sought, and was granted, a new trial on the basis that the judgment in favour of Fleming was procured by deceit. The court held that a party need not reveal something to the discredit of that party but this does not mean that the party can by implication falsely pretend that a particular state of affairs exists, and knowing that the court has been misled with respect to a material matter, foster and confirm the misrepresentation through answers given by the party.[7]

Misleading the court by presenting a misleading or false document is contrary to the lawyer's duty of honesty and candour, including in their capacity as a litigant. This principle is well illustrated in *Law Society of New South Wales v Foreman*.[8] Foreman was a partner of Clayton Utz. She was a very experienced family law solicitor who was involved in a costs dispute with a former client. The client made an application for the taxing of a bill for work performed in relation to a property settlement. Foreman wished to show that she had given the client a costs agreement during their first meeting, however her time sheet for that meeting did not record that she had done so.



Foreman destroyed the original time sheet held by the firm's accounts department and the copy time sheet in her file and substituted false versions on which she added the words, "Gave her costs agreement". The original false time sheet was later tendered at the hearing of the costs dispute in the Family Court and the false copy was included in an affidavit of documents. Foreman's misconduct came to light when it was discovered that the accounts department had retained a copy of the genuine time sheet. Until then, she did not confess her wrongdoing.

Foreman's actions in intentionally presenting a false document to the Court, knowing that the Court and her opponent would be misled into believing that it was genuine and then perpetuating that falsity, resulted in the New South Wales Court of Appeal ordering that her name be removed from the Roll of Practitioners. Mahoney JA stated that:

"A practitioner must not merely not deceive the court before which she practises; she must be fully frank in what she does before it. This obligation takes precedence over the practitioner's duty to her client, to other practitioners and to herself. The justice system will not work if a practitioner is, for her own purposes, free to put to the court that which she knows to be false".[9]

Ironically, it is unlikely that Foreman's dishonest conduct would have materially assisted her in the dispute with the former client because the former client did not dispute that she had been given a costs agreement. Rather, she claimed that she had never signed that costs agreement. Had Foreman refrained from altering the time sheet, the worst that could have happened was that the firm would not have been able to recover costs above scale. By breaching her duty of honesty and candour, Foreman lost her reputation and livelihood and forfeited her membership of the legal profession.

The *Foreman* case demonstrates that a lawyer's behaviour after the initial wrongdoing can be highly significant for their fate. If the lawyer perpetuates the wrongdoing by concealment and deception, the consequences will usually be far more serious than if the lawyer promptly confesses the wrongdoing and takes corrective action.

The different facets of the duty of honesty and candour are well illustrated in the Victorian Court of Appeal decision in *Forster v Legal Services Board*.[10] For the purposes of defending proceedings by the Legal Services Board (LSB) for the appointment of receivers to his practice, Forster obtained various documents from the LIV pursuant to a subpoena. One of those documents was a redacted document headed "Item 10" which was an extract from a letter that another law firm had sent to the LIV. Forster did not know this and believed that the document was an extract from the minutes of the executive Council of the LIV. When he asked officers of the LIV whether the document was an executive Council document, they neither confirmed nor denied that it was. There was no statement by the LIV that the document had any connection with the executive Council and nothing on the face of the document to indicate any such connection.

Despite these facts, Forster wrote the words "Executive Council" at the top of a copy of the document and exhibited that copy to an affidavit that he swore. In the affidavit, Forster described the document as "a copy of the Law Institute of Victoria Executive Council Minute Item 10".

Emerton J appointed receivers to Forster's legal practice on the basis of trust account deficiencies. Subsequently, the LSB refused to renew Forster's practising certificate on the basis that Emerton J's findings meant that he was not a fit and proper person to continue to

hold a practising certificate. Forster applied to VCAT for review of the Board's decision. VCAT agreed that Forster was not a fit and proper person to continue to hold a practising certificate but did so not because of the trust account deficiencies but due to his conduct in the Supreme Court and VCAT proceedings. This conduct included breaches of Forster's duty of honesty and candour to the Supreme Court in relation to the exhibited document.

On appeal, the Court of Appeal decided that VCAT was justified in finding that Forster was not a fit and proper person to continue to hold a practising certificate and dismissed his appeal.

In relation to the exhibited document, the Court found that Forster had breached his duty of honesty and candour to the Court in the following four respects:

- ascribing to the document the unqualified description "the Law Institute of Victoria Executive Council Minute Item 10" in his affidavit;
- not disclosing that he had written the words "Executive Council" on the document;
- standing by while his counsel asked questions that were premised on the document being a document of the executive council and on the words "Executive Council" having been written by a person other than Forster; and
- not informing Emerton J of the correct position at any time prior to the making of the receivership order.[11]

The Court of Appeal also upheld VCAT's decision that Forster had breached his duty of candour by failing to disclose a material fact to the Supreme Court. After the receivers had been appointed, without disclosing to the Court that he had sold the business premises of the practice or that he was proposing to practise from his home, Forster applied for a stay of the receivership order on the basis that the receivership was causing "mortal damage to the practice". The Court of Appeal concluded that, as the sale of the premises and the other steps that Forster had taken to effectively close his practice were relevant to the stay application, by withholding that information, Forster created a misleading impression and breached his duty of candour.[12]

Forster highlights some of the common errors that lawyers make in affidavits. It is not unusual for affidavits to describe exhibited documents as true copies when even on a cursory reading it would be clear that they are not true copies because they are redacted, incomplete or covered in handwritten comments. While these misdescriptions may not be sinister, at best they indicate a poor attention to detail and at worst they disclose an unacceptable, cavalier attitude to the duty of candour.

The duty of candour has particular relevance in ex parte applications. In such cases, a lawyer must disclose all non-privileged matters within their knowledge that are relevant to the application, even if they are adverse to the client's position. Ex parte applications eventually become contested proceedings. It is not unusual for a defendant to allege that the ex parte order was obtained in breach of the duty of candour to the court. Although ex parte applications usually involve great urgency and the preparation of affidavit material in a limited time frame, the plaintiff's lawyer must nevertheless be scrupulous to ensure that they have not omitted any information which is of relevance, irrespective of whom that information favours.

Where a lawyer makes a disclosure to the court pursuant to the duty of candour, the disclosure must be sufficient to inform the court of the substance of the matter being disclosed. The disclosure must not be incomplete, cryptic or selective.

The duty of honesty and candour — as with all other duties to the court — is an incident of a lawyer's status as an officer of the court. Compliance with the duty is fundamental to ensuring that the court makes the correct decision in the particular case in which the lawyer is involved. It is also essential to the administration of justice. ●

THE HON JUSTICE EMILIOS KYROU is a judge of the Victorian Court of Appeal and the Victorian patron of the Hellenic Australian Lawyers Association.

*This article is adapted from a paper delivered by Justice Kyrou at an Hellenic Australian Lawyers Association event on 29 May 2014.

1. *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 303 ALR 199, 213 at [64]–[67].
2. (2011) 32 VR 568.
3. Note 2 above, 581–2 at [61]–[62].
4. Note 2 above, 585 at [79].
5. *Slaveski v Victoria* [2010] VSC 441 (1 October 2010) [290].
6. [1961] 2 QB 366.
7. *Meek v Fleming* [1961] 2 QB 366, 380.
8. (1994) 34 NSWLR 408 ("*Foreman*").
9. *Foreman* (1994) 34 NSWLR 408, 447 (citations omitted).
10. [2013] VSCA 73 (11 April 2013) ("*Forster*").
11. Note 10 above, at [170].
12. Note 10 above, at [183].

THE ETHICS COMMITTEE AT WORK

For those practitioners faced with an ethical difficulty, the LIV Ethics Committee is here to help.

By Richard Fleming

Experienced practitioners will often see a potential conflict of interest or other ethical issue coming and take steps to avoid or manage it long before it is a reality. Accordingly, it is possible that a practitioner could avoid directly encountering an ethical problem of their own throughout their entire career, and have little cause to understand the role and nature of the LIV Ethics Committee (EC).

Sometimes, however, an unexpected turn of events can catch out even the most diligent practitioner. Alternatively, a practitioner may be involved in a matter where the opposing practitioner engages in conduct that appears to be unethical and perhaps also contrary to the interests of the client of the innocent practitioner. In such circumstances, the EC is one potential source of assistance to members of the LIV.

THE ETHICS COMMITTEE

The EC is a committee of the Council of the LIV. The EC has existed in various guises for at least 60 years[1] and possibly longer. Today, the EC is made up of about 15 present and past LIV Council members, and is assisted by a group of experienced professional staff from within the LIV.

The EC members are all experienced practitioners, with hundreds of years of experience between them, who cover the spectrum of legal practice in terms of:

- practice types (e.g. large, small, city, suburban, country, private firm, corporate, legal aid or community practice); and
- subject matter (e.g. general practice, litigation, commercial, property, family, criminal, wills and estates, and migration).

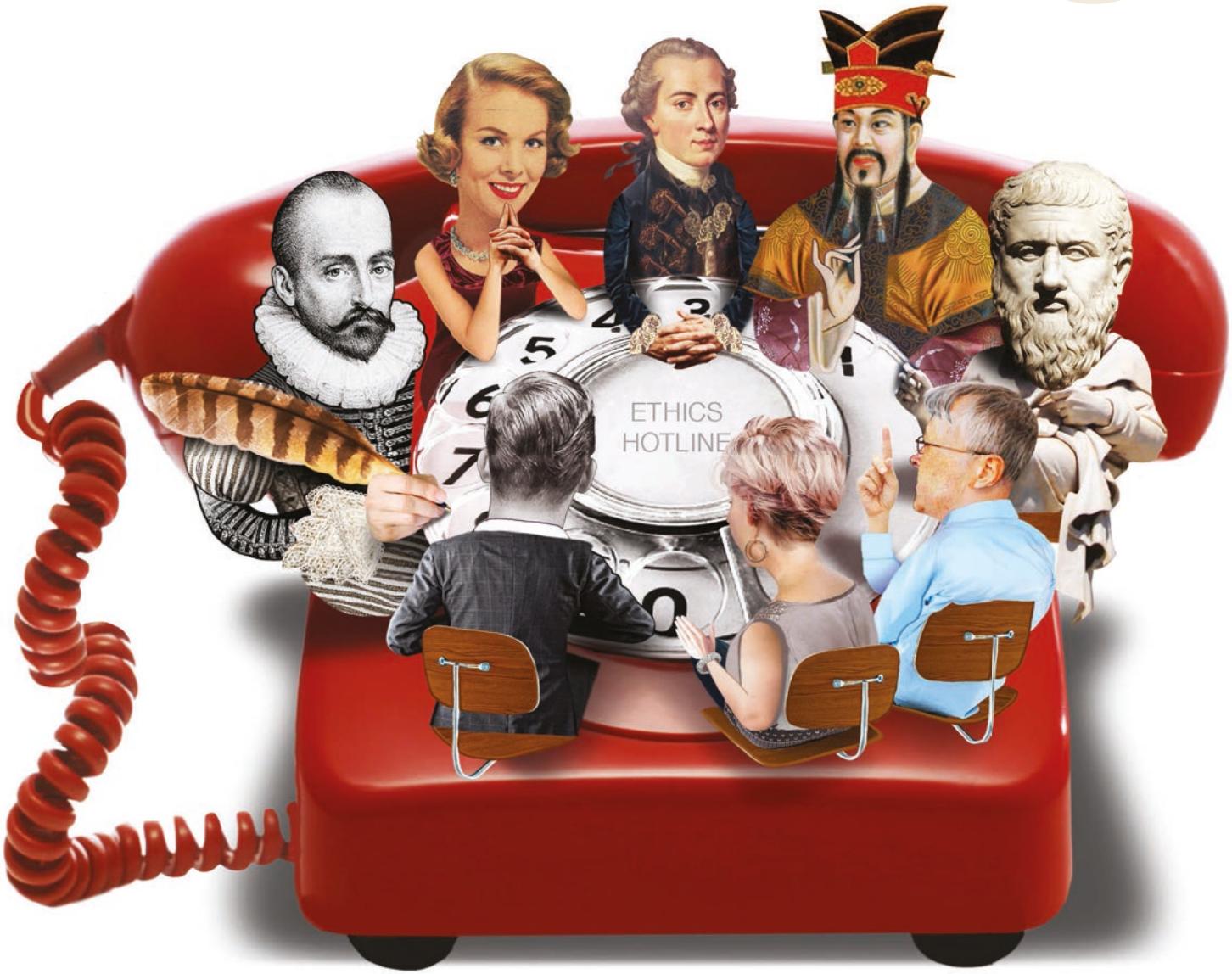
Although the EC adds new members from time to time, a significant number of its members have sat on the EC for at least 10 years. The EC represents an impressive depth of knowledge and practical insight on ethical questions.

Monthly rulings

The main role of the EC is to meet monthly (except in January) to consider various ethical dilemmas LIV members face, and provide rulings in relation to them.

Usually practitioners first contact the LIV's Ethics department by phone to discuss the issue. The Ethics department is staffed by professionals who assist the EC, and in many cases the matter is resolved when the practitioner first calls. The experience of the Ethics department in assessing ethical problems will often enable them to provide clear guidance regarding the appropriate course of action for the practitioner.

Some matters, however, cannot be resolved in a phone call or two. They may be too complex, involve novel issues or



circumstances, or simply be in a "grey zone" where the appropriate ethical response is not obvious. Alternatively, it may be that a ruling is necessary or desirable, e.g. in order to provide a sufficient level of comfort to the practitioner regarding the course of action to take, or in order to assist in resolving a dispute between two practitioners on a question of ethics.

Matters that are not resolved with the initial phone calls usually proceed to a ruling by the EC, provided that they do not involve issues that are the subject of a current complaint to the Legal Services Commissioner or disciplinary proceedings before the courts or tribunals. Excluding such matters is necessary to reduce the potential for contradictory approaches by the EC, regulators and courts and tribunals.

The EC's processes to obtain a ruling are relatively informal – the EC requires that practitioners submit a form or letter describing the relevant issue(s) together with any supporting documentation that the practitioner believes is relevant. If the matter involves another practitioner, the EC will usually also ask the other practitioner to provide his or her views on the matter. Although it is preferable that both sides participate, it is worth noting that the EC may proceed to provide a ruling even if there is another practitioner involved who refuses to participate in the process.

The EC cannot decide matters of fact if they are in dispute. Only a court or tribunal can make such determinations.

The EC considers matters on a confidential basis – except, of course, for the disclosure of material submitted by the practitioner to the other practitioner involved (if there is one), and vice versa.

The EC then makes a ruling "on the papers" (submissions in person are not permitted) in the course of its regular meetings.

Rapid rulings

Most ethical issues facing solicitors are not truly urgent. Accordingly, the monthly cycle

. . . although a court could ultimately decide that the ruling of the EC is incorrect, the practitioner can hardly be criticised for following that ruling.

of EC meetings will be sufficiently responsive in most cases. There are, however, some limited circumstances that are legitimately more urgent – usually court or tribunal matters.

The EC has recently developed a rapid rulings process to address such cases. It is available for either:

- matters involving an ethical problem that arise only shortly before an impending court or tribunal appearance; and
- matters where the court or tribunal itself requests that the practitioner obtain an urgent EC ruling.

In such cases the EC will endeavour to provide a ruling overnight. Such rulings will usually be passed by circular email – it being impractical to hold a physical meeting at short notice because EC members are located across Melbourne and Victoria.

The nature of rulings

Although described as "rulings", the determinations of the EC are really recommendations in that they are non-binding. However, the courts have stated that the rulings carry significant weight as they represent the considered view of a group of practitioners whose collective breadth and depth of experience is significant. For example, in the Supreme Court Byrne J stated:

"Finally, I make mention of the submission of counsel for Coopers & Lybrand, which I found very troubling. He drew my attention to the rulings of the Ethics Committee of the Law Institute where the position of a solicitor witness was discussed. The Committee was, generally speaking, against the concurrence of these two functions. I pay great weight to this as the considered view of practitioners of repute and experience".[2]

Indeed, in most years there are instances of a court adjourning proceedings so that the EC can provide its view on a related ethical matter, or of a court recommending that a practitioner seek a ruling from the EC.

For this reason, an EC ruling can provide significant comfort for a practitioner as, although a court could ultimately decide that the ruling of the EC is incorrect, the practitioner can hardly be criticised for following that ruling.

Where a matter involves another practitioner engaging in conduct regarded as unethical, a ruling of the EC against that practitioner can lead to him changing his approach (including ceasing to act in some cases), effectively resolving the problem. Even the most belligerent of opponents will have pause for thought when faced with an EC ruling against them. Certainly an opponent would want to have very clear arguments for ignoring an EC ruling if there is a likelihood that persisting in the conduct ruled as being unethical will be challenged in the courts.

Matters considered

The EC considers matters involving the full gamut of ethical questions and related professional rules. Although the most common scenarios are those involving a conflict of duties to a current client and a previous client, rulings can involve a huge variety of ethical issues, including:

- acting as a witness in proceedings;
- releasing files or documents to an ex-client's new solicitor;
- terminating the engagement with a client; and
- problems with undertakings, including those involving money held in trust.

For example, one ruling involved only one practitioner and concerned a situation where an elderly client had, through or in the presence of her daughter, repeatedly provided instructions to change her will to the benefit of the daughter. However, each time the solicitor discussed the matter with the elderly client separately from the daughter, the elderly client said that she did not want to change the will. Ultimately the elderly client did provide uncontroverted instructions to change the will and appeared to have legal capacity.

The solicitor was understandably concerned about the influence of the daughter over the mother. The EC ruled that, if the solicitor was of the view that her client had legal capacity, then the solicitor was obliged to follow the instructions of her client. The ruling would have provided significant comfort to the practitioner.

Resources

The EC also provides a significant range of resources for self-help. In particular:

- a selection of recent rulings (together with their factual backgrounds) is anonymised, summarised, and published monthly in the *LIJ*;
- the LIV website includes a useful database of anonymised summaries of more than 500 rulings that can easily be searched to identify potential rulings of relevance to the issue facing a practitioner; and
- the EC also prepares and maintains a variety of guidelines on common ethical issues that are formally published by LIV Council. Again, these can be found on the LIV website.

Conclusion

If you are an LIV member and have an ethical issue, you should not hesitate to seek the assistance of the EC. Initially that might be via the self-help materials on the LIV website. Alternatively you could contact the Ethics department for an initial view. The easiest place to start is the LIV website – just type "ethics" in the search box, and you will soon find yourself on the right track. ●

RICHARD FLEMING is the principal at Benelex where he practises commercial and technology law. He has been a member of the LIV Ethics Committee since 2002 and its chair since 2005. Richard was also a member of the Legal Services Board from 2010 to 2014.

1. For example, the LIV's 1953 Annual Report of Council refers to a six member "Complaints and Etiquette Sub-Committee".
2. *Executive Homes v First Haven* [1999] VSC 26 (13 July 1999) at [14].

THE CLIENT FROM HELL

Can a solicitor terminate a client engagement before completion of the matter?

By Michael Dolan

ETHICS
SPECIAL ISSUE

For the best part of a year you have been acting for a client in a very difficult and complex commercial matter. Your client has been extremely challenging and arguing about every second recommendation you have made. Increasingly, your client has been bombarding you and members of your team with letters, emails and telephone calls, and the tone of those communications is becoming ruder and more offensive. Despite this behaviour, your client has continued to pay your monthly interim accounts on time and without complaint. You now do not wish to continue the solicitor client relationship as it is beginning to affect the health and wellbeing of you and your staff. Can you terminate your client engagement?

AN ENTIRE CONTRACT

A client may terminate a solicitor's engagement at any time subject to any special conditions in the engagement agreement, but there are limitations on a solicitor's ability to terminate. Although a client can terminate the engagement without giving any reason, the client remains liable to the solicitor for the legal fees and disbursements incurred to that point. If a client exercises the right to terminate the engagement prior to completion of the matter, the solicitor may normally exercise a general retaining lien over the client's file and related documents.[1]

In the absence of an agreement with the client, a solicitor's engagement is normally held to be an "entire contract" under which the solicitor agrees to act for the client in a particular matter until its completion and the client agrees to pay the solicitor for carrying out those services either on completion or on such other terms as may be agreed (e.g. upon receipt of monthly invoices from the solicitor).[2] This is the position at common law.[3]

THE PROFESSIONAL CONDUCT RULES

Rule 6.1.3 of the Victorian Professional Conduct and Practice Rules provides that:

"A practitioner must complete the legal services required by the practitioner's engagement, unless the practitioner terminates the engagement for just cause, and on reasonable notice to the client".

Rule 6 appears as Rule 13 of the Australian Solicitors' Conduct Rules in identical terms.

"Just cause"

"Just cause" may include:

- a failure by the client to put a solicitor in funds to pay disbursements including counsel's fees or the client committing a serious breach of a written fees agreement with the solicitor;
- a delay or refusal to pay the solicitor's agreed fees;
- the client making material misrepresentations to the solicitor about the facts;
- a request by the client for the solicitor to do something illegal or unethical;
- a refusal by the client to give the solicitor instructions to enable the solicitor to carry out the retainer;
- the client clearly indicating that another lawyer has been retained in the matter;
- the client casting insulting imputations upon the solicitor's character or conduct;
- continued representation of the client placing the solicitor in clear conflict of interest;
- the solicitor becoming likely to be a material witness in the case;
- a potential negligence claim against the solicitor depending on the outcome of the case;
- continued representation of the client having a serious adverse effect on the solicitor's health; or
- there being a complete breakdown in the solicitor client relationship.

Not "just cause"

What is probably not "just cause" may include:

- the solicitor having an excessive workload;
- the solicitor having better remunerative work;
- the solicitor having lost interest in the case; or
- the solicitor disliking the client.

"Reasonable notice"

What constitutes "reasonable notice" will depend upon the circumstances of each case. If the retainer has been terminated for "just cause" and on "reasonable notice", the client will be liable to pay the solicitor's fees and disbursements incurred until that point.

As a general principle, a solicitor who discharges a client must hand over the client's file to a new solicitor who holds it subject to the former solicitor's lien.[4]

JUDICIAL STATEMENTS ON "JUST CAUSE"

In a 19th century decision in the English Court of Appeal the following statement was made:

"I should say that when a solicitor is in a position to show that the client has hindered and prevented him from continuing to act as a solicitor should act, then upon notice he should decline to act further; and in such a case the solicitor would be entitled to sue for the costs already incurred. But we have not now to deal with such a case. The sole question here is whether the solicitor is entitled without rhyme or reason to throw up his retainer having given due notice of intention to do so. I do not think that he is so entitled".[5]

This decision set the standard for "just cause" in the cases that have followed both in the UK and Australia.

In 2000 the Supreme Court of South Australia addressed "just cause" as follows:

"The appellants maintain that Stanleys undertook an entire job and were not entitled to be paid when they were reluctant to continue the third set of proceedings. The Magistrate found at [28]:

"'There had been a complete breakdown in the solicitor/client relationship. Mr Bourne said that he could not get a simple task done by a junior solicitor without criticism from the Everinghams, and by then he felt that he was in a conflict situation because he had no enthusiasm to act in the third judicial review and therefore he was not any longer prepared to act. By offering the Everinghams the option of going to another solicitor he felt that the conflict would resolve. I should point out that the third judicial review was in turn discontinued, apparently on the advice of Caldicott and Co'.

"The instructions came to an end by mutual consent. Mrs Everingham refused even to speak to a junior solicitor who was sent to a routine listing conference by Stanleys. In my opinion, the Everinghams were not entitled to avoid paying their solicitors by reason of the circumstances in which the relationship came to an end."[6]

Some years later in the US, the Supreme Court of Utah considered the issue of "good cause" or "just cause":

"We have long held that '[w]hile a party may discharge his [or her] attorney with or without cause, [an] attorney should not withdraw from a case except for good cause'. Accordingly, the legal standard applicable to determining whether an attorney's withdrawal is justified is whether the attorney had good cause. Whether good cause exists is a fact-intensive inquiry based on the reasons for withdrawal and the actions of the parties prior to withdrawal. If, based on the parties' actions, the withdrawal is for good cause, the attorney may seek his fees earned up until the time of the voluntary withdrawal. ('[U]nless an attorney has just grounds to withdraw, he waives his retaining lien by thus terminating his services.') In order to do this however, the attorney must have proof of the work done and demonstrate that the work was of value to or benefitted the client" (references from the court omitted).[7]

More recently, the Supreme Court of Victoria gave consideration as to whether there had been a complete breakdown of trust between the client and the solicitors.[8]

An associate justice had given the solicitors leave to withdraw stating that "it would not be in the interests of justice to allow a situation to continue whereby these solicitors were forced to act on the record in circumstances where the evidence squarely points to a complete breakdown of the professional relationship".

The trial judge dismissed an appeal from the decision of the associate justice. In doing so, His Honour said:

"The evidence as a whole . . . demonstrates an irretrievable breakdown of trust and confidence between Mr Tomasevic and the firm. That was apparent to the associate justice and is apparent to me. In these circumstances, it would not serve the interests of justice for the firm to be forced to continue to act for Mr Tomasevic".

In that case the plaintiff suffered from psychiatric problems and had trust issues with his solicitors from the outset. The plaintiff refused to follow reasonable legal advice and demanded constant information about his case despite the solicitors advising him that this would increase his solicitor client costs.

The solicitor handling the case swore in an affidavit that she believed that the relationship between the plaintiff and the firm had "irretrievably broken down". Leave to withdraw as solicitors on the record was sought and granted on that basis.

LIV ETHICS COMMITTEE RULING

This important issue for solicitors was considered recently by the LIV Ethics Committee.[9]

From 1 March 2013 a firm had been acting for a plaintiff in a legal professional negligence claim against five lawyer defendants. The client had previously engaged at least 12 barristers and six different law firms. The action had commenced in 2003. A mediation had been unsuccessful, and the case was proceeding to trial. The firm had faced considerable problems in acting for the client in the conduct of the litigation and was of the view that there had been an irretrievable

breakdown in the solicitor client relationship such that it wished to terminate its engagement and cease acting. The firm sought guidance from the Ethics Committee as to whether it could discharge the client.

The Ethics Committee ruled that in its opinion and on the information presented:

"The Ethics Committee cannot determine the contractual rights and obligations between a solicitor and its client as these are matters of substantive contract law. Such a determination can only be made by a court however the Committee can provide ethical guidance.

"The firm has established on balance 'just cause' to terminate its engagement by the client to act on its behalf in the proceedings;

"If the firm terminates its engagement by the client, then it must do so 'on reasonable notice' to the client;

"Termination of its client engagement by the firm at a time when the proceedings are still at an interlocutory stage would appear to satisfy the ethical requirement for 'reasonable notice' to be given to the client; and

"Given the past and ongoing disputes about legal costs between the firm and the client during the course of its engagement a conflict of interest now exists which requires the firm to cease acting."

This ruling provides important ethical guidance to solicitors seeking to terminate their client engagement where the solicitor client relationship has broken down irretrievably.

CONCLUSION

Terminating a client engagement is an extremely serious step for a solicitor to take and may adversely affect the right of a solicitor to exercise a general retaining lien over a client's file and other documents to secure payment of outstanding professional fees and disbursements. It may also have potential breach of contract consequences for the solicitor. It is not a step which any solicitor should take lightly.

Before doing so it would be well worth taking a step back to ask yourself: Why do I want to terminate my client engagement? Can I resolve the situation in another way, e.g. by a frank discussion with my client or the assistance of a trained mediator? What are the potential downsides for both my client and me in terminating the engagement? What professional obligations do I owe to my client? ●

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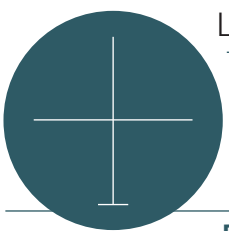
1. *McKenzie v Director-General of Conservation & Natural Resources* (2001) VSC 220; *Ahmed v Russell Kennedy* (a firm) (2000) VSC 41; *Heather French v Carter Lemon Camerons LLP* (2012) EWCA Civ 1180.
2. *Baker v Legal Services Commissioner* [2006] QCA 145 at [2]-[3]; *Ahmed v Russell Kennedy* [2000] VSC 41.
3. *Underwood, Son & Piper v Lewis* (1894) 2 QB 306 *Richard Buxton (Solicitors) v Huw Llewelyn Paul Mills-Owen and The Law Society* [2010] EWCA Civ 122).
4. *McKenzie v Director-General of Conservation & Natural Resources* (2001) VSC 20 per Gillard J at [68].
5. *Underwood, Son & Piper v Lewis* (1894) 2 QB 306 AL Smith LJ.
6. *Everingham v Mullins* (2000) SASC 448 per Williams J at [12] and [13].
7. *Hartwig v Johnsen* (2008) UT 40.
8. *Tomasevic v Melbourne Injury Lawyers* [2014] VSC 434) per Hargrave J.
9. *LIV Ethics Committee* Ruling 4850, September 2014.

THE ETHICS OF CHOOSING CLIENTS



Law firms should consider the best approach to take when faced with ethical questions, particularly when deciding which clients to serve.

By Rufus Black

Law firms face important ethical questions when it comes to potential clients who engage in what some see as morally questionable enterprises – from selling tobacco, gambling products, armaments and pornography to engaging in environmentally harmful activities.

THE OVERALL APPROACH

While it might sound like a rather "academic issue", the first step is for a firm to decide the approach it will take when solving ethical questions, because different approaches lead to very different answers when deciding who to serve and how.

The utilitarian approach

This is the most widely used form of ethics today – the right thing is that which will produce the greatest good for the greatest number.

When it comes to applying utilitarian thinking to business ethics, a common approach articulated by Milton Friedman is:

"There is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud".[1]

If you follow this utilitarian logic then so long as a client runs a legal business the only question is whether the client can be served profitably. There are, of course, important second order effects to be considered in determining profitability – the impact on the firm's reputation from serving businesses regarded as unethical and the impact on the firm's ability to attract talented staff who do not want to serve businesses they judge as unethical. The answers need to be weighed in any utilitarian calculation, but in principle, who a firm decides to serve is a profit maximising decision.

The non-utilitarian approach

Even before the global financial crisis, there had been a growing shift away from this narrowly utilitarian view to one that maintains that corporations have a wider set of ethical and social responsibilities. For those holding these views, the question of what is an ethical business is more complex.

Practically, the judgment that a business is unethical can lead to the decision not to provide them with goods or services, or not to invest in them.

Those who hold this broader view of the social and ethical responsibilities of corporations have drawn on a range of non-utilitarian traditions of ethical reasoning including Kantian, Aristotelian or natural law theories.[2] Often they have done this relatively unsystematically and with little or no explicit awareness of the form of ethical reasoning they are using. If you are to use a non-utilitarian approach, you must be explicit about the approach and systematic in its application.

Who decides?

With a range of ethical approaches open, one answer is to let each individual in the firm decide how they will reason ethically and, therefore, which clients they will serve. The difficulty with this approach is that individual decisions have implications for others. The choice of one partner to serve a business that many regard as unethical will lead to the firm as a whole being associated with serving such clients. Clearly, that has implications for all partners and employees. Therefore, the decision to let everyone decide is an important philosophical position in its own right.

Choosing options

If a law firm decides to adopt a particular ethical approach, then there is the important matter of how this is to be done.

The starting point is what approach best fits with the firm's identity. Some firms have a clear sense of where their staff generally stand in a particular ethical tradition. Some would recognise that their employees would not be happy with a utilitarian answer, and that if a given business is legal, the firm is willing to serve them, and therefore a non-utilitarian approach best fits their general outlook.

If the firm's identity doesn't provide a clear direction, then there is a need to debate the merits of different approaches and to recognise that the decision will be an identity defining choice.

Implications of a non-utilitarian approach

If a law firm decides on a non-utilitarian approach then there are some further analytic steps on whether and how ethically questionable clients can be served.

For the purposes of this analysis, we will use a natural law theory approach, as articulated by the contemporary Oxford jurisprudential philosopher John Finnis[3] for three reasons:

- It is the theory that has addressed the question of involving oneself in other people's wrongdoing with the greatest analytic precision;
- It is a theory of ethics from which the common law grew, which means lawyers find it aligns well with the ethical logic embedded in legal traditions;
- The practical conclusions are very similar to those produced by Kantian traditions. So even if you don't agree with natural law theories, the practical answers are likely to have a wide appeal among many non-utilitarian thinkers.

Obligation to serve a client

It is certainly a central tenet of the rule of law that a person brought before a court should be able to have their case competently presented. In our legal system, to help ensure that this requirement is met, the obligation has evolved that barristers must accept the brief of any client who seeks their assistance if they are not otherwise engaged. Today, that is supported by the provision of legal aid to help meet the cost of representation if a client is unable to do so.

Our system relies on having a plurality of firms that collectively ensures that all businesses and individuals can access basic legal services.

However, our system has not made it obligatory for solicitors' firms to accept clients. Rather, we have implicitly adopted the view that solicitors' firms are private business and that while the services they provide are a public good, they are able to determine to whom they provide that good. Our system relies on having a plurality of firms that collectively ensures that all businesses and individuals can access basic legal services. In cases where there is market failure in relation to basic services, which happens primarily in relation to individuals, it is addressed through the provision of legal aid services.

Choosing clients

Given that private solicitors' firms can choose who to serve, how do they make that choice when it comes to clients with ethically questionable business activities?

The first part of that answer depends on how the firm understands its purpose. For a utilitarian, the purpose of the firm is to maximise the return for its shareholders or owners within the bounds of the law. However, a natural law approach, while certainly agreeing that making an adequate return for investors and owners is an important obligation, starts by asking what is the intrinsic purpose of the business.

Some law firms see their intrinsic purpose simply as the provision of legal services. If they view themselves this way, then their purpose doesn't really limit who they service so long as the client has a legal need and they are competent to meet it.

Other law firms understand the purpose of their business in broader terms, for example, they might see themselves advancing a more equitable Australia through making union clients their focus. While broad, that purpose does imply some real choices about what businesses the firm will seek to serve.

It is on the basis of fit that some firms might also choose not to serve clients. Such a decision doesn't necessarily require a strong view that a business is unethical, but rather that serving this client doesn't fit with what you have chosen to focus your firm's talent and resources on. You might, for example, be interested in advancing the health of Australians and focus on the clients in the healthcare sector, and so even if you thought a fast food company was an ethical business, you might choose not to serve them because it doesn't fit with your firm's purpose.

Is the business unethical?

There is likely to be a wide range of clients that would fit most law firms' vision and purpose, but might still be ethically questionable. Therefore, how do we determine if a client, or potential client, runs an unethical business.

Unethical products or services

There are many ways products or services could be unethical.

- There are products and services where any form of consumption is inherently unethical. For example, some will argue that any use of prostitution or pornography treats a person as a means to an end, and is, therefore, unethical;
- There are products or services which are unethical because of the harmful side effects they produce. Tobacco might be argued to provide a pleasurable experience, relaxation, or the facilitation of social interaction and so its consumption is not inherently unethical. However, the problem is whether you can reasonably accept the harmful side effects of tobacco consumption on people's health and the devotion of substantial, scarce and expensive medical resources to treat preventable tobacco related illness rather than other conditions. Some take the view that the harmful side effects can't reasonably be accepted and that, therefore, these business are unethical. Others will respond that society has decided to mitigate these harmful side effects so that they can reasonably be accepted as part of a societal choice to allow people the freedom to engage in risky activities or ones where they suffer some harm;
- There are goods or services which are unethical because of the harm caused in producing them. Poor working conditions, child labour and environment destruction have given rise to this concern in recent times.

Is the business conduct unethical?

Regardless of the goods or services a business produces, the way it conducts its business can be unethical. Today, most forms of unethical business conduct – false advertising, mistreatment of employees, abuse of market power – are illegal as well as unethical. Nevertheless, there is still room for legal but unethical conduct, especially where businesses operate in countries with limited restrictions on business conduct.

If the law firm follows a non-utilitarian approach, then it needs to ask whether any of its clients or potential clients are producing goods or services that are unethical or conducting their business in an unethical manner. This doesn't mean they can't be served, as we will see below, but if a business is unethical it triggers a different set of questions about what that firm can do for them.

Limits to serving an unethical business

Even if a business is unethical, there are still circumstances in which serving it can be ethical. Before exploring those circumstances, it is important to recognise that life often involves some form of cooperation with other people's wrongdoing. For example, taxpayers fund wars they may consider unjust, or we might buy a car made with steel produced by a highly polluting smelter.

Some involvement in the wrongdoing of others is inescapable, but is it justified? Because this is a common problem, much ethical reflection has gone into answering this question. For a law firm, the acute form of this question is when is it reasonable to serve clients with unethical businesses.

There are three questions you need to answer to ensure involvement does not make you complicit in wrongdoing.

Is what I am doing inherently good?

There is a wide range of services, which are good in themselves, that are required even by unethical businesses, for example: advice on how to draw contracts that comply with employment law; advice on the implications of changes in tax law; and advice on leasing corporate office space. In these cases it is important that employees, even in unethical businesses, have properly drawn legal relationships with their employer.

Then there is a range of other services like writing contracts for customers or providing advice on how best to protect intellectual property where the advice per se might be a good thing but the purposes for which it is used may be questionable. For example, making sure there is a sound contract with a customer is a good thing but where the contract is for the sale of armaments to a government engaged in hostilities against its own people we have a problem. This is where the second test comes in.

Do I share in their unethical plans?

When serving a client actually involves sharing in their unethical plans, it is clear that you have become complicit in their wrongdoing. It is not always easy to determine whether or not in serving them you necessarily have to

share in their intention. A good way to test your intention is to ask whether, to successfully serve the client, their unethical plan needs to proceed or succeed.

In the example of the arms contract, the law firm does have to share their client's unethical plan because the only reason they need this particular service is to fulfil the unethical end of selling arms to wicked governments. If they do not proceed to sell the arms, they do not need the contract.

Can I fairly accept the side-effects?

There will be situations where the services provided are ethical and don't involve you in the client's unethical plans, but where there are still ethical issues because of the side effects of serving them.

For example, as a leading law firm you might draw employment contracts for workers at an arms manufacturer which sells its weapons for unjust purposes. There may be nothing wrong with drawing the employment contracts per se. However, the side effect of you serving the arms manufacturer is that they gain respectability by making it known that a highly reputable firm is prepared to serve them, which in turn makes it easier for them to develop relationships with other governments. The question is whether you can fairly accept this side-effect of your otherwise good actions.

There are a range of other side-effects or second order effects that can give rise to similar issues:

- The effect on your employees of working for clients whose businesses they consider unethical. These effects can be dramatically increased if employees have friends or family members who have suffered as a result of those clients' unethical actions, for example from being exposed to harmful products.
- Where ethical participation with a wrongdoer risks a slippery slope into involvement in unethical work. This is especially the case where your business becomes dependent on the ethical work so that it becomes difficult to say no to requests to be involved in unethical work. If there is a risk of this sort of situation occurring, considerable safeguards are needed.
- Victims of wrongdoing can perceive that those who are assisting wrongdoers are themselves unethical.
- If your law firm serves clients who have unethical businesses, then careful decisions need to be made about how they are served within these parameters.

CONCLUSION

There are few areas of ethics that are as complicated as involvement with the unethical conduct of others. However, navigating these issues successfully repays the effort in a strong employee value proposition, reputation and better risk management. Over time, as the forms of analysis become more familiar, sorting through these issues will be quicker and easier and simply part of the way you do good business. ●

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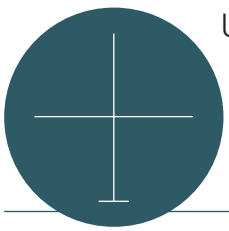
1. Friedman, *The New York Times Magazine*, September 13, 1970, 122-6.
2. For a good survey of different theories see Michael Sandel, *Justice*, Allen Lane, 2009.
3. John Finnis, *Natural Law and Natural Rights*, Oxford University Press; 1980.

INTERVIEWING POTENTIAL DEFENDANTS



Until recently it had been accepted practice that plaintiff lawyers involved in transport accident claims should not communicate with a witness who is a potential defendant to a transport accident. The LIV Ethics Committee found that this view was incorrectly based. **By Jonathan King**

In late 2013 the question arose as to the appropriateness of plaintiff practitioners contacting parties who may be potential defendants in common law proceedings. Plaintiff lawyers regularly seek to ascertain accident circumstances in order to advise clients on the merits of proceeding with a potential claim. The question as to the appropriateness of such contact arose in the context of whether this type of contact infringed the Professional Conduct and Practice Rules 2005 which prohibit practitioners holding discussions with another practitioner's client.

After an ongoing dialogue between the TAC and Maurice Blackburn as to the appropriateness of plaintiff lawyers speaking with witnesses to transport accidents, the law firm asked the LIV Ethics Committee (EC) to provide clarification on whether it is appropriate for plaintiff practitioners to hold such discussions, and if so, at what point in a claim is it appropriate for them to speak.

The situation arose on two occasions when, at informal common law settlement conferences (held before formal proceedings are lodged), the TAC indicated it had not been able to speak to the potential defendant in relation to liability, and when asked, refused to allow Maurice Blackburn to do so. On both occasions, clients were faced with making decisions as to whether to bring formal common law proceedings against the potential defendant driver, without being provided with their version of the accident circumstances and without "permission" to discuss the circumstances with the potential defendant. While also raising questions regarding whether the TAC's conduct was that of a Model Litigant or in compliance with the *Civil Procedure Act*, the refusal to allow parties to examine the potential defendant's version of the accident circumstances certainly obstructed the plaintiff's ability to make an informed and considered decision about whether to bring proceedings, and in both instances led to the plaintiff abandoning the case due to the uncertainty and risks involved in lodging proceedings against another party without being able to ascertain their version of liability.

The TAC's view was that it exercises a right of subrogation of the insured driver's rights under s94 of the *Transport Accident Act* 1986. Therefore, in the TAC's view, despite not entering into a direct solicitor client relationship with the insured driver in the usual sense, the TAC "acted on the insured driver's behalf" (by way of its exercise of the powers

contained in s94 to take over the claim on behalf of the driver).

The Professional Conduct and Practice Rules 2005 prohibit practitioners dealing directly with an opponent's client without notice and consent and, as such, if it was accepted that the TAC were "acting on behalf of" the potential defendant then such contact would be prohibited.

It was conceded by Maurice Blackburn that it is settled law of insurance subrogation that where an insurer seeks to defend an action on behalf of an insured, the solicitors of record act for both the insurer as well as the insured. Maurice Blackburn was of the view that prior to a writ being served and a notice of appearance being filed on behalf of the TAC, no subrogation of rights has taken place, and there is no prohibition against such discussions. It is recognised that there is no property in a witness, and as such, discussions between the potential defendant and plaintiff lawyers or representatives, at this point in the potential proceeding, would not infringe upon the rules of professional conduct as intimated by the TAC. Maurice Blackburn's view was that a defendant is not legally represented by the TAC (by way of subrogation) until an appearance is filed on behalf of the defendant.

Maurice Blackburn approached the EC in February 2014 querying the appropriateness of practitioners contacting parties who may be potential defendants in common law proceedings, and sought a ruling that plaintiff practitioners be allowed to contact potential defendants to common law proceedings until a notice of appearance is filed on behalf of the defendant (and subrogation of rights occurs).

Prior to making its ruling, the EC sought clarification in relation to the parties views on the effect of the Australian Solicitors' Conduct Rules 2011 (ASCR) which the Victorian Legal Services Board has endorsed for adoption in Victoria and which will replace the existing Professional Practice and Conduct Rules 2005.

While the ASCR contain similar provisions about not contacting another solicitor's client, they also provide that a solicitor must not confer or deal with any party represented by, or, to the knowledge of the solicitor, indemnified by an insurer, unless the party and the insurer have agreed to contact occurring. The question for the EC was therefore at what point does such indemnity occur in a proceeding. In a TAC context, it could be interpreted as occurring as soon as a driver pays their registration on a motor vehicle.

However, it may be that such indemnity does not in fact crystallise until an actual liability is established, creating an obligation on the insurer to indemnify against the liability incurred.

Maurice Blackburn submitted that the ASCR only prohibit contact with a party who is indemnified after such indemnity has been made out by the insured accessing the serious injury gateway and obligation to pay damages arises. The Supreme Court of Appeal decided in *Primary Health Care Ltd v Giakalis (Giakalis)* that, prior to the plaintiff establishing that they have suffered a serious injury, the plaintiff's cause of action is "contingently extinguished" by the failure to access the serious injury gateway and no indemnity exists.[1]

The Court in *Giakalis* concluded that indemnity cannot apply ". . . unless the circumstances in which the injury occurred were such as to give rise to legal liability in the putative third party to pay damages".[2] The Court referred to the decision in *Skilled Engineering Ltd v Glaxo Wellcome Australia Pty Ltd (Skilled)*[3] and concluded that indemnity only occurs where the third party has incurred an actual liability to the injured worker noting that "liability referred to is one that goes beyond a contingent remedy and refers to a true remedy to pay damages".[4]

RULING

On 21 July 2014 the EC ruled as follows:

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

"There is nothing under the current Rule 25 of the Professional Conduct and Practice Rules 2005 to prevent a plaintiff lawyer interviewing a prospective Transport Accident Commission (TAC) defendant until such time as the defendant is represented.

"The prospective Rule 22.4 of the Australian Solicitors' Conduct Rules 2011 does not prevent a plaintiff lawyer interviewing a prospective TAC defendant until such time as the defendant is represented or the TAC has indemnified that person. The Ethics Committee understands that there is no obligation on the part of the TAC to indemnify the driver of a motor vehicle involved in a transport accident until the relevant plaintiff has, under section 93 of the *Transport Accident Act* 1986 (Vic), become entitled to recover damages.

"In any event a plaintiff's lawyer should comply with the Guidelines on Interviewing Witnesses published by the Law Institute of Victoria in October 1990."

The ruling of the EC supported Maurice Blackburn's position that there is nothing contained in either the Professional Practice and Conduct Rules 2005 or the ASCR that prevents contact between plaintiff lawyers, or their representatives, and potential defendants up until the point an appearance is filed on behalf of the insurer.

INTERVIEWING WITNESSES

The LIV published "Guidelines on Interviewing Witnesses" in the October 1990 edition of the *LIJ* which were referred to in the EC ruling as a reference and needed to be complied with when such discussions occur. The guidelines make it clear that lawyers must be upfront with people they are interviewing and not mislead them about the nature of the interview and who they represent.

The Guidelines are as follows:

Interviewing witnesses: A lawyer should act fairly and honestly in interviewing witnesses and, in particular, should:

- inform a witness on whose behalf he or she acts; and

- ensure that there is no attempt to manipulate the witness' evidence.

Interviewing prospective defendants: A lawyer should act fairly and honestly in interviewing persons who are prospective defendants and, in particular, should:

- inform the person on whose behalf he or she acts;
- inform the person about the matter in which he or she is acting;
- ensure the person is aware that the lawyer is not acting or giving advice on the person's behalf;
- advise the person he or she may decline to discuss the matter if he or she chooses to do so;
- ensure that there is no attempt to manipulate the person' evidence.

Interviewing corporations: When a party is a corporation, the lawyer for another party is prohibited from interviewing:

- the chief executive officer of the corporation, and
- any other person ("authorised person") whom the lawyer knows, or ought to know, has been given, in good faith, authority to make admissions on behalf of the corporation or to instruct the corporation's solicitors in the conduct of the proceedings;

Before interviewing an employee of the corporation, whom a lawyer ought reasonably anticipate could be:

- an authorised person; or
- a person who could significantly influence decisions about the conduct of the proceedings;

the lawyer must observe the same constraints as apply when interviewing prospective defendants.

Interviewing third parties: A lawyer should not interview an insurer or other third party who is giving instructions to a lawyer for another party.

CONCLUSION

The ruling of the EC has been applauded by plaintiff practitioners who have long felt that allowing discussions to take place between the parties and potential witnesses prior to formal proceedings being instigated enables proper advice to be given to clients in relation to the likely prospects of their claim at an early stage. This in turn results in matters either capitulating where there is no likelihood of success, or proceeding in circumstances where the client is able to properly consider an informed view of the liability material. This approach is also entirely consistent with the obligations imposed by the Model Litigant Guidelines and the *Civil Procedure Act* by potentially preventing unnecessary litigation and only bringing claims which have a proper basis.

Plaintiff practitioners must continue to act fairly and disclose their interests when speaking to potential parties in any matter, but they can now do so in order to investigate their client's claim prior to formal proceedings being lodged unfettered by any claim of subrogation of rights by an insurer. The ruling of the EC has provided clarity to parties in approaching these matters and has settled any ongoing misunderstandings insurers had in relation to the timing and powers attached to the subrogation of insured's rights. ●

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1. *Primary Health Care Ltd v Giakalis* (2013) VSCA 75 (12 April 2013), at [78].
2. Note 1 above, at [55].
3. *Skilled Engineering Ltd v Glaxo Wellcome Australia Pty Ltd* (2005) TASSC, at [86].
4. Note 3 above, at [99]-[100].

COMMUNICATION AND UNDERTAKINGS

At the heart of every legal practice is communication, and keeping promises, or undertakings, is its backbone.

By Michael Dolan

Everything a solicitor does revolves around communication, while, as officers of the court, practitioners have a professional duty to honour an undertaking once given.

COMMUNICATION

The first part of this article explores some common areas of communication in legal practice in respect of which a solicitor must be careful to ensure that no breach of their ethical obligations occurs.

Taking instructions from a client or prospective client, conducting a client matter, giving legal advice (oral and written), preparing contracts and other legal documents, briefing counsel, drafting statements of claim, defences, and other pleadings, making submissions, and appearing in courts and tribunals on behalf of clients all involve communication.

Communication can be good, bad, poor or non-existent. It is at the centre of the solicitor client relationship. Many complaints to regulators about solicitors' conduct are made because of poor or unclear communication.

Ethical practice is the bedrock for every solicitor. The president of the Victorian Court of Appeal Justice Chris Maxwell said about legal practice: "If it can't be done ethically, then it can't be done".[1]

Therefore, all of a solicitor's communications must be ethical. For example, a solicitor must never knowingly mislead a court or another solicitor. A solicitor must never communicate directly with the client of another solicitor except in certain tightly regulated circumstances.

Civility and courteousness

Solicitors' professional conduct and practice rules require them to be courteous.[2] It may seem surprising that solicitors need a professional conduct rule requiring them to be courteous in the course of legal practice. However, on 6 November 2013 the Victorian Legal Services Commissioner Michael McGarvie felt he needed to remind solicitors to "Play the ball, not your opponent!".[3]

He explained that his office had been receiving an increasing number of complaints about solicitors using aggressive language when communicating with other solicitors. He wrote:

"The aggressive and personal tone of interactions between lawyers evident in these complaints demonstrates professional conduct which falls far short of the standard expected of members of our profession, and is of significant concern to the regulator".[4]

A US law firm described what it saw as some causes of discourtesy or incivility in the legal profession:

- increased competition due to the growth of the profession;
- adversarial legal system;
- poorly prepared law school graduates;
- a client's desire for a combative lawyer;
- the misperception that courtesy shows weakness;
- pressures caused by "the billable hour"; and
- the growing impression that law is a business rather than a profession.[5]

A lack of courtesy in correspondence last year caught out a firm of solicitors in the Federal Court of Australia.[6] In the course of vigorous winding-up litigation, the firm wrote to the other side as follows:

"First, the first paragraph of your letter is a false assertion . . . Secondly, such a ground of defence to the winding-up application would be absurd . . . Fourthly, the attack on [the liquidator's] independence is equally absurd . . . The proposition in your letter [is] as specious as the proposition . . . The attack on [the liquidator's] reputation is as egregious as the unfounded allegations of fraud and perjury you and your Counsel instructed by you have made against Mr N . . . Fifthly, the vast bulk of the evidence . . . is nothing short of a gross abuse of process . . ."[7]

The trial judge remarked that the manner and tone of the letter were wholly inappropriate for the conduct of civil litigation in any court. After citing NSW professional conduct and practice rules requiring lawyers to be courteous with each other, the judge remarked that:

"The professional conduct rules reflect the need for litigation to be conducted by officers of the Court in an adult fashion. It is not adult for grown lawyers to accuse each other of lying in correspondence and it is not edifying for anyone involved. Correspondence of this kind ought not to be tolerated . . . I should say for the benefit of the solicitor for Mr K that I have detected not the slightest behavior on her part to deserve the opprobrium poured upon her".[8]

These judicial remarks are a timely reminder of the ethical obligations of all lawyers, as officers of the court, to be courteous in all of their professional dealings, especially with other lawyers.

A few years ago in Queensland there was an example of poor correspondence by a solicitor that resulted in a formal reprimand.[9] An experienced solicitor who had been practising for more than 30 years was acting for a husband in a bitterly contested family law matter. In a letter to his opponent the solicitor wrote:

"I have advised my client to instruct me not to respond to any more of your correspondence. It just seems to me that every time you have got no work to do you return to [the wife's] file because there is plenty of money there to pay your legal fees . . .

"The children's issues are never going to be resolved at the mediation. The likelihood is that your client and her family have done so much damage to [the child] that my client will never have a meaningful relationship with his daughter. Your client will live to regret that in the future, when [the child] grows up and becomes as dysfunctional as your client is".[10]

The solicitor had subsequently expressed regret for the language used, and had written letters of apology both to his opponent and her client, but in convicting the solicitor of unsatisfactory professional conduct, the Queensland Civil and Administrative Tribunal described the language used as "intemperate, inappropriate, and discourteous, and in some respects offensive".[11]

The lesson to be learnt from this and similar cases is that whenever a solicitor feels tempted to write a fiery letter or engage in any kind of communication of that nature, the best thing to do is not to send the letter or despatch the communication on the same day, and preferably have it peer-reviewed by a trusted colleague before sending it.

Failure to communicate

Communication can land a solicitor in disciplinary hot water, but failure to communicate can do so too. Professional conduct and practice rules require legal work to be carried out with expedition.[12]

Early last year, a solicitor incurred disciplinary sanction because he had missed a crucial date for a client, and then prevaricated for some years while he decided what to do about it.[13] It is an example of a solicitor placing a task in the "too hard basket".

In 2002, the solicitor had been instructed to effect a subdivision of a suburban lot into two, and then transfer one of those lots to other members of the transferor's family – a simple and then non-dutiable transaction, as the transfer was to be made in consideration of marriage.

By the middle of 2008 (some six years later) the solicitor had still not effected the transfer. This was because he had, through his various delays, failed to do so prior to the repeal of s43(1) of the *Duties Act* 2000 (Vic), which meant that the parties had become liable for stamp duty on the transfer.

The solicitor pleaded guilty to two charges of professional misconduct for failing to use his best endeavours to effect a transfer of the property, and failing to communicate effectively and promptly with his clients concerning the transfer of land, in breach of the conduct rules referred to above.

The solicitor accepted that his conduct had involved "a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence".[14] He was convicted and fined $2000.

Ethical use of social media

The increasing use of social media by society has brought about a new set of communication and ethical challenges for all lawyers.

In 2011, the International Bar Association (IBA) surveyed its members, asking whether they thought they needed ethical guidance in the area of social media. More than 80 per cent of respondents gave a positive answer to this question, and more than 90 per cent said they wanted to receive such guidance from either the IBA or their local law society.

At the end of 2012, the LIV published guidelines on the ethical use of social media.[15] The introduction to the guideline document reads:

"Social media presents both opportunities and challenges for legal practitioners. Various articles have discussed some of those opportunities. The purpose of this guideline is to assist practitioners in addressing some of these challenges".[16]

Some of the ethical challenges for lawyers in social media include the dangers of breaching the duty of confidentiality, inadvertently establishing a solicitor and client retainer, breaching the solicitor's duty to the administration of justice, and breaching the no contact rule.

Similar guidelines on social media have been published by the Law Society of England and Wales[17] and the Law Society of Scotland.[18]

The no contact rule

There has long been an ethical prohibition on a solicitor contacting the client of another solicitor directly without the express permission of that solicitor or the existence of very urgent circumstances. Such a prohibition is now contained in professional conduct and practice rules.[19]

Last year, the Victorian Legal Services Commissioner prosecuted a solicitor successfully for a glaring breach of the no contact rule.[20] The solicitor was a respected leader in his ethnic community. Other community leaders often sought advice from him. However, the solicitor fell into the trap of succumbing to pressure from community leaders to meet with them and a child in a protection matter at the solicitor's office without the child's court-appointed solicitor being present.

The Children's Court made a complaint to the Legal Services Commissioner and the solicitor was convicted of professional misconduct. As a result, his practising certificate was cancelled for a year. The Supreme Court of Victoria refused the solicitor leave to appeal from the disciplinary tribunal's decision.[21]

This was a sad case because the solicitor was well respected in his community, and was a person to whom members of his community could approach for advice and assistance. However, the solicitor's conduct was a serious breach of the no contact rule.

Media contact by solicitors

In the 24/7 media cycle, considerable interest is often shown by the media in proceedings in the courts, or in legal matters generally. In terms of communication, what ethical restrictions are there on what solicitors may or may not do in dealings with the media?

In Victoria, there is no general prohibition against solicitors speaking with, or being interviewed by, representatives of the media. However, there are professional conduct rules for solicitors dealing with some aspects of the issue.[22]

A leading Australian legal academic wrote:

"The extent to which lawyers' freedom of speech should be curtailed in making out-of-court media communications, or in conference addresses, remains the subject of debate. Restrictions on those communications … seek to balance … three interests: the interest of the public and the media in accessing facts and opinions about litigation; the interest of litigants in placing a legal dispute before the public or in countering adverse publicity about the matter; and the interest of the public and opposing parties in ensuring that the process of adjudication is not distorted by statements carried in the media. It is in the context of lawyers commenting on cases in which they are, or have been, involved that the balancing of these interests has proven most challenging of late …

"Ultimately, lawyers must appreciate the dangers of making public and media comment on cases. Blanket prohibitions leave little scope for professional judgment on occasions where comment is legitimate. The consequences of public comment may not all be negative."[23]

It goes without saying that any public comments made by a solicitor to the media or in any public forum must not breach client confidentiality, be inaccurate or misleading, or be in breach of the solicitor's duty to the court and to the administration of justice. At all times, extreme care should be exercised by solicitors when dealing with the media.

UNDERTAKINGS

"An undertaking is a promise to do something, or not do something, and the recipient is entitled to rely on it. As officers of the court, practitioners have a professional duty to honour an undertaking. Breach of an undertaking by a solicitor is regarded by courts and tribunals as an extremely serious matter, and in some instances may result in a civil contempt of court, or a finding of professional misconduct or unsatisfactory professional conduct."[24]

Undertakings and the professional conduct rules

Professional conduct and practice rules deal with undertakings.[25]

The Victorian rule has been described judicially as:

"An undertaking is not something given lightly. It is a personal promise by a legal practitioner and it is a mechanism whereby practical courses of action can be taken based upon the reliance by one legal practitioner upon the undertaking of another that the contents of that undertaking will be observed … strictly. If there was not such a requirement there would be a breakdown in what is a very important mechanism employed by members of the legal profession. The breach of an undertaking strikes at the heart of such a system."[26]

In that case, a client changed solicitors. The new solicitor provided a client authority to hand over documents. The former solicitor was owed professional fees. The new solicitor wrote to the former solicitor and said: "In return of the documents we undertake to pay your costs and we will be sending a courier to collect the documents at 3:00pm".[27] The documents were handed over to the new solicitor in reliance upon the undertaking. The fees remained unpaid for seven months.

The new solicitor was prosecuted and the disciplinary tribunal made a finding of professional misconduct, with a reprimand and costs order.

Important points to note about undertakings

Both the Victorian Conduct Rules and the Australian Solicitors' Conduct Rules provide that a solicitor must not give to another solicitor an undertaking, compliance with which requires the cooperation of a third party who is not a party to the undertaking and whose cooperation cannot be guaranteed by the solicitor giving the undertaking.

"There is no question that undertakings between solicitors are sacrosanct. They facilitate efficient dealings between parties where the interests of one party may be advanced without prejudice to the interests of another party. Rule 22.1 is worded in uncompromising terms. An undertaking must be honoured strictly in accordance with its terms. Rule 22.1 reinforces the integrity of an undertaking by directing a practitioner not to give another practitioner an undertaking where compliance may rely upon a third party whose cooperation cannot be guaranteed."[28]

For example, if a solicitor attends a settlement and a bank document is missing, the solicitor should not undertake to provide to another solicitor or third party the missing document when the solicitor has obtained it from the bank. It may be that the bank will fail or refuse to provide the document to the solicitor who will then be in breach of the undertaking. On the other hand, if the missing document is in the solicitor's possession and control, for instance at their office, then the solicitor would be able to give such an

undertaking in order to enable the settlement to proceed.

Similarly, a solicitor should never give a personal undertaking that their client will do or refrain from doing something. Clients can and do change their minds for good or bad reasons. In the case of an undertaking given on behalf of a client, it must be made very clear to the person receiving the undertaking that it is the client's undertaking and not that of the solicitor. In that regard, such an undertaking should only ever be given in writing in clear and unambiguous terms.

The Victorian Conduct Rules further provide that an undertaking given by an employee of a solicitor is deemed to be a personal undertaking by the solicitor unless the employee, if a solicitor, makes expressly clear that the undertaking is the employee solicitor's personal undertaking and not that of the employer. For this reason many firms of solicitors will only allow undertakings to be given by a partner of the firm.

An undertaking given by one partner in a law firm will bind all partners in the firm. It is wise, therefore, for law firms to have in place written policies dealing with the giving of undertakings.

If a personal undertaking is given by a solicitor, it should be expressed in clear and unambiguous terms and it is advisable to keep within the firm a central record of all undertakings given, as well as keeping a record on the individual client file.

The Victorian Conduct Rules also provide that a solicitor must not seek from another solicitor (or his or her employee) an undertaking, compliance with which would require the cooperation of a third party who is not a party to the undertaking and whose cooperation cannot be guaranteed.

"Traditionally the courts have exercised jurisdiction to enforce undertakings given by lawyers as part of the inherent jurisdiction to ensure that lawyers, as officers of the court, observe a high standard of conduct. For this reason it is very important when giving an undertaking to be clear as to whether it is the lawyer's personal undertaking or is given on behalf of the client. Unless it is abundantly clear that the undertaking is not given as a personal undertaking it is likely to be construed as a personal undertaking. Strict compliance with a personal undertaking is insisted upon."[29]

The Victorian Conduct Rules also provide for the same strict compliance principles outlined above in relation to undertakings being given to solicitors to apply to undertakings given to third parties.

Finally, the word "undertaking" does not have to be used for a promise made by a solicitor to be enforced as an undertaking.[30]

The key message is that solicitors and their staff should be extremely careful when asking for, and giving undertakings to, other solicitors and third parties. The law expects strict compliance with undertakings by solicitors and members of their staff and any breach of an undertaking can have extremely serious consequences including adverse disciplinary findings for a solicitor.

Undertakings are an extremely important part of legal practice. They should never be sought or given lightly. They should always be expressed in clear and unambiguous terms. Any breach of an undertaking can have extremely serious consequences for a solicitor or a law firm.

The LIV has recently published an ethics guideline about undertakings.[31]

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1. Address to LIV Ethics Liaison Group on 25 July 2012.
2. In Victoria, Rule 21.1 of the *Professional Conduct and Practice Rules* 2005 provides: "A practitioner, in all of the practitioner's dealings with other practitioners, must take all reasonable care to maintain the integrity and reputation of the legal profession by ensuring that the practitioner's communications are courteous and that the practitioner avoids offensive or provocative language or conduct". Rule 4.1.2 of the *Australian Solicitors' Conduct Rules* which now apply in South Australia, Queensland and NSW and are expected to be promulgated in Victoria by the Legal Services Board some time within the next year provides: "A solicitor must be honest and courteous in all dealings in the course of legal practice".
3. Michael McGarvie ,Victorian Legal Services Commissioner, *RPA Alert 6*, November 2013.
4. Note 3 above.
5. *Transactional Lawyers Behaving Badly – Ethics, Civility and the Modern Day Lawyer*, Nixon Peabody, October 2013.
6. *Ren Nominees Pty Ltd v MS Cognosis Pty Limited (No. 1)* (2013) FCA 916 (11 September 2013) per Perram J.
7. Note 6 above, at [52].
8. Note 6 above, at [55].
9. *Legal Services Commissioner v Cooper* (2011) QCAT 209.
10. Note 9 above, at [4]–[5].
11. Note 9 above, at [19].
12. In Victoria, Rule 1.2 of the *Professional Conduct and Practice Rules* 2005 provides: "Expedition: A practitioner must, in the course of engaging in legal practice, use the practitioner's best endeavours to complete legal work as soon as reasonably possible". Rule 39.1 provides: "Communication with clients: A practitioner, in the course of engaging in legal practice, must communicate effectively and promptly with clients of the practitioner". Rule 4.1.3 of the Australian Solicitors' Conduct Rules provides: "A solicitor must deliver legal services competently, diligently, and as promptly as reasonably possible".
13. *Legal Services Commissioner v Galatas* (Legal Practice) [2013] VCAT 214.
14. Note 13 above, at [11].
15. *Guidelines on the Ethical Use of Social Media*, LIV, 29 November 2012, www.liv.asn.au/PDF/For-Lawyers/Ethics/2012Guidelines-on-the-Ethical-Use-of-Social-Media.aspx.
16. Note 15 above, p1.
17. *Practice Note on Social Media*, Law Society of England and Wales, 20 December 2011, www.lawsociety.org.uk/advice/practice-notes/social-media.
18. *Social Media – Advice and Information for the Legal Profession*, Law Society of Scotland, www.lawscot.org.uk/rules-and-guidance, search for "social media".
19. For example, Rule 33 of the *Australian Solicitors' Conduct Rules* provides: "33 Communication with another solicitor's client 33.1 A solicitor must not deal directly with the client or clients of another practitioner unless: 33.1.1 the other practitioner has previously consented; 33.1.2 the solicitor believes on reasonable grounds that:(i) the circumstances are so urgent as to require the solicitor to do so; and (ii) the dealing would not be unfair to the opponent's client; 33.1.3 the substance of the dealing is solely to enquire whether the other party or parties to a matter are represented and, if so, by whom; or 33.1.4 there is notice of the solicitor's intention to communicate with the other party or parties, but the other practitioner has failed, after a reasonable time, to reply and there is a reasonable basis for proceeding with contact". In Victoria, Rule 18.4 of the *Professional Conduct and Practice Rules* 2005 provides: "A practitioner must not deal directly with the opponent's client in relation to the case for which the opponent is instructed unless: 18.4.1 the opponent has previously consented; 18.4.2 the practitioner believes on reasonable grounds that: (a) the circumstances are so urgent as to require the practitioner to do so; and (b) the dealing would not be unfair to the opponent's client; or 18.4.3 the substance of the dealing is solely to enquire whether the person is represented and, if so, by whom".
20. *Legal Services Commissioner v Tuferu* (Legal Practice) (2013) VCAT 1438.
21. *Tuferu v Legal Services Commissioner* (2013) VSC 645.
22. In Victoria, Rule 19.1 of the *Professional Conduct and Practice Rules* 2005 provides: "A practitioner must not publish or take steps towards the publication of any material concerning current proceedings for which the practitioner is engaged which may prejudice a fair trial of those proceedings or prejudice the administration of justice". Rule 28 of the Australian Solicitors' Conduct Rules provides: "28 Public comment during current proceedings 28.1 A solicitor must not publish or take steps towards the publication of any material concerning current proceedings which may prejudice a fair trial or the administration of justice".
23. Gino Dal Pont, *Lawyers' Professional Responsibility*, (5th edn) Thomson Reuters, 2013 at 17.190 and 17.200.
24. LIV, *Undertakings Guideline*, 30 January 2014, www.liv.asn.au/PDF/For-Lawyers/Ethics/2014-Guidelines-on-Undertakings.
25. In Victoria, the *Professional Conduct and Practice Rules* 2005 provide: "22.1 A practitioner who, in the course of the practitioner's practice, communicates with another practitioner orally, or in writing, in terms which, expressly, or by necessary implication, constitute an undertaking on the part of the practitioner personally to ensure the performance of some action or obligation, must honour the undertaking so given strictly in accordance with its terms, and within the time promised (if any) or within a reasonable time". Rule 6 of the *Australian Solicitors' Conduct Rules* provides: "6 Undertakings 6.1 A solicitor who has given an undertaking in the course of legal practice must honour that undertaking and ensure the timely and effective performance of the undertaking, unless released by the recipient or by a court of competent jurisdiction.6.2 A solicitor must not seek from another solicitor, or that solicitor's employee, associate, or agent, undertakings in respect of a matter, that would require the co-operation of a third party who is not party to the undertaking".
26. *Legal Services Commissioner v Sapountzis* (Legal Practice) (2010) VCAT 1124, at [17].
27. Note 26 above, at [4].
28. *Legal Services Commissioner v Kaine* (Legal Practice) [2013] VCAT 1077 at [52].
29. David Bailey, *Undertakings by lawyers: content and consequences*, Barrister-at-Law, 18 October 2012.
30. *Legal Service Commissioner v Kaine* (Legal Practice) (2013) VCAT 1077; *Legal Services Commissioner v Simon* (2013) VCAT 736.
31. Note 24 above.

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HIGH COURT JUDGMENTS

CONSTITUTIONAL LAW

Kable – anti-bikie laws in Queensland – standing of club member to seek relief

In *Kuczborski v Queensland* [2014] HCA 46 (14 November 2014) various Acts of the Queensland Parliament including the *Vicious Lawless Association Disestablishment Act* 2013 (Qld) attempted to destroy various "bikie" gangs by making special penalties applicable to members convicted of certain offences; creating new "association" offences; and making it harder for members to get bail. K (a member of the Hells Angels Motorcycle Club) brought proceedings in the original jurisdiction of the High Court contending the legislation offended the principle in *Kable v DPP* (NSW) [1996] HCA 24 by involving state courts that had Constitution Chapter III responsibilities in state administrative decisions. The Court generally concluded that K did not have standing to challenge the laws or his interest was hypothetical: French CJ; Crennan, Kiefel, Gageler Keane JJ jointly; contra Hayne J in part. Questions in case stated answered accordingly.

CORPORATIONS

Managed investment schemes – role of responsible entity – distribution of scheme property "in specie"

In *Wellington Capital Limited v Australian Securities and Investments Commission* [2014] HCA 43 (5 November 2014) the High Court concluded that while a responsible entity for a managed investment scheme under Part 5C.1 of the *Corporations Act* 2001 (Cth) has all the powers of a natural person, the Federal Court had correctly concluded this did not include a power to distribute the scheme property (shares) to unit holders "in specie": French CJ, Crennan, Kiefel, Bell JJ jointly; sim Gageler J. Appeal dismissed.

CRIMINAL LAW

Appeal against sentence – change of law – whether substantial injustice

In *Kentwell v The Queen* [2014] HCA 37 (9 October 2014) K was sentenced in 2009 to a term of imprisonment that involved a non-parole period calculated in a way that was determined by the High Court in *Muldrock v The Queen* [2011] HCA 39 to be in error. In 2013 K applied to the Court of Criminal Appeal (NSW) for an extension of time to appeal against his sentence because of the change in the law. The Court accepted there was error but found there was no substantial injustice and dismissed the application. K's appeal to the High Court was allowed: French CJ, Hayne, Bell, Keane JJ jointly; sim Gageler J. The High Court concluded the Court of Criminal Appeal had erred by concluding it did not consider the aggregate sentence as excessive rather than whether the sentence might be different on re-sentencing. Appeal allowed. In *O'Grady v The Queen* [2014] HCA 38 (9 October 2014) the High Court in a joint judgment restated the conclusion in *Kentwell* that in circumstances where a person is serving a sentence imposed in erroneous exercise of discretion it is an error to treat the principle of finality as a discrete factor weighing against the exercise of an extension of time to seek leave to appeal against it: French CJ, Hayne, Bell, Gageler, Keane JJ jointly. Appeal against orders refusing extension of time under *Criminal Appeal Act* 1912 (NSW) and *Criminal Appeal Rules* (NSW) allowed.

DAMAGES

Personal injury – injured person rendered incapable of managing affairs – cost of administering estate

In *Gray v Richards* [2014] HCA 40 (15 October 2014) the High Court in a joint judgment in an appeal from the NSW Court of Appeal reviewed authority as to when an incapacitated plaintiff is entitled to damages to compensate for the cost of administering a large lump sum of damages. The Court concluded such a plaintiff is not entitled to damages to compensate for the cost of administering the future income of the fund: French CJ, Hayne, Bell, Gageler, Keane JJ jointly. Appeal allowed in part.

INDUSTRIAL LAW

Union membership – prohibition on adverse action against union member for industrial action – adverse action for multiple reasons

In *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41 (16 October 2014) the High Court by majority concluded the Full Court of the Federal Court had correctly concluded the reasons the employer gave for dismissing an employee (who was a union official) did not amount to a dismissal contrary to s347 of the *Fair Work Act* 2009 (Cth) because of that membership or participation in industrial activity. Decision of the Court in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [No1] [2012] HCA 32 applied: French CJ with Kiefel J; Gageler J sim; contra Hayne J and Crennan J. Appeal dismissed.

MIGRATION

Refugees – internal relocation

In *Minister for Immigration and Border Protection v SZSCA* [2014] HCA 45 (12 November 2014) the Refugee Review Tribunal found that SZSCA was not a refugee as he could live and work as a truck driver in Kabul without fear of persecution. This decision was quashed by the Federal Circuit Court. The Minister's appeals against this were dismissed by the Federal Court. The High Court dismissed the Minister's appeal to it: French CJ, Hayne, Kiefel, Keane JJ jointly; contra Gageler J. The High Court majority concluded the RRT had erred by not considering the impact on SZSCA of being required to stay in Kabul and not take his work as a truck driver out of it. Appeal dismissed.

NEGLIGENCE

Duty care – inconsistency between statutory and common law duties – release of mentally ill person under statute

In *Hunter and New England Local Health District v McKenna; Hunter and New England Local Health District v Simon* [2014] HCA 44 (12 November 2014) PP was a mentally ill Victorian. While travelling he came to be detained in the appellant NSW mental health facility in 2004 as required by the *Mental Health Act* 1990 (NSW). The staff of the appellant decided to release PP into the care of R to drive PP to Victoria and other care. PP murdered R on the trip. R's relatives sued the hospital alleging breach of duty in releasing PP. The claim failed before the primary judge but an appeal was upheld by the NSW Court of Appeal. The hospital's appeal to the High Court was allowed: French CJ, Hayne, Bell, Gageler and Keane JJ jointly. The Court concluded that whatever common law duties could be contemplated they were subject to the hospital's obligation to detain PP only as required by the Act. Appeal allowed.

PATENTS

Extension of time to extend patent

In *Alphapharm Pty Ltd v H Lundbeck A-S* [2014] HCA 42 (5 November 2014) the High Court by majority decided that the Full Court of the Federal Court had correctly concluded the commissioner had power under s223(2) of the Patents Act 1992 (Cth) to extend the time in which an application under s70 for an extension of the term of a patent could be made calculated by reference to s71(2) (a), (b) and (c): Crennan, Bell and Gageler JJ; contra Kiefel and Keane JJ. Appeal dismissed. ●

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FEDERAL COURT JUDGMENTS

BANKRUPTCY

Bankruptcy notice – whether copy of final judgment "attached" – curing of defects

In *Curtis v Singtel Optus Pty Ltd* [2014] FCAFC 144 (30 October 2014) a Full Court found the requirement of s41 of the *Bankruptcy Act* 1966 (Cth) that the final judgment be "attached" to the bankruptcy notice when it was issued was satisfied where the application for the notice was sent, and the notice was issued, by email.

COSTS

Whether provisions for costs in High Court Rules exclude state costing provisions for acting in High Court matter – who is proper claimant for counsel's fees

In *Batterham v Goldberg* [2014] FCAFC 136 (15 October 2014) a Full Court concluded the existence of provisions for costs of High Court proceedings in High Court Rules Ch 5 did not create any inconsistency within Constitution s109 preventing the operation of state legislation concerning assessment of solicitor-client costs in acting in High Court matters. The Court also concluded that in the absence of any specific agreement between a client and counsel the proper creditor in a claim against the client for counsel's fees was the instructing solicitor who retained counsel.

INDUSTRIAL LAW

Awards – classification

In *Transport Workers' Union of Australia v Coles Supermarket's Australia Pty Ltd* [2014] FCAFC 148 (3 November 2014) a Full Court concluded the Federal Circuit Court had not erred in finding that "customer service agents" employed to deliver online shopping services were not covered by the Road Transport and Distribution Award but by retail industry awards. Consideration of the interpretation of awards.

JUDICIAL REVIEW

AD (JR) Act – whether decision of university to suspend enrolment of student reviewable

In *Luck v University of South Queensland* [2014] FCAFC 135 (15 October 2014) a Full Court concluded the primary judge had not erred in declining to disqualify himself because the judge was also the Judge Advocate General for the Australian Defence Force. The Court concluded the appointment of the judge to this position did not contravene the separation of powers. The Court found the primary judge had not erred in finding decisions of the University to suspend L were not reviewable under the *Administrative Decisions (Judicial Review) Act* 1975 (Cth) as made in some way under the *Higher Education Funding Act* 1988 (Cth).

MIGRATION

Visas – cancellation – policy – whether discretion in Act fettered

In *Minister for Immigration and Border Protection v Lesianawai* [2014] FCAFC 141 (27 October 2014) a primary judge set aside a decision of the Administrative Appeals Tribunal to affirm deportation under s501 of the *Migration Act*. The primary judge referred to *Sean Investments Pty Ltd v McKellar* [1981] FCA 191 and found the discretion was unfettered even though subject to ministerial policy guidelines. The Full Court concluded the primary judge was in error because the discretion was subject to the guidelines. The Full Court considered whether any demonstrated jurisdictional error had a discernible effect on the decision before relief will be granted. The Full Court allowed the Minister's appeal.

MIGRATION

Migration decision – judicial review of conduct prior to migration decision

In *SZSSJ v Minister for Immigration and Border Protection* [2014] FCAFC 143 (29 October 2014) a Full Court concluded that various decisions of the Department when preparing to made a decision under s198(6) of the *Migration Act* 1958 (Cth) to remove SZSSJ constituted conduct preparatory to making a decision that the Federal Circuit Court should have accepted it had jurisdiction to review under s474(3)(h) of that Act.

MIGRATION

Independent reviewer – review by subsequent reviewer

In *WZARH v Minister for Immigration and Border Protection* [2014] FCAFC 137 (20 October 2014) the tape of the interview WZARH had with the first independent merits reviewer was heard by the second reviewer after the first became unable to finalise the matter. The Full Court did not decide that claimant's such as WZARH were entitled to an oral hearing but the Court did accept there was an expectation that the person who conducted the face-to-face interview would be the decision-maker or that any one appointed as replacement would conduct a fresh interview.

MIGRATION

Unreasonable decision – decision based on incorrect facts

In *Minister for Immigration and Border Protection v SZSNSW* [2014] FCAFC 145 (3 November 2014) SZSNSW made claims of sexual assault when first interviewed on Christmas Island when making his claim for refugee status. The independent merits reviewer appointed to advise the Minister on whether to allow the claim to proceed wrongly concluded SZSNS had not then made a claim of sexual assault but had made it subsequently and this undermined his credit. The Full Court concluded the decision to recommend the claim for refugee status not be allowed involved an error of law and while it differed from the Federal Circuit Court as to the analysis, it dismissed the Minister's appeal.

MIGRATION

Advice to person in detention

In *SZSPI v Minister for Immigration and Border Protection* [2014] FCAFC 140 (28 October 2014) a Full Court considered whether the applicant applying for an extension of time had had sufficient access to legal advice.

NATIVE TITLE

Costs

In *Oil Basins Ltd v Watson* [2014] FCAFC 154 (17 November 2014) a Full Court concluded there was no error in the award of costs against the appellant by the primary judge under s85A of the *Native Title Act* 1993 (Cth) in proceedings where the appellant resiled from disputing the "connection" to the land as an issue. Consideration of costs in Native Title proceedings.

PATENTS

Validity – whether creation of a computer program involves "manufacture"

In *Research Affiliates LLC v Commissioner of Patents* [2014] FCAFC 150 (10 November 2014) a Full Court found the creation of a computer program to create a securities index and assist investing in the stock exchange did not constitute or produce a form of "manufacture" that could be patented under s18 of the *Patents Act* 1990 (Cth). ●

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FAMILY LAW JUDGMENTS

PROPERTY

Treatment of redundancy payment of $459,199 as worth $300,000 due to "taxation implications" was in error

In *Diggelen & Diggelen* [2014] FamCAFC 160 (1 September 2014) the Full Court (Strickland, Ainslie-Wallace & Ryan JJ) considered Johnston J's decision to treat a $459,199 payment the husband had received from his employer for "accrued annual leave, long service leave, severance payment and ETP" (at [25]) as having a value of $300,000. Johnson J said at [27]:

"... it was submitted [for] the wife that there should be added back ... the $469,199 (sic) which [the husband] received as his redundancy payment ... To do so would ignore taxation implications. It must be the case that some of this payment was on account of leave. There was no suggestion that the money paid was tax free. This is a most unsatisfactory aspect of the case. Doing the best I can in difficult circumstances I propose to allow $300,000 of this payment to be added back to the pool of property".

In remitting the case for re-hearing, the Full Court said at [34]:

"... there was no evidentiary basis on which his Honour could have found ... that some part of the redundancy payment ... was subject to tax ... and ought to be brought into account at a lesser amount than that received. We also observe that his Honour's conclusion is at odds with ... ss12-85 of Schedule 1 *Taxation Administration Act* 1953 (Cth) by reason of which the husband's employer was obliged to retain PAYG payments on the redundancy/termination of employment payment".

PROPERTY

Husband loses appeal where wife won $6 million after separation – Parties "leading separate lives"

In *Eufrosin & Eufrosin* [2014] FamCAFC 191 (2 October 2014) the Full Court (Thackray, Murphy & Aldridge JJ) heard the husband's appeal against a property order made where, after a 20 year marriage, the wife won $6 million six months after separation. Stevenson J had adopted a two pools approach, found the husband had made no contribution to the lottery pool, divided the $2 million non-lottery pool equally and made a s75(2) adjustment in favour of the husband of $500,000. Stevenson J said that the wife had four sources of funds available when she bought the winning ticket and that at [12] "it would be 'pure sophistry' to credit the husband with any contribution to the funds used to purchase the ticket". The Full Court said at [7]-[8]:

"The husband contends that the wife used funds from a business that had been run primarily by him ... during ... the marital relationship to purchase the lottery ticket. Even if that is accepted, the argument which proceeds from it ignores the reality of the parties' post-separation lives. The parties had put in place a system whereby regular withdrawals of funds were made by each of them from what was *formerly* a joint asset, and those funds were applied by each of the parties individually to purposes wholly unconnected with the former marital relationship.

"At the time the wife purchased the ticket ... the parties had commenced the process of leading 'separate lives', including separate financial lives. That crucial matter, the importance of which is reinforced by the High Court in *Stanford* [(2012) 247 CLR 10], renders reference to the sources of the funds or nomenclature such as 'joint funds' or 'matrimonial property' unhelpful in assessing what is just and equitable".

In dismissing the appeal the Full Court said at [11]:

"... What is relevant ... is the nature of the parties' relationship at the time the lottery ticket was purchased. In our view, the authorities ... [and] what was said by the High Court in *Stanford* regarding the 'common use' of property [are] sufficient to dispose of the husband's contention that her Honour erred in failing to find that he contributed to the wife's lottery win. At the time the wife purchased the ticket, regardless of the source of the funds, the 'joint endeavour' that had been the parties' marriage had dissolved; there was no longer a 'common use' of property. Rather, the parties were applying funds for their respective *individual* purposes".

CHILDREN

Choice of supervisor of father – Court prefers commercial agency to father's fiancée

In *Joelson & Joelson* [2014] FamCA 788 (19 September 2014) the father had a history of being prescribed anti-depressant medication, had threatened suicide and was the subject of a police report expressing "genuine fears that [he] will snap and hurt himself and anyone he holds responsible for the demise of his relationship". A single expert psychiatrist (Dr R) reported at [97] being "dissatisfied with the progress made by the father in appreciating his underlying illness and the steps he needed to undertake ... to manage his illness". Dr R had recommended that the father's time occur while his fiancée (Ms Z) was at home but later recanted after Ms Z misled Dr R as to her experience of abuse. While accepting Dr R's recommendation for a review before any progression from supervised time, Loughnan J decided at [200] that it was "safer" to make a final order for indefinite supervision (at [198]-[199]) in which it was noted that any application (after 12 months) for removal of the supervision was to be supported by a mental health assessment by the father's treating psychiatrist.

CHILDREN

Unilateral relocation – Morgan & Miles distinguished – Recovery application dismissed

In *Geddes & Toomey* [2014] FCCA 1814 (13 August 2014) Judge Harland dismissed the father's recovery application where (at [4]) the mother had "again moved" unilaterally from Darwin to Queensland with the children (aged 10 and 9). The father, a Darwin resident, had the children during school holidays under a parenting order and informally about once a month. The Court at [18] distinguished *Morgan & Miles* [2007] FamCA1230 (relied on by the husband), saying that "at the time of the unilateral relocation in *Morgan & Miles* the father was seeing the children on a week about basis. In the current case ... the father was seeing the children once a month". Upon considering s60CC factors Judge Harland said at [20] that it was "clear that the children have a meaningful relationship with both their parents and that this will continue regardless of whether the children are in Darwin or Queensland". The Court also gave weight at [26] to evidence that "the father pays no child support currently and that the orders ... for [his] time during school holidays will not be affected by the move". ●

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SUPREME COURT JUDGMENTS

HORE-LACY AND CONTEXTUAL TRUTH DEFENCES TO CLAIM FOR DEFAMATION

***Setka v Abbott & Anor* [2014] VSCA 287 (unreported, 18 November 2014, No S APCI 2012 0231, Warren CJ, Ashley and Whelan JJA).**

This was an application for leave to appeal against a decision of a judge of the Court to refuse an application to strike out parts of the defendants' defence to a claim for defamation.

The plaintiff pleaded a number of imputations upon which he relied, said to have been spoken by the first defendant, now Prime Minister of Australia, and republished by the second defendant at [5]:

"The plaintiff pleads that in their natural and ordinary meaning, the words were defamatory of him, and meant and were understood to mean that:

(a) the plaintiff engages in unlawful behaviour by visiting the homes of people working in the construction industry for the purpose of intimidating them;
(b) the plaintiff visits the homes of people working in the construction industry for the purpose of making demands that amount to extortion;
(c) the plaintiff is a thug in that he visits the homes of people working in the construction industry for the purpose of intimidating them;
(d) the plaintiff is a self-confessed thug who has admitted visiting the homes of people working in the construction industry for the purpose of engaging in the conduct referred to in [earlier paragraphs]".

The defendants by their defence pleaded at [11]:

"Further, or alternatively, if the words alleged in paragraph 4 of the statement of claim were defamatory of the plaintiff then in their natural and ordinary meaning the words meant and were understood to mean that the plaintiff was a person who had engaged in:

(a) intimidation;
(b) unlawful behaviour;
(c) thuggery; and
(d) extortion".

And in the meanings alleged, the words used were true in substance and in fact. Particulars were given.

The defence pleaded derived from *David Syme & Co Ltd v Hore-Lacy* [(2000) 1 VR 667.

The defendants further pleaded that if any of the words bore any of the plaintiff's imputations, which was denied, then at [13]:

"(a) in their natural and ordinary meaning the words also meant and were understood to mean that the plaintiff was a person who had engaged in:
  (i) intimidation;
  (ii) unlawful behaviour;
  (iii) thuggery; and
  (iv) extortion;
  ("the contextual imputations");
(b) the contextual imputations were substantially true;
(c) the plaintiff's imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations; and
(d) accordingly, the first defendant has a defence pursuant to s26 of the *Defamation Act* 2005 and corresponding uniform legislation".

The plaintiff sought to argue that *Hore-Lacy* ought not to be followed even though it was an earlier decision of the Court of Appeal. Two principal arguments were advanced for these departures at [41]-[43] of the joint judgment of Warren CJ and Ashley JA:

"In our opinion, for two reasons, the submission for the plaintiff that this Court should depart from *Hore-Lacy* should be rejected.

"First, even if what was before the Court were an appeal, and not an application for leave to appeal from an interlocutory judgment upon an application made under r23.02(a) of ch 1 [of the Rules], this Court would only depart from one of its own previous decisions if it considered that decision to be plainly wrong. We are not persuaded that the decision in *Hore-Lacy* was plainly wrong. To the contrary, we respectfully consider that the majority judgments were correct.

"Second:

Intermediate appellant courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong. Since there is a common law of Australia, rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory law". [Endnotes omitted]

Hore-Lacy had been considered and applied by a number of intermediate courts. The decision was not plainly wrong. Warren CJ and Ashley JA spent some time explaining why this was so and concluded at [66]:

"The submission for the plaintiff that *Hore-Lacy* has led, in effect, to chaos in defamation law – if it could be decisive – does not accord with experience. The decision has produced a certain amount of interlocutory disputation in this and other jurisdictions; but not of great extent. Judges in this state have been

directing juries in accordance with *Hore-Lacy* for more than a decade now. As we earlier noted, only one appeal from a jury verdict in all that time in this State has involved the decision, and that was a case which had unique features. Counsel did not refer us to any other relevant post-trial decision in any other state or territory". [Endnote omitted]

Hore-Lacy was not inconsistent with s25 of the *Defamation Act* 2005 (Vic). The section is as follows:

"25 Defence of justification

It is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true".

Section 6(2) of the Act preserves common law defences except to the extent the Act provides otherwise expressly or by necessary implication.

Warren CJ and Ashley JA said at [108]:

"If a defendant were to be required to plead the substantial truth of all imputations – pleaded or not – which permissibly arise from a publication of defamatory matter, it would have two consequences. First, a defendant might, in effect, be put to defending as true in substance a meaning which he or she says is incapable of arising. Second, the obscurity of confession and avoidance would conceal from the plaintiff the beneficial effect of a defendant being required to identify permissible meanings upon which the defendant accepts that the plaintiff could succeed, and pleading justification to them. We reject as an adequate response to those consequences the plaintiff's submission that, because 'imputations' in s25 can include (some) variants, and because a defendant can plead justification across the board, the point and utility of HL justification is subsumed by s25".

Even if it were assumed that s25 permitted a defendant to plead justification to some only of the plaintiff's pleaded imputations, the position would be no better (at [109]-[111]).

It followed that the plaintiff's "exclusion by necessary implication" argument failed.

Hore-Lacy justification was preserved as part of the operation of the general law rather than as an available pleading under s25 (at [113]-[114]).` Whelan JA at [312] differed with Warren CJ and Ashley JA on this point. However, even if their Honours approach was wrong, there was every reason to conclude that Hore-Lacy justification was available under s25. Reference was made to the decision of McCallum J in Bateman v Fairfax Media Publications Pty Ltd (No 2) [2014] NSWSC 1380 which was distinguished.

Warren CJ and Ashley JA then proceeded to the question of whether the imputations pleaded by the defendants were permissible variants of the plaintiff's imputations. They referred to New South Wales authorities. These did not support the plaintiff's argument that it is for the judge to determine the presence or absence of a difference. It is for the judge to determine whether the imputations are capable of being held by a jury to be a variant of, not substantially different from and not more injurious than, the plaintiff's meanings (at [163]). The jury will then decide the matter unless the judge rules against the defendant (at [190]). The judge at first instance had applied the correct test.

Their Honours dealt also with contextual truth defences in favour of the defendants.

Leave to appeal was given in relation to certain grounds argued by the plaintiff and not in others. Where leave was given, the appeal was dismissed. ●

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LEGISLATION UPDATE

NEW VICTORIAN 2014 ASSENTS (AS AT10/11/2014)

2014 No. 73 Casino and Gambling Legislation Amendment Act

2014 No. 74 Crimes Amendment (Sexual Offences and Other Matters) Act

2014 No. 75 Drugs, Poisons and Controlled Substances Further Amendment Act

2014 No. 76 Emergency Management Amendment (Critical Infrastructure Resilience) Act

2014 No. 77 Family Violence Protection Amendment Act

2014 No. 78 Improving Cancer Outcomes Act

2014 No. 79 Justice Legislation Amendment (Confiscation and Other Matters) Act

2014 No. 80 Justice Legislation Amendment (Succession and Surrogacy) Act

2014 No. 81 Sentencing Amendment (Historical Homosexual Convictions Expungement) Act

2014 No. 82 Sex Offenders Registration Amendment Act

NEW VICTORIAN 2014 REGULATIONS (AS AT 10/11/2014)

2014 No. 156 Supreme Court (Oath and Affirmation of Office) Regulations

2014 No. 157 County Court (Oath and Affirmation of Office) Regulations

2014 No. 158 Magistrates' Court General Amendment (Judicial Registrar Oath and Affirmation of Office) Regulations

2014 No. 159 Coroners Amendment Regulations

2014 No. 160 Children, Youth and Families Amendment (Judicial Registrar Oath and Affirmation of Office) Regulations

2014 No. 161 Financial Management Amendment Regulations

2014 No. 162 Building Further Amendment (New Residential Zones) Regulations

2014 No. 163 Planning and Environment (Fees) Interim Regulations

2014 No. 164 Subdivision (Fees) Interim Regulations

2014 No. 165 Country Fire Authority Regulations

2014 No. 166 Parliamentary Salaries and Superannuation (Allowances) Amendment Regulations

2014 No. 167 EastLink Project Amendment Regulations

2014 No. 168 Melbourne City Link Amendment Regulations

2014 No. 169 Mineral Resources (Sustainable Development) (Mineral Industries) Amendment Regulations

2014 No. 170 Royal Botanic Gardens Regulations

2014 No. 171 Water Industry (Reservoir Parks Land) Regulations

2014 No. 172 Gambling Regulation (Pre-commitment and Loyalty Scheme) Regulations

2014 No. 173 Building Amendment (Farm Buildings) Regulations

2014 No. 174 Heritage (General) Amendment (Fees) Regulations

2014 No. 175 Accident Towing Services Amendment Regulations

2014 No. 176 County Court (Chapter I Circuit Fees, Expenses and Allowances Amendment) Rules

2014 No. 177 County Court (Chapter II Vexatious Proceedings Amendment) Rules

2014 No. 178 County Court (Chapter III Amendment No. 4) Rules

2014 No. 179 Magistrates' Court (Judicial Registrars) Amendment Rules

2014 No. 180 Magistrates' Court General Civil Procedure (Scale of Costs Amendment) Rules

2014 No. 181 Victorian Civil and Administrative Tribunal (Service Outside Victoria and Other Amendments) Rules

2014 No. 182 Victorian Civil and Administrative Tribunal (Vexatious Proceedings Amendment) Rules

2014 No. 183 Agricultural and Veterinary Chemicals (Control of Use) (Infringement Notices) Amendment Regulations

2014 No. 184 Prevention of Cruelty to Animals Further Amendment Regulations

2014 No. 185 Conservation, Forests and Lands (Primary Industries Infringement Notices) Amendment (Fisheries) Regulations

2014 No. 186 Status of Children Regulations

2014 No. 187 Confiscation Amendment (Unexplained Wealth) Regulations

2014 No. 188 Wrongs (Part VBA) (Asbestos Related Claims) Regulations

2014 No. 189 Estate Agents (Exemption) Regulations

2014 No. 190 Wildlife (State Game Reserves) Regulations

2014 No. 191 Conservation, Forests and Lands (Infringement Notice) Amendment Regulations

2014 No. 192 Assisted Reproductive Treatment Amendment Regulations

2014 No. 193 Drugs, Poisons and Controlled Substances (Commonwealth Standard) Revocation Regulations

2014 No. 194 Drugs, Poisons and Controlled Substances Amendment (Residential Medication Chart) Regulations

2014 No. 195 Drugs, Poisons and Controlled Substances (Drugs of Dependence - Synthetic Cannabinoids) Regulations

2014 No. 196 Building Amendment (Additional New Residential Zones) Regulations

2014 No. 197 Building Amendment (Live Music) Regulations

2014 No. 198 Tourist and Heritage Railways Amendment Regulations

2014 No. 199 Road Safety (Drivers), (General) and (Vehicles) Amendment Regulations

2014 No. 200 Road Safety (Drivers) Amendment (Probationary Prohibited Vehicles) Regulations

2014 No. 201 Road Safety (Vehicles) Amendment Regulations

2014 No. 202 Coroners Court (Amendment No. 2) Rules

2014 No. 203 Magistrates' Court (Vexatious Proceedings Amendments) Rules

2014 No. 204 Supreme Court (Chapter I Scale of Costs Appendices A and B Amendment) Rules

2014 No. 205 Supreme Court (Chapter II Arbitration Amendment) Rules

2014 No. 206 Supreme Court (Vexatious Proceedings Amendments) Rules

2014 No. 207 Supreme Court (Chapter VI Mental Impairment and Unfitness To Be Tried Amendment)

2014 No. 208 Supreme Court (Chapters II and III Family Provision and Other Matters Amendment) Rules

2014 No. 209 Supreme Court (Civil Appeals Amendments) Rules

NEW VICTORIAN 2014 BILLS (AS AT 10/11/2014)

Road Safety Amendment (Mandatory Drug Testing) Bill 2014

NEW COMMONWEALTH ASSENTS (AS AT 10/11/2014)

2014 No. 109 Omnibus Repeal Day (Autumn 2014) Act

2014 No. 110 Tax and Superannuation Laws Amendment (2014 Measures No. 4) Act

2014 No. 111 Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy Amendment Act

2014 No. 112 Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy (Collection) Amendment Act

2014 No. 113 Customs Amendment (Korea-Australia Free Trade Agreement Implementation) Act

2014 No. 114 Customs Tariff Amendment (Korea-Australia Free Trade Agreement Implementation) Act

2014 No. 115 Dental Benefits Legislation Amendment Act

2014 No. 116 Counter-Terrorism Legislation Amendment (Foreign Fighters) Act

NEW COMMONWEALTH 2014 PRINCIPAL REGULATIONS (AS AT 10/11/2014)

2014 No. 146 Spent and Redundant Instruments Repeal Regulation 2014 (No. 2)
2014 No. 147 Fair Entitlements Guarantee Amendment Regulation 2014 (No. 1)
2014 No. 148 Health Insurance (Diagnostic Imaging Services Table) Regulation
2014 No. 149 Health Insurance Legislation Amendment (General Medical Services Table and Other Measures) Regulation
2014 No. 150 Health Insurance (Pathology Services Table) Regulation
2014 No. 151 Federal Circuit Court Amendment (2014 Measures No. 1) Rules
2014 No. 152 Criminal Code (Terrorist Organisation - Al-Murabitun) Regulation
2014 No. 153 Great Barrier Reef Marine Park Amendment (Bait Netting) Regulation
2014 No. 154 Ozone Protection and Synthetic Greenhouse Gas Management Amendment Regulation
2014 No. 155 Renewable Energy (Electricity) Amendment (Solar Zones and Other Measures) Regulation
2014 No. 156 Financial Framework (Supplementary Powers) Amendment (2014 Measures No. 1) Regulation
2014 No. 157 Autonomous Sanctions Amendment (Fiji) Regulation
2014 No. 158 Health Insurance (General Medical Services Table) Amendment (Chronic Disease Management) Regulation
2014 No. 159 Therapeutic Goods (Medical Devices) Amendment (Australian Manufacturers) Regulation
2014 No. 160 Customs Amendment (Korean Rules of Origin) Regulation
2014 No. 161 Customs (Korean Rules of Origin) Regulation
2014 No. 162 Migration Amendment (Subclass 050 Visas) Regulation
2014 No. 163 Migration Legislation Amendment (2014 Measures No. 2) Regulation
2014 No. 164 Corporations (Aboriginal and Torres Strait Islander) Amendment (Financial Reports) Regulation
2014 No. 165 Civil Aviation Amendment (Narrow Runways) Regulation
2014 No. 166 Civil Aviation Legislation Amendment (Airworthiness and Other Matters - 2014 Measures No. 1) Regulation
2014 No. 168 Competition and Consumer (Industry Codes - Franchising) Regulation
2014 No. 169 Competition and Consumer (Industry Codes - Franchising) Repeal Regulation
2014 No. 170 National Rental Affordability Scheme Amendment (Administrative Processes) Regulation
2014 No. 171 Trade Agreements Legislation Amendment Regulation

NEW COMMONWEALTH 2014 BILLS (AS AT 10/11/2014)

Acts and Instruments (Framework Reform) Bill 2014
Amending Acts 1970 to 1979 Repeal Bill 2014
Australian Citizenship and Other Legislation Amendment Bill 2014
Australian War Memorial Amendment Bill 2014
Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014
Building Energy Efficiency Disclosure Amendment Bill 2014
Civil Law and Justice Legislation Amendment Bill 2014
Corporations Amendment (Publish What You Pay) Bill 2014
Corporations Legislation Amendment (Deregulatory and Other Measures) Bill 2014
Counter-Terrorism Legislation Amendment Bill (No. 1) 2014
Customs Amendment (Japan-Australia Economic Partnership Agreement Implementation) Bill 2014
Customs Tariff Amendment (Japan-Australia Economic Partnership Agreement Implementation) Bill 2014
Export Finance and Insurance Corporation Amendment (Direct Lending and Other Measures) Bill 2014
Omnibus Repeal Day (Spring 2014) Bill 2014
Statute Law Revision Bill (No. 2) 2014
Tax and Superannuation Laws Amendment (2014 Measures No. 6) Bill 2014
Telecommunications (Industry Levy) Amendment Bill 2014
Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014
Telecommunications Amendment (Giving the Community Rights on Phone Towers) Bill 2014
Telecommunications Legislation Amendment (Deregulation) Bill 2014
Treasury Legislation Amendment (Repeal Day) Bill 2014 ●

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

PRACTICE NOTES

FAMILY LAW COURTS

Form updates

The following forms have been updated to include space to record the applicant and respondent names:

Annexure to draft consent parenting orders (FCoA):
www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Forms/Family+Court+of+Australia+forms/FCOA_form_Annex_Consent_Parenting_Order

Case information (FCoA):
www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Forms/Family+Court+of+Australia+forms/FCOA_form_Case_info

Changes to "Collector of Public Monies"

Cheques should now be made payable to the "Family Court and Federal Circuit Court" and not "Collector of Public Monies".

The relevant court forms have been updated with this change including:

Proof of Divorce:
www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Forms/Family+Law+Courts+forms/Divorce_Reprint_NEC

Application for sealed copy of orders (FLC):
www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Forms/Family+Law+Courts+forms/Document+request+form

FAMILY LAW COURTS NATIONAL COMMUNICATION
FAMILY COURT OF AUSTRALIA, FEDERAL CIRCUIT COURT OF AUSTRALIA, 6 NOVEMBER 2014

THE FEDERAL CIRCUIT COURT OF AUSTRALIA

(Bankruptcy) Amendment (Examination Summons and Other Measures) Rules 2014

The Federal Circuit Court has agreed to amendments to the Federal Circuit Court (Bankruptcy) Rules 2006 by way of the Federal Circuit Court (Bankruptcy) Amendment (Examination Summons and Other Measures) Rules 2014 ("the Amendment Rules"). The Amendment Rules include the following amendments to the Federal Circuit Court (Bankruptcy) Rules 2006:

Amendments to rules 6.12 and 6.17 to explicitly provide that a Registrar may exercise a power to discharge an examination summons (see *Travagline v Raccunia* [2007] FMCA 777).

Amendments to rule 6.13 to facilitate the staged implementation of an electronic court file. The amendment replicates, in an electronic environment, the requirements for an affidavit supporting an application for the issue of a summons for the examination of an examinable person under s81 of the *Bankruptcy Act* 1966, being filed in a sealed envelope.

An amendment to Form 6 is being made to remove reference to the Insolvency and Trustee Service Australia with the new title "Australian Financial Security Authority".

The inclusion of sub-s55(3B) of the *Bankruptcy Act* 1966 to the list powers in Schedule 2 that may be exercised by a Registrar (being a power to direct an Official Receiver to accept or reject a debtor's petition).

The amendment rules are available at www.comlaw.gov.au.

ADELE BYRNE
PRINCIPAL REGISTRAR, 1 DECEMBER 2014

THE MAGISTRATES' COURT OF VICTORIA

Practice Direction 8 of 2014: Exclusion Orders (*Summary Offences Act* 1966)

Purpose:

To provide directions on how to apply:

- for an Exclusion Order under s6D of the *Summary Offences Act* 1966
- to vary or revoke an Exclusion Order under s6H of the *Summary Offences Act* 1966.

Application for an Exclusion Order:

- a member of Victoria Police must file a "Notice of Application for an Exclusion Order" ("the notice") and an affidavit in support.
- the notice must contain:
  - a hearing date at least 14 days from the date of filing;
  - a venue of the Magistrates' Court, being either the closest court to where the respondent resides or to the place of the subject of the proposed order.

Police must serve the respondent with the application as soon as practicable after the application is filed with the court.

Prior to the hearing date, police must file an affidavit of service of the notice.

Application to Vary/Revoke an Exclusion Order

- the applicant must file an "Application to Vary/Revoke an Exclusion order";
- a hearing date will be listed at least 14 days from the date of filing of the application, unless otherwise directed by the court;
- the applicant must serve a copy of the application on the respondent to the application as soon as is practicable after the application is filed with the court.

This Practice Direction takes effect on 3 November 2014.

PETER LAURITSEN
CHIEF MAGISTRATE, 24 OCTOBER 2014

THE MAGISTRATES' COURT OF VICTORIA

Practice Direction 9 of 2014: Alcohol Exclusion Orders (*Sentencing Act* 1991)

Purpose:

To provide directions on how to apply to vary an Alcohol Exclusion Order under s89DG of the *Sentencing Act* 1991.

Applications to vary an Alcohol Exclusion Order

- the applicant must file an "Application to Vary an Alcohol Exclusion Order";
- the following documents are to be attached to the application:

Original order made by Magistrates' Court

1. A copy of the "Summary of Charges" or "Statement of Alleged Facts" which was part of the brief originally served on the offender when charged with the relevant offence.

Original order made by County Court or Supreme Court

1. A copy of the order made by the County Court or Supreme Court;
2. A copy of the sentencing remarks in the hearing where the order was imposed;
   or
   A copy of the "Summary of Charges" or "Statement of Alleged Facts" which was part of the brief originally served on the offender when charged with the relevant offence.

- The court will list the application for hearing at least 14 days in advance, unless otherwise directed by the court.
- The applicant must serve a copy of the application on the respondent to the applicaton as soon as is practicable after the applicaton was filed with the court.

This Practice Direction takes effect on 3 November 2014.

PETER LAURITSEN
CHIEF MAGISTRATE, 24 OCTOBER 2014

THE MAGISTRATES' COURT OF VICTORIA

Practice Direction 10 of 2014: Fast tracking of the hearing and determination of criminal offences arising out of family violence incidents

Background:

It is well-known with family violence cases that the rate of recidivism for crimes of violence against intimate partners is much greater than crimes of violence against strangers. We also know that usually the violence increases, in number and intensity. Accordingly, the Magistrates' Court of Victoria will introduce in stages the fast

tracking of these cases. The first stage will start in the Dandenong Magistrates' Court.

Direction:

1. As and from 1 December 2014, all criminal charges arising out of family violence incidents and filed in the Dandenong Magistrates' Court will be listed according to these timelines:
   a) Where the accused person is on bail, from the date of his or her release on bail to the first listing of those charges – one week;
   b) Where the accused person has been summonsed, from the date of the issue of the summons to the first listing – four weeks;
   c) In either case described in (a) and (b):
      i) From the date of the first listing to the date of the second listing – four weeks;
      ii) From the date of the second listing to contest mention – four weeks
      iii) From the date of the contest mention to trial – four weeks.
2. At the time of release on bail or when served with a summons, the accused person must be given a document entitled "Family violence related criminal proceedings".
3. This Practice Direction commences on 1 December 2014.

PETER LAURITSEN
CHIEF MAGISTRATE, 25 NOVEMBER 2014

THE MAGISTRATES' COURT OF VICTORIA

Practice Direction 11 of 2014: Mediation Programme

Background:
Practice Direction 6 of 2007 created a mediation pilot programme for certain defended civil proceedings at the Magistrates' Court of Victoria (the Court) at Broadmeadows. The purpose of this Practice Direction is to extend the civil mediation programme to the Court at Frankston.

Directions

1. From 1 January 2015, the Court will commence a mediation programme at Frankston (the Programme) for all defended civil disputes where the amount sought in the complaint is less than $40,000 or where the dispute is under the Associations Incorporation Act 1981 (irrespective of the amount or matter of dispute). These proceedings will be referred to mediation pursuant to s108 of the Magistrates' Court Act 1989 unless the Court determines otherwise, on application by any party.
2. The Programme will involve only those proceedings where a notice of defence is filed at the Court at Frankston on or after 1 January 2015.
3. In addition to serving upon a defendant the complaint and two notices of defence, a plaintiff in a proceeding will serve upon the defendant a document entitled "Information About Court-Annexed Mediation".
4. Where a defendant seeks to defend a complaint and files and serves a notice of defence in order to do so, that person must return to the Magistrates' Court at Frankston at the same time as the notice of defence is filed with a completed Section A.
5. This Practice Direction commences from 1 January 2015.

PETER LAURITSEN
CHIEF MAGISTRATE, 8 DECEMBER 2014

THE MAGISTRATES' COURT OF VICTORIA

Practice Direction 12 of 2014: Mediation Programme

Background:
Practice Direction 6 of 2007 created a mediation pilot programme for certain defended civil proceedings at the Magistrates' Court of Victoria (the Court) at Broadmeadows. The purpose of this Practice Direction is to extend the civil mediation programme to the Court at Moorabbin.

Directions

1. From 1 January 2015, the Court will commence a mediation programme at Moorabbin (the Programme) at Frankston for all defended civil disputes where the amount sought in the complaint is less than $40,000 or where the dispute is under the Associations Incorporation Act 1981 (irrespective of the amount or matter of dispute). These proceedings will be referred to mediation pursuant to s108 of the Magistrates' Court Act 1989 unless the Court determines otherwise, on application by any party.
2. The Programme will involve only those proceedings where a notice of defence is filed at the Court at Moorabbin on or after 1 January 2015.
3. In addition to serving upon a defendant the complaint and two notices of defence, a plaintiff in a proceeding will serve upon the defendant a document entitled "Information About Court-Annexed Mediation".
4. Where a defendant seeks to defend a complaint and files and serves a notice of defence in order to do so, that person must return to the Magistrates' Court at

Moorabbin at the same time as the notice of defence is filed with a completed Section A.
5. This Practice Direction commences from 1 January 2015.

PETER LAURITSEN
CHIEF MAGISTRATE, 8 DECEMBER 2014

STATE REVENUE OFFICE

Changes to SRO duty lodgements

Duties Online (DOL), the SRO's online system for the lodgement and payment of duty, has recently celebrated its third birthday and is now the main accepted lodgement channel for duty transactions in Victoria. Nearly 90 per cent of all transactions are completed in DOL by more than 1400 DOL organisations.

Any business engaged in lodging duty transactions can apply to become a registered user of DOL. DOL is an easy to use, free, convenient way to lodge and pay duty with same day service.

Effective 15 January 2015, the SRO will no longer assess transactions which can be processed in DOL. The available options are as follows:

1. sign up to DOL to take advantage of an easy to use, free and convenient way to lodge and pay duty; or
2. use a registered DOL organisation to process the transaction on your behalf. A list of registered organisations is available on the SRO website.

The SRO will continue to accept lodgements of complex transactions and lodgements by individuals while we are building an all-inclusive electronic lodgement capability. These lodgements will be processed with a 21 day turnaround.

For further information, please visit www.sro.vic.gov.au/dutiesonline.

DUTIES ONLINE TEAM
STATE REVENUE OFFICE, VICTORIA, 25 NOVEMBER 2014

CASH RATE TARGET

From 6 December 2007 law practices whose matters are governed by the *Legal Profession Act* 2004 cannot use the penalty interest rate for their accounts. The maximum rate is the cash rate target plus 2 per cent. The cash rate target is currently 2.50 per cent (from 7 August 2013). To monitor changes between editions of the *LIJ*, practitioners should check www.rba.gov.au/statistics/cash-rate.

VALUE OF PENALTY AND FEE UNITS

For the financial year commencing 1 July 2014, the value of a penalty unit is $147.61. The value of a fee unit is $13.24 (*Government Gazette* SG123, 15 April 2014).

PENALTY INTEREST RATE

The penalty interest rate is 10.5 per cent per annum (from 11 August 2014).

To monitor changes to this rate between editions of the *LIJ*, practitioners should check the Magistrates' Court of Victoria website at www.magistratescourt.vic.gov.au/jurisdictions/civil/procedural-information/penalty-interest-rates. ●

COURT & TRIBUNAL WEBSITES

To check for new court and tribunal practice notes issued between editions of the *LIJ*, practitioners should refer to the following websites:

High Court: www.hcourt.gov.au
Federal Court: www.fedcourt.gov.au
Family Court: www.familycourt.gov.au
Federal Circuit Court: www.federalcircuitcourt.gov.au
Supreme Court: www.supremecourt.vic.gov.au
County Court: www.countycourt.vic.gov.au
Magistrates' Court: www.magistratescourt.vic.gov.au
Administrative Appeals Tribunal: www.aat.gov.au
VCAT: www.vcat.vic.gov.au

LIV HONOUR ROLL

LAW INSTITUTE VICTORIA

The LIV wishes to acknowledge and thank all individuals who have spoken at our events and delivered professional development programs.

Their expertise and influence have enabled the LIV to offer presentations of the highest quality for members and the entire profession. Listed below are some of the people who have helped make the LIV's President's lunches and PD programs premier events. The LIV looks forward to offering you a new line-up of outstanding speakers in 2015.

Malcolm Fraser AC CH
Australian Prime Minister and leader of the Liberal and National Country Party Coalition 1975–1983

Geoffrey Robertson QC
Leading human rights advocate, whose work as a barrister and author has been central to the global justice movement

Chief Justice Marilyn Warren AC
Appointed Chief Justice of the Supreme Court of Victoria in 2003 and Lieutenant-Governor in 2006

Chief Justice James Allsop AO
Simon Bailey
Justice Jonathon Beach
Dr George Beaton
Associate Professor Rufus Black
Kathryn Booth
Rupert Burns
Julian Burnside AO QC
Andrew Clements
Russell Cocks
Justice Clyde Croft
Hugh de Kretser
The Hon. Linda Dessau AM
Mark Dreyfus QC MP
The Hon Ray Finkelstein QC
Joanna Fletcher
Justice Jack Forrest
Justice Terry Forrest
The Hon. Bill Gillard QC
Sharon Givoni
Justice Michelle Gordon
Philip Grano OAM
Justice Kenneth Hayne AC
Fabian Horton
Graeme Innes AM
Rob Jackson
Kate Jenkins
Justice Betty King
Peter Little
Joan Kirner AC
Joh Kirby
The Hon Michael Kirby
Ken Lay
Michael McGarvie
Steve Mark AM
Justice Chris Maxwell
Sue Mitra
Albert Monichino QC
The Hon Nahum Mushin
Norman O'Bryan AM SC
David O'Callaghan QC
Professor James Ogloff
Peggy O'Neal
Peter Pascoe
David Pringle
Ross Ray QC
Tony Riordan
Michael Sassella
Martin Scott QC
Barbara Shalit
Rabia Siddique
Deborah Siemensma
The Hon Frank Vincent QC AO
Jason Walker
Michael Wheelahan QC

Accredited Specialists

Justin Hartnett – Wills & Estates
Simon Libbis – Property Law
Anne Nielsen – Property Law
Phillip Nolan – Property Law
Samuel Norton – Criminal Law
Katherine Wilson – Personal Injury Law

insites@liv.asn.au

Reviews are provided by the LIV library, ph 9607 9360; email library@liv.asn.au.
We welcome suggestions for websites, apps and blogs to include in this column.
Neither the LIV nor the *LIJ* in any way endorses or takes any responsibility whatsoever for any material contained on external sites referred to by the *LIJ*.

INSITES

The Victorian Inspectorate

www.vicinspectorate.vic.gov.au

The Victorian Inspectorate is the key body overseeing and monitoring the functions of the Ombudsman, IBAC and the Auditor-General among others. The Inspectorate operates under the *Victorian Inspectorates Act* 2001 (Vic). The website highlights its key functions and powers as well as provides a link to the complaint form to initiate a process. Various reports required to be prepared for Victorian Parliament are also available on this website including *Surveillance Devices Act* reports from 2006 to 2014.

Workplace Gender Equality Agency

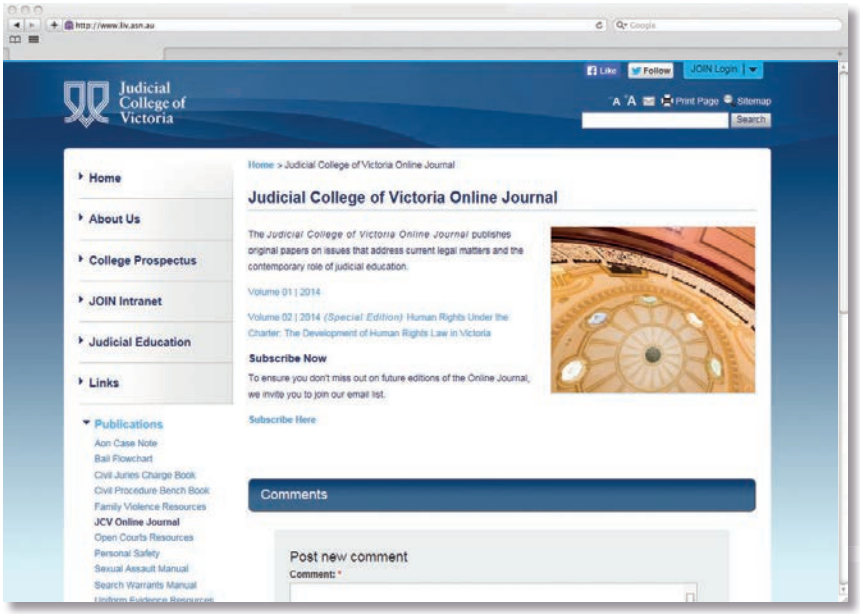
www.wgea.gov.au/report/minimum-standards

Employers of 500 or more employees now need to meet the minimum standards as outlined in the Workplace Gender Equality (Minimum Standards) Instrument 2014 in order to comply with gender equality indicator requirements. If you are unsure which organisations it refers to, then the "Minimum standards" link on the website is a good place to start. There is also clear and comprehensive information on how to create the required reports online using AUSkey.

JuriGlobe

www.juriglobe.ca/eng

One of the great features of the JuriGlobe website, compiled by the Faculty of Law at the University of Ottawa, is the ability to check which legal systems exist in a country and the official languages of that country. Within the "legal system classifications" menu tab you will find an alphabetised list by country and its corresponding legal system/s. This information is also available pictorially by continent, highlighting the systems that are most prominent in certain parts of the world.



Judicial College of Victoria Online Journal

www.judicialcollege.vic.edu.au/publications/jcv-online-journal

The Judicial College of Victoria publishes some excellent free publications on its website including its own journal, *Judicial College of Victoria Online Journal*. The first two issues are available on the site. The journal publishes original papers that discuss modern issues in judicial education. The second volume will be of interest for those involved in human rights, with papers featured from the Human Rights under the Charter: The development of human rights law in Victoria conference held in August 2014. Join the email list to receive information about forthcoming issues.

Victorian Legislation and Parliamentary Documents (Legislative Information)

www.legislation.vic.gov.au

The Office of the Chief Parliamentary Counsel, which drafts legislation in Victoria, has removed some of its content from its pages. The information is now available from the "Legislative Information" link on the homepage of the Victorian Legislation and Parliamentary Documents website. Here you will find commencement information of Victorian Acts in easy to browse pdf documents. You will also find a subject index that allows you to search for the name of the relevant Acts or Statutory Rules simply by looking up a key term.

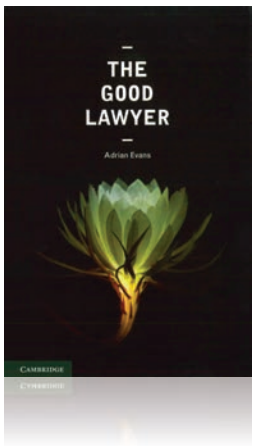
iDcare

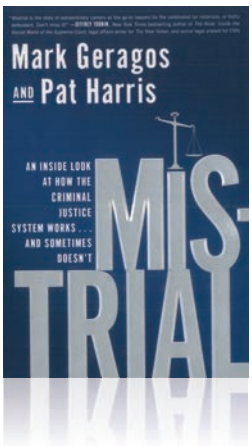
www.idcare.org

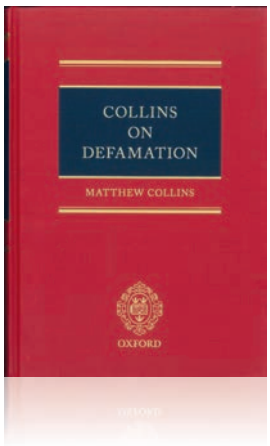
iDcare, Australia & New Zealand's national identity theft support centre, is a new website which has been launched to provide support to victims of identity crime. Founded by Dr David Lacey, with the government providing financial support, the site aims to provide information on how best to minimise the damage once the stolen information has been misused. It also contains practical steps, particularly for the elderly and the young, as well as links to other key sites, to stay on top of current scams and cyber threats.

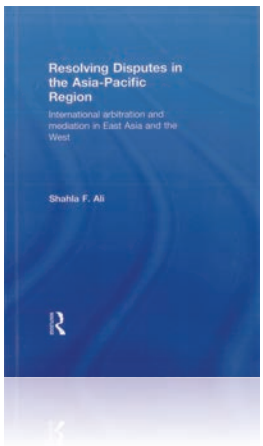
books@liv.asn.au

INPRINT









The Good Lawyer

Professor Adrian Evans, *The Good Lawyer*, 2014, Cambridge University Press, pb $50

For many readers of fiction the quintessential good lawyer is Atticus Finch seen through the eyes of his young daughter Scout in Harper Lee's timeless Pulitzer Prize winning classic *To Kill a Mockingbird*.

In the mid 1930s Finch defends a black man falsely accused of rape in America's deep south.

I was reminded of Atticus Finch – a small town lawyer with high moral principles – when I read Adrian Evans' latest addition to Australian legal ethics literature *The Good Lawyer*. Finch would have easily passed the tests of what makes a good lawyer set out in Evans' well researched and thoughtful book.

A law professor at Monash University, Evans has been studying, researching and teaching ethics to law students for more than three decades. He has brought his many years of research, learning and experience to the fore in this small but useful publication.

Writing for an audience of senior secondary school students, tertiary law students and new lawyers, Evans has focused his discussions around the whole lawyer, a person who is not only a lawyer but a decent and moral human being.

What makes a good lawyer? Is there a place for good lawyers in the legal profession? What role does morality play in creating a good lawyer?

Evans sets out his aim: "This book aims to make you a better person and, I hope, a better lawyer. 'Better' does not mean clever or more highly skilled – although that is necessary and should go without saying: it means more socially and morally responsible. That is, a 'good lawyer'".

Richly mining academic research and real case studies (both from overseas and within Australia) over the past 30 years, Evans draws conclusions which suggest that not all lawyers have been or are driven by ethical and moral considerations in their daily practice of the law. In some cases, law firm business imperatives have driven outcomes rather than ethics or morality.

Evans analyses four critical ethical areas through different philosophical eyes – truth and deception, professional secrets, conflicts of loyalty and interest, and the morality of professional competence. Evans explains the choices faced by lawyers in each area. Responding to those choices may or may not result in a moral outcome. Many case studies are cited with an abundance of tables, flowcharts, and diagrams to assist in understanding the text.

The book concludes with a chapter on practical wisdom for lawyers with clear encouragement for lawyers to be "better", citing the ideal law office workplace as one which is "primarily an exciting, compassionate and justice-focused workplace, where your character development, judgment and resilience are prioritised and ethical awareness is valued as a business strategy".

This book should find a wide audience among those who are contemplating studying for a law degree or are already on the way to doing so. Lawyers should read it as well.

MICHAEL DOLAN
ACTING MANAGER, LIV ETHICS DEPARTMENT

Mistrial

Mark Geragos and Pat Harris, *Mistrial*, 2013, Gotham Books, pb $20

This book, written by two Californian criminal defence lawyers, provides an opportunity to compare different systems. The authors are highly critical of prosecution strategies, including the reliance on confessions (which are apparently not required to be audio-taped in the US). Chapter 9 is headed "The Best System in the World" but the title is followed by three question marks. It seems clear that we should be grateful that we have a different system.

Significantly, we have a system in which judges are appointed by the executive. More than half of the 50 states in the US use a system of popular election of judges. This has many disadvantages. It encourages judges to impose harsh penalties, especially when re-election looms, on the basis that a reputation for being tough on crime will be popular with the electorate. (For the same reason, a background as a prosecutor will help the applicant to succeed in an election.) Election campaigns require funds and local lawyers might prove to be enthusiastic donors, thus compromising the elected judge. It is not surprising then, that the authors offer as the number one (out of 10) suggestion for improving the system that judges should be appointed rather than elected.

The authors provide entertaining glimpses of some notable cases, such as that of OJ Simpson. This leads to another aspect in which the US system of peremptory challenges (called preemptory in this book) is open to criticism. Defence counsel can cross-examine prospective jurors endlessly in an attempt to obtain jurors who will be sympathetic to the defendant.

I was present in 1994 in the early stages of the Simpson empanelment (a process that ended up taking three months). The process made it easy to get a predominantly black jury ready to believe in LAPD corruption. American lawyers were astonished when I told them that in Australia a jury empanelment usually takes just a couple of hours. In my view, our system makes it more apt to achieve a random cross-section of the community.

GRAHAM FRICKE
RETIRED COUNTY COURT JUDGE

Collins on Defamation

Matthew Collins, *Collins on Defamation*, 2014, Oxford University Press, hb $435.95

This is a textbook on English defamation law by a member of the Victorian Bar. The text focuses on the *Defamation Act* 2013 (UK) but contains extensive material on defamation law in other countries, especially Australia and Canada. There is also substantial analysis of the application of defamation law to the internet. The appendixes include legislation, civil procedure rules, tables of damages and precedents.

The *Defamation Act* 2013 is the result of a private member's bill introduced by Lord Lester of Herne Hill in 2010. It constitutes the most wide-ranging set of reforms ever made to the law of defamation in England and Wales and tilts the balance towards protecting freedom of expression.

According to Collins, the 2013 legislation makes a number of significant reforms. First, only a statement that has caused or is likely to cause serious harm to the claimant's reputation is defamatory. Second, for claimants not domiciled in the EU, the court only has jurisdiction if it is clearly the most appropriate forum. Third, secondary publishers cannot be sued unless it is not reasonably practicable to sue the primary author, editor or publisher. Fourth, a website operator has a defence if it can show that it was not the operator who posted the statement on the website (provided the poster can be identified). Fifth, a single publication rule has been introduced, so that multiple publications of substantially the same statement are taken to be published on the date of first publication for the purpose of the statutory limitation period. Sixth, the common law defence of truth and the Reynolds defence are abolished and statutory defences of substantial truth and publication in the public interest are created. Seventh , a defence of honest opinion is available if the statement was of an opinion the basis of which was indicated and which an honest person could have held on the basis of any existing facts or privileged statement.

With the commencement of this legislation, defamation law in England and Wales is now very different from Australian law. Collins advocates a Reynolds defence for publications in the public interest and a single publication rule so the statutory limitation period is effective. However any changes to the uniform Australian defamation legislation in the short term seems unlikely.

ANDREW WESTCOTT
SPECIAL COUNSEL, HWL EBSWORTH LAWYERS

Resolving Disputes in the Asia-Pacific Region

Shahla F. Ali, *Resolving Disputes in the Asia-Pacific Region – International arbitration and mediation in East Asia and the West*, 2012, Routledge, pb $26

This book provides insight into the attitudes, perceptions and practices of participants in commercial arbitrations in East Asia, compared with participants of arbitrations in the West.

The book is divided into two parts. The first part considers the cultural and legal history behind the growth of arbitration and other dispute resolution practices in East Asia. The second part of the book provides an in-depth analysis of the empirical research undertaken by the author on attitudes, perceptions and practices of participants of arbitral proceedings, including arbitrators, judges, lawyers, clients and members of various arbitral institutions, such as the China International Economic and Trade Arbitration Commission. The empirical research presented is a combination of surveys and interviews, as well as examination of individual cases and statistical data obtained from arbitral institutions. In the final chapter, the author examines the issue of reconciling global harmonisation and cultural diversity in international commercial arbitration in East Asia.

Although highlighting a number of similarities, the author identifies some key differences between East Asian countries and western countries in the way arbitrations are viewed and the manner in which they are approached and conducted. For example, the author highlights the fact that there is generally greater acceptance and frequency of arbitrators promoting and participating in mediations during arbitral proceedings in East Asian countries, such as in China, as opposed to arbitrations conducted in Europe and the US.

Importantly, the empirical research presented by the author was conducted in 2006-2007, although some material up to 2010 has been considered. Statistics pertaining to arbitral proceedings conducted in China for the period 1963 to 1996 have also been examined. It would be interesting to consider and compare the author's work with more recent empirical data in order to determine whether sentiments and practices in East Asia and the West have changed since the author's research. ●

DAVID KIM
BARRISTER

INREFERENCE

New books and articles of interest from the LIV library.

ONSITE FACILITIES

- Wide range of online legal databases
- PCs with free internet access and commonly used software
- Private study carrels with power for notebooks
- Wireless internet access
- Photocopiers
- Members' lounge
- Staff assistance and advice in the use of resources

NEW BOOKS AND SEMINAR PAPERS

LIV Members may borrow library material for 14 days, with a one week renewal available unless reserved by a member. Items can be collected from the library, posted or sent via DX free of charge. Material including the location REF is unable to be borrowed.

Conveyancing

Rosier, Peter, *Understanding National e-Conveyancing*, LexisNexis Butterworths, 2014 (Location: KN 74 R 2)

Corporate governance

Fishel, David, *The Book of the Board: Effective Governance for Non-Profit Organisations*, Federation Press, 2014 (Location: KN 255 F 1 3)

Criminal law

Corns, Christopher, *Criminal Investigation and Procedure in Victoria*, Thomson Reuters (Professsional) Australia, 2014 (Location: KM 570 C 2 2)

Directors' duties

Langford, Rosemary Teele, *Directors' Duties: Principles and Application*, Federation Press, 2014 (Location: KN 264 L 1)

Family law

Chisholm, Richard, Christie, Suzanne and Kearney, Julie, *Annotated Family Law Legislation*, 2nd edn, LexisNexis Butterworths, 2014 (Location: KN 170 C 1 2)

Renton, N E and Caldwell, Rod, *Family Trusts: A Plain English Guide for Australian Families*, Wrightbooks, 2014 (Location: KN 210 R 3 5)

Legal profession

Field, Rachael, Duffy, James and Huggins, Ana, *Lawyering and Positive Professional Identities*, LexisNexis Butterworths, 2014 (Location: KL 85 F 3)

McFarlane, Tim, Snooks, Steuart and Robertson, Penny, *Essential Skills*. Seminar paper, 1 August 2014, Law Institute of Victoria, 2014 (Location: F KL 82 M 12)

Negotiating effective outcomes – The WWW of mastering email overload – Cost update.

O'Shea, Kerry, Whish-Wilson, Adele and Cuming, Angela, *Ballarat Law Association Conference*. Seminar papers, 18 November 2014, Law Institute of Victoria, 2014 (Location: F KB 105 O 2)

Traditional media and legal practice – Social media insights for legal practice management and promotion – LIVing ethics

Property law

Nolan, Phil, Gavan, Michael, Gandolfo, David, et al, *Property Law Conference 2014*. Seminar papers, 2 October 2014, Law Institute of Victoria, 2014 (Location: F KN 60 N 3)

Keynote address: e-conveyancing: developing a national approach to regulation and implementation – Current developments in property law: case law insights and analysis – Changes to Victoria's planning schemes: the new residential zones – Vendor's statements: the new disclosure requirements - includes vendor's statement provisions comparative table – Key taxation issues in property transactions – Owners Corporations: current issues for property lawyers – Treating title trauma: surgery for property lawyers – Online resources for the savvy property law practitioner – Risk management for property lawyers

Workplace relations

Englander, Charles, Harrington, Nicholas, Robinson, Graham, et al, *Workplace Relations Conference 2014*. Seminar papers, 24 October 2014, Law Institute of Victoria, 2014 (Location: F KN 190 E 1)

Fair Work Ombudsman: a year in review – Adverse action and discrimination law/general protections: analysis of recent case law and implications for practice – Lessons learned: a focus on the past year's key industrial cases and their implications for employers and unions – Legal representation at the Fair Work Commission – Post-employment restraint of trade clauses – Two steps forward, one step back: equal opportunity in the workplace – Effective witness statements – Ethics for workplace relations lawyers.

ARTICLES

Articles may be requested online and will be emailed, faxed or mailed to members.

Air space

Lee, Peter, "Drone laws – shaping an industry" in *Computers and Law: Journal for the Australian and New Zealand Societies for Computers and the Law*, vol 25 no 3, August/September 2014, pp11-14 (ID 56832)

Considers the legislation that currently applies to drones and what legislation may look like in the future.

Alternative dispute resolution

Powell, Carol, "Alternative dispute resolution" in *New Zealand Law Journal*, August 2014, pp261-264 (ID 56581)

This article discusses 10 attributes of a good negotiator. Includes the International Mediators' Institute (IMI) competency criteria.

Competition law

Parry, Marianna and Hobson, Richard, "A snuggle for survival - the paradox of section 44ZZRD(3)(c): restricting co-operation may mean restricting competition" in *Australian Journal of Competition and Consumer Law*, vol 22 no 2, September 2014, pp201-209 (ID 56715)

Case law, legal background and analyses on s44ZZRD(3) of the Australian Competition Law, and the potential illegality of joint bidding and teaming agreements.

Conveyancing

Thomas, Rod, Griggs, Lynden and Low, Rouhshi, "Electronic Conveyancing in Australia – is anyone concerned about security?" in *Australian Property Law Journal*, vol 23 no 1, 2014, pp1-2 (ID 56981)

Commentary on security issues for Australia's new electronic conveyancing system with discussion on the Property Exchange of Australia (PEXA), FAST and CHESS transfer of shares, as well as easier alternatives.

Data storage

Jermey, Jon, "Very like a whale: commercial cloud storage services come into their own" in *Online Currents*, vol 28 iss 4, November 2014, pp195-199 (ID 57152)

Compares commercial cloud storage options for individuals or small businesses.

Elder law

McCullagh, Richard, "Aged care reforms: the residents' perspective" in *LSJ (NSW)*, no. 4, September 2014, pp70-71 (ID 56580)
Overview of the new *Aged Care (Living Longer Living Better) Act* 2013 (Cth) and regulations.

Expert witnesses

Edmond, Gary, "How to cross-examine forensic scientists: a guide for lawyers" in *Australian Bar Review*, vol 39 no 2, October 2014, pp174-196 (ID 56709)
This article is intended to be used as a resource guide for lawyers who are required to cross-examine expert witnesses.

Legal drafting

Adam, Kenneth, "Banishing shall from business contracts: throwing the baby out with the bathwater" in *Australian Corporate Lawyer*, vol 24 no 3, September 2014, pp12-13 (ID 56584)
Commentary on drafting of contracts in plain English and in particular, the word "shall". Also discusses the words "will" and "must".

Garner, Bryan, "10 tips for better legal writing" in *ABA Journal*, vol 100, October 2014, pp24-25 (ID 56733)
Provides valuable tips on how to improve your legal writing and produce a better final product.

Mentoring

Clutterbuck, David, "Bad manners at the mentoring table" in *LSJ (NSW)*, no 4, September 2014, pp38-39 (ID 56660)
Highlights 12 habits of the toxic mentor and 12 habits of the toxic mentee.

Power of attorney

Chesterman, David, "Attorney on the dotted line – a risk exposed" in *Proctor*, vol 34, no 8, September 2014, pp14-16 (ID 56565)
Commentary on a 2014 Queensland Court of Appeal case, *Nielson v Capital Finance Australia*, regarding the signing process for documents in a power of attorney. The article highlights the risks involved with execution of instruments particularly in the signing phase.

Privacy

Prasek, Dana, "Website terms of use and privacy policies: practical tips and tricks to effectively manage your risk and minimise exposure to the new *Privacy Act* penalties" in *Privacy Law Bulletin*, vol 11 no 8, September/October 2014, pp141-143 (ID 56656)
Highlights tips for website terms of use including click-through or browse-wrap, standard terms of use for a website, Zappos, special terms and inclusions in your privacy policy.

Recruitment

Breckon, Rachael, "All aboard" in *Lawtalk*, no 848, 29 August 2014, pp4-7 (ID 56569)
Tips on how to recruit the best people for your law firm, working collaboratively and using social media.

Restraint of trade

McEwan, Graeme, "Employment restraint of trade clauses and protection of confidential information from trade rivals part 1" in *Employment Law Bulletin*, vol 20 no 7, August 2014, pp94-101 (ID 57068)
Part one of a two part article on restraint of trade clauses and confidential information, this part deals with the construction of employee restraint of trade clauses, with commentary and case law covering the issues of intention, letters of demand, special circumstances, the rules of construction and reasonableness.

Shareholder agreements

Chew, Deborah, "Tips for drafting a successful shareholders agreement" in *Inhouse Counsel*, vol 18 no 6, August 2014, pp85-87 (ID 56591)
Discusses the importance of a shareholders agreement, the different types of agreements that exist and what common provisions should be present.

Social media

O'Halloran, Paul, "When can you dismiss an employee for misuse of social media?" in *Internet Law Bulletin*, vol 17 no 7, September 2014, pp150-152 (ID 56654)
Looks at two recent Fair Work Commission decisions highlighting distinctions between a public and private comment on social media.

Succession

"Succession laws in Victoria: forthcoming changes" in *The Legal Executive*, no 5, September/October 2014, pp10-11 (ID 56658)
Commentary on the new *Justices Legislation Amendment (Succession and Surrogacy) Bill* 2014 (Vic). If passed it will makes changes to the *Administration and Probate Act* 1958 and other related Acts.

Websites

Prasek, Dana, "Website terms of use and privacy policies: the why, the what and the how" in *Internet Law Bulletin*, vol 17 no 8, October 2014, pp187-189 (ID 56941)
Outlines standard clauses that should be used in a terms of use for a website and special clauses that need to be tailored above the "boilerplate" clauses. ●

LIBRARY ACCESS

LIV members can use their member cards to gain convenient access to the library. Simply swipe your member card at the entrance to the library.

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Use the website to request, reserve and renew books, order copies of articles, request research assistance and access legal resources.

ethics@liv.asn.au

INTERVIEWING WITNESSES

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

Litigation

Communicating with potential client of another firm

(R4833 – July 2014)

When is it appropriate for a legal practitioner to interview a potential defendant in a motor vehicle accident matter where an insurer is likely to be involved at some later date?

The law firm acted from time to time for plaintiffs in common law proceedings arising from motor vehicle accidents. The law firm asked whether it was ethically appropriate for the plaintiff's lawyers or their agents to hold discussions with a witness who was a potential defendant in common law proceedings arising from such an accident.

The relevant insurer was not a law firm and took the view that the law firm's request for an Ethics Committee Ruling was an inappropriate use of the Ethics Committee's processes. Nevertheless, the insurer made observations germane to the one issue on which it felt it might be appropriate for the Committee to provide guidance, namely the obligations on solicitors when communicating with persons entitled to be indemnified by the insurer, including potential defendants in a suit or cross-claim potentially to be brought by the solicitor's client.

Ruling

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

1. There is nothing under the current Rule 25 of the *Professional Conduct and Practice Rules* 2005 to prevent a plaintiff lawyer interviewing a prospective insurer's defendant until such time as the defendant is represented.
2. The prospective Rule 22.4 of the *Australian Solicitors' Conduct Rules* 2011 does not prevent a plaintiff lawyer interviewing a prospective insurer's defendant until such time as the defendant is represented or the prospective insurer has indemnified that person. The Ethics Committee understands that there is no obligation on the part of the prospective insurer to indemnify the driver of a vehicle involved in an accident until the relevant plaintiff has become entitled to recover damages.
3. In any event a plaintiff's lawyer should comply with the *Guidelines on Interviewing Witnesses* published by the LIV in October 1990.

Family; bankruptcy

Conflict of interest

(R4841 - April 2014)

Can a law firm act for a trustee in bankruptcy in family law property proceedings in which the bankrupt is a party and in which the trustee has been joined as a party when the law firm acted previously for the bankrupt in those proceedings?

A law firm was acting for a client as applicant in de facto family law property proceedings in the Family Court of Australia. The trial of the matter was part heard in June 2013 and was due to resume in August 2014. In September 2013 the client was declared bankrupt and thereafter the firm filed a Notice of Ceasing to Act for the client. The trustee in bankruptcy was joined as a party to the proceedings. The trustee in bankruptcy asked the firm to act for him in the remainder of the proceedings as the trustee believed that such a course would be in the best interests of the creditors. The client consented to such a course. The firm was prepared to act as requested provided that the Ethics Committee was of the view that no conflict of interest would arise that could not be addressed by the giving of informed consent.

Ruling

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

1. There is a risk of a conflict of interest arising if the law firm acts for the trustee in bankruptcy in the remainder of the client's property settlement proceedings in the Family Court of Australia. Informed consent will enable that course to be undertaken as the interests of the client and the trustee in bankruptcy in the litigation appear to be aligned at this point in time.
2. In order to be satisfied that informed consent has been given, the client should obtain independent legal advice and it may be prudent for the trustee in bankruptcy to also obtain independent legal advice before the law firm commences to act. ●

The **ETHICS COMMITTEE** is drawn from experienced past and present LIV Council members, who serve in an honorary capacity. Ethics Committee rulings are non-binding. However, as the considered view of a respected group of experienced practitioners, the rulings carry substantial weight. It is considered prudent to follow them. The LIV Ethics website, www.liv.asn.au/For-Lawyers/Ethics.aspx, is regularly updated and, among other services, offers a searchable database of the rulings, a "common ethical dilemmas" section and information about the Ethics Committee and Ethics Liaison Group. For further information, contact the ethics solicitor on 9607 9336.

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TIME FOR REVIEW

Implementing some targeted resolutions could help you avoid a claim in 2015.

Lawyers are typically time poor and consequently have difficulty taking the time to reflect on ways to improve their client service and management practices.

The start of the year is a good time for you and your firm to think about how you can consistently serve your clients better and reduce practice risk. Look at which bad habits you could put to rest and which firm policies need reviewing and rewriting.

Based on claims LPLC receives, here is a list of 20 resolutions which would be a great place to start.

Client selection and retainers

- I will think about which clients experience and gut instinct tell me are trouble and, where possible, refer them elsewhere. I will adjust my client selection policies in accordance with the lessons learned.
- I will meet and verify the identity of all new clients.
- Under no circumstances will I dabble in areas outside my expertise. Clients will be referred to appropriate experts where necessary.
- I will send an engagement letter or email properly documenting the scope of work I will and will not be doing for every matter.
- I will write to any unrepresented parties making it clear I am not acting for them.
- I will take instructions from third parties such as intermediaries and joint venture partners only with clear documented authorisation from the client. I will then have the client confirm the instructions.

Communicating with clients

- I will document all important communications, especially instructions and advice. Signed instructions for important decisions are preferable.
- I will be careful to document with great detail communications from difficult or emotional clients or those who choose not to accept my advice.
- I will take the time to talk to my clients. This will enable me to better understand their circumstances and objectives, manage their expectations by keeping them updated about the progress of their matter and unexpected developments, and give them timely advice in language they understand.
- I will promptly return phone calls and emails, even if to inform the client I am looking into the issue and will respond to them in a realistic timeframe.

Matter management

- I will diarise all critical dates and have a system allowing others in the practice to see the reminders in my absence.
- I will develop a realistic matter plan at the outset of each non-routine matter before providing the client with time and cost estimates.
- I will not commit to unrealistic timeframes.
- I will implement a policy regarding solicitor's certificates, including a prohibition on issuing certificates to "walk-in" clients.
- I will not advise on family law financial agreements unless I am a family law expert.
- I will carefully review all wills I prepare against my instructions and check them with the client before execution.
- I will use a file closing checklist to ensure all necessary lodgements have been attended to, trust monies returned and the matter is otherwise properly completed.

Other risk factors

- I will bill the client periodically and talk to them before sending any large bills that could take them by surprise.
- I will pursue clients for fees but carefully review the file before deciding to sue a client for unpaid fees.
- I will seek help if I feel overwhelmed or unable to cope with professional or personal problems.

One more

There is one further resolution to consider: I will refer to LPLC's risk management resources on its website more often.

The website contains information and tips on all of the topics listed above as well as extensive material on insurance, claims and other risk management issues.

Another useful resource to help you to implement your resolutions is LPLC's list of policies for law firms. There is commentary of relevant risk management issues on many of the policies and not all firms need or have the complete suite.

You can also contact LPLC's risk management team directly for information or to discuss any risk issues.

Implementing these resolutions and others applicable to your practice could help you avoid a claim this year. Of course, anyone who has ever made a new year's resolution will know the hard part is sticking to it. Good luck. ●

This column is provided by the **LEGAL PRACTITIONERS' LIABILITY COMMITTEE**. For further information ph 9672 3800 or visit www.lplc.com.au.

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SPEAKING UP FOR ASYLUM SEEKERS

Class actions can be a powerful vehicle for pro bono lawyers to help improve access to justice for people without a voice.

Many lawyers are rightly troubled by the treatment of asylum seekers. There has been a search among public interest lawyers for silver bullet litigation in respect of immigration policies, in particular offshore detention. In general, this focus seems to be on administrative and constitutional points. This is certainly a noble pursuit, perhaps propelled by the success of the M70 (Malaysian solution) case. However, it seems increasingly clear that offshore processing is here to stay for the foreseeable future.

It is imperative that while offshore processing exists, people held in immigration detention still have access to justice through lawyers to assert their legal rights. An example of how pro bono lawyers can address this legal need can be seen in proceedings that Maurice Blackburn has filed on behalf of AS, a child held in immigration detention.

AS was detained on Christmas Island but has since been moved to the Australian mainland. Lawyers for AS allege that the Minister for Immigration and Border Protection, and the Commonwealth, owe a variety of duties to people held in immigration detention. This includes a duty to provide reasonable medical care. Lawyers for AS allege that the defendants have breached these duties, causing her harm.

Following several visits by its lawyers to Christmas Island, Maurice Blackburn was of the view that many people detained on Christmas Island were suffering physical and psychiatric harm and that such harm was likely being exacerbated by their detention. In the past, these kinds of cases have been litigated individually, with a number of precedents determined at various interlocutory stages. There is a statutory duty to detain asylum seekers without a visa in the *Migration Act* 1958, but this does not absolve the defendants of their common law duty to take reasonable care to avoid causing the plaintiff harm. Though it seems clear from these precedents that the defendants owe a duty to people held in immigration detention, the nature and content of that duty will need to be fully examined.

Recognising the strain on the legal system litigating each matter of this kind individually, and an opportunity to improve the administration of justice, Maurice Blackburn was instructed to commence a class action and is running the matter on a pro bono basis. AS is the lead litigant and the class covers anyone who was detained on Christmas Island within the last three years (the limitation period) who is injured or was pregnant and has suffered an injury or exacerbation of that injury. On behalf of the class, AS is seeking compensation and an order restraining the defendants from detaining the class members on Christmas Island.

For many in the class, some of the immediate issues raised by the litigation may find a political solution. An order restraining the defendants from continuing to detain people on Christmas Island may not be necessary if people on Christmas Island are given the opportunity to apply for temporary protection visas.

At the very least, this case highlights that class actions can be a powerful vehicle for pro bono lawyers to help improve access to justice for classes of disadvantaged people who might otherwise not have had a voice to challenge their legal rights, and for pro bono lawyers to streamline the administration of justice. ●

ELIZABETH O'SHEA is the head of the social justice practice at Maurice Blackburn Lawyers.

LOOKING TO HELP?

To help lawyers and firms become involved in pro bono work – legal services and otherwise – the *LIJ* profiles a community group and its needs each month. See www.goodcompany.com.au for more skilled volunteering opportunities.

Gould League

Contact: Joanna Cantwell

Email: mail@goodcompany.com.au

Gould League is an Australian not-for-profit environmental education organisation. It aims to empower teachers, students and the community to live more sustainably and protect the environment.

Current needs of group

Gould League is seeking a lawyer to help review its booking terms and conditions for school excursions.

The work can be done offsite via phone and email or onsite. This is a one-off role that the organisation estimates could be completed within eight hours. To volunteer for this role apply at www.goodcompany.com.au.

Goodcompany

See www.goodcompany.com.au for more skilled volunteering opportunities. For more information about volunteering in general see www.volunteeringaustralia.org and www.ourcommunity.com.au.

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DEATH BENEFITS

It is important to provide greater certainty in succession matters following an unlawful killing.

The Victorian Law Reform Commission's report on the common law rule of forfeiture was tabled in Parliament on 14 October 2014. The VLRC had been asked to review the rule and make recommendations on the need for legislative or other reforms to clarify the application of the rule or replace the common law.

Application of the rule

The law as it currently applies in Victoria is described by Justice Gillard in *Re Estate of Soukup* (1997) 97 A Crim R 103. The forfeiture rule prevents persons who have killed unlawfully from inheriting or otherwise deriving a benefit from the death of their victim unless they are found not guilty by reason of mental impairment. However, Soukup left open the question of whether the rule applies to every manslaughter case. Justice Gillard suggested that the rule does not apply if the person was not guilty of deliberate, intentional and unlawful violence or threats of violence resulting in death. More recently, in *Re Edwards* [2014] VSC 392 (22 August 2014), Justice McMillan agreed and stated that she doubted that the rule would apply to a case of "culpable driving causing death or other crimes of a similar nature".

Uncertainty about the scope of the rule makes it difficult for legal practitioners to advise clients and encourages parties to litigate in ambiguous cases. This increases costs to the estate and delays distribution to innocent parties.

In Victoria, once the rule has been found to apply, it applies regardless of the circumstances: the court may not take into account the moral culpability, motive or intention of the killer. Because the rule is applied strictly, it can produce harsh results. For example, a person who kills their abuser after ongoing family violence would be deprived of entitlements that, morally, they may still deserve.

Other jurisdictions have introduced legislation to address injustice that can be caused by the strict application of the rule – the *Forfeiture Act* 1995 (NSW), the *Forfeiture Act* 1991 (ACT) and the *Forfeiture Act* 1982 (UK). Under these Acts, the court may modify the effect of the rule on application where required by the justice of the case. New South Wales legislation also allows applications to be made to the court to apply the forfeiture rule to persons found not guilty because of mental illness.

Proposed reforms

The VLRC considers it important to achieve a balance between greater certainty and fairness. It recommends legislation be enacted that:

- specifies when the rule applies by creating a nexus with indictable offences under the *Crimes Act* 1958 (Vic);
- excludes from the rule offences for which any offender would have a low level of moral culpability and responsibility – infanticide, dangerous driving causing death, manslaughter pursuant to a suicide pact with the deceased person, or aiding or abetting a suicide pursuant to such a pact;
- retains the existing exception at common law for persons who are not guilty by reason of mental impairment;
- provides the curt with a discretion to modify the effect of the forfeiture rule in respect of all offences to which it applies if required by the justice of the case – except murder; and
- is prescriptive in framing the court's discretion to focus on the moral culpability.

Effect of the rule

Once the forfeiture rule has been applied, the court must consider how to dispose of an interest or entitlement. In Victoria, the application of the rule generally results in the exclusion of innocent third parties from taking a benefit in place of the killer.

The ACT and NSW Forfeiture Acts have been criticised for giving the court discretion to alter the effect of the rule but failing to deal with the effect when the rule applies. However, in the UK the estate is distributed as if the killer predeceased the victim, allowing innocent third parties to take benefits that they might otherwise be excluded from.

Recommendations

The VLRC recommends that a Victorian Forfeiture Act should amend existing legislation to provide greater certainty. If enacted, these amendments would:

- prevent an offender from acting as executor or administrator of the estate by deeming that the offender predeceased the victim;
- clarify how to distribute a forfeited gift;
- enable the offender's children to inherit a share of the estate;
- prevent an offender from making an application for family provision;
- clarify the effect of the rule on the deceased person's interest in property that they and the offender owned as joint tenants; and
- clarify the effect of the rule on the distribution of a payment under a state statutory defined benefit superannuation scheme.

Read the report at: www.lawreform.vic.gov.au.

Contributed by the **VICTORIAN LAW REFORM COMMISSION**. For further information ph 8608 7800 or see www.lawreform.vic.gov.au.

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E-CONVEYANCING: WHAT YOU NEED TO KNOW

Before you rush headlong into the electronic future there are a number of things you should know about e-conveyancing. Here are the top 10.

What it does

E-conveyancing stores the data required for lodgement of dealings at Land Victoria and the transfer of funds at settlement. At a nominated time the funds are transferred and data lodged. It is not involved in the other aspects of the conveyancing transaction.

How it is being implemented

You cannot lodge electronic dealings directly with Land Victoria. They must be processed through an Electronic Lodgement Network (ELN) which can also provide the facility for funds transfers. The entity that owns the ELN is an Electronic Lodgement Network Operator (ELNO). There is only one ELNO which is PEXA Ltd (www.pexa.com.au). It is a public company the major shareholders of which are Commonwealth Bank, National Australia Bank, ANZ Bank, Westpac Bank, Macquarie Capital, Little Group, Link Group, and the governments of Victoria, NSW, Queensland and Western Australia.

Client authorisation

You need to obtain the authority of your client before lodging electronically. The form of client authorisation, along with other compliance obligations, can be found in the Model Participation Rules (MPRs) on the ARNECC website (http://tinyurl.com/n2sxang).

The client must execute the authority for you to sign documents, submit them for lodgement, transfer funds for settlement, and do anything else necessary.

Identification of clients

Before the client signs the authorisation you are required to carry out a process to verify the identity of the client. The obligation is to "take reasonable steps". The MPRs set out a Verification of Identity Standard. If this is followed then, subject to a couple of exceptions, it will constitute reasonable steps.

There are also processes for identification of corporations, attorneys, clients without photo identification and those located overseas. Provision is made for the use of agents to carry out the identification.

Certification of dealings

Clients authorise you to sign instruments on their behalf. They no longer see or sign them. This is done by certifying the electronic instrument with a digital signing certificate. This is your online signature and, with limited exceptions, is binding on you and your client.

You are required to certify that you have identified the client; you hold a client authorisation; you obtained, considered and retained the requisite supporting evidence; the instrument is correct and compliant with relevant legislation; and the paper title has been obtained and destroyed.

Transferring funds

The funds required for settlement can be transferred from either your trust account, the PEXA source account, or an earlier electronic settlement. There are some limitations on these. Only trust accounts held with CBA, NAB, ANZ and Westpac can be used in PEXA. If your trust account is with another financial institution it cannot be used for settlements through PEXA. The PEXA source account is intended to allow subscribers who do not operate trust accounts to provide funds for settlement. Regulators have raised concerns about its status . The way it works could mean that it does constitute "trust money" with all that entails.

Linked settlements

It is not unusual for settlements to be relying on earlier ones. A common way of dealing with the funds is to have bank cheques payable to parties at later settlements. This will not be possible in electronic settlements. PEXA has indicated its system will allow for up to three settlements to be linked. How will it work, though, when not all the settlements are to be conducted electronically? If the prior settlement is paper then the bank cheques obtained will need to be deposited into an account. The funds may not, therefore, be available for an electronic settlement the same day. Funds transfers do not usually appear in the destination account until the next day. So, if an electronic settlement preceded a paper one it may not be possible to draw the bank cheques on the same day. These issues may be resolved. In the meantime you will need to ensure that by agreeing to an electronic settlement you will not run into difficulties as a result of a paper settlement.

The certificate title

One of the certifications mentioned is that the paper title has been destroyed. There is no place for paper titles in electronic settlements. Once the settlement has occurred the title that issues after it is called an eCT. This simply means that there is no paper title and that the party with control of the title is noted on it. There is an option to have the eCT converted to a paper title but it is unlikely to continue.

Opting out

An electronic settlement can only occur if all parties involved are using the system. This will usually be known at the outset of the transaction and the decision then made to proceed that way. Circumstances may, however, arise where it is no longer possible to continue. If, for example, a caveat were lodged before settlement the caveator may need to be involved with the settlement. Unless that caveator could join in the electronic process then a physical settlement would be required. This means that documentation will have to be prepared and executed by all the parties and arrangements made with banks to draw cheques and attend settlement. This could result in a lengthy delay in settlement.

Cost

There will be a cost to use PEXA. Its fees can be found at www.pexa.com.au/pricing-schedule. Conducting a standard discharge/transfer/mortgage settlement will cost $300, including the cost to mortgagees. As that is usually passed on to the customer it is reasonable to say that the vendor and purchaser will be paying about $150 each for an electronic settlement.

A number of organisations have been promoted as PEXA sponsors. Presumably this means that they facilitate the use of PEXA. Any fee they charge for this service will be an additional cost for an electronic settlement.

The move to electronic land dealings has significant implications for practitioners. There will be a lot more information available during the year. This will include an assessment of the operation of the system as and when it is rolled out in Victoria. ●

SIMON LIBBIS is an accredited property law specialist, principal of Subdivision Lawyers and LIV councillor. He is conducting e-conveyancing workshops in February and March (see http://tinyurl.com/qghwu2b).

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PREPARING TO SELL

It is important to understand value when getting ready to sell your law firm.

You have decided to sell your small or medium-sized legal practice. There are many reasons for a sale. Maybe it is your choice after new year reflections, a business strategy or maybe it's forced on you due to poor health, business results or partner relationships.

Generally it is better to plan in advance for a sale as part of your exit strategy for the business (and yourself). The sale process is likely to be a roller coaster: emotional, time-consuming and stressful, especially if a new experience. The more investment you make in understanding value and what buyers may value, the more likely it will be a better experience.

Like many small and medium business owners new to a sale, you will be asking questions such as what is the value of my legal practice? What happens in a sale? Who would buy my business? Do I need an adviser?

What is its value?

The value of your law firm will depend on a number of factors including its size and buyer.

Traditionally, for a larger legal business, it is likely that the expert valuation will be financially based and address future cash flow or "goodwill", adjusted by a risk factor. Methods include future maintainable earnings based on discounted cashflow and net profitability less commercial salaries to owners.

Occasionally accountants also assess the net value of assets. For example work in progress, debtors, equipment less creditors, loans and employee entitlements. This can be confusing as it may be used to allocate price after the overall deal.

Calculation of the risk factor (also called capitalisation rate) is more challenging. It assesses how much a buyer is willing to pay based on the risks and rewards of the economy, legal industry and your particular legal practice. For legal businesses, a rough rule of thumb is one to three times the future cashflow with the smaller the business, the lower the multiple.

For smaller businesses, it's usually all about meeting key performance indicators (KPIs). That is, owners are required to transition by remaining as employees in the business with payment on success in meeting KPIs with "perhaps a little upfront".

In addition, be aware that each potential buyer will value your business differently. If you gave 10 potential buyers the same information about your business and each put in an offer, each would put a different dollar value and deal terms. This is because the buyers all have unique business and personal needs. Say there are two genuine buyers. Buyer 1 needs to sell their existing business first. Buyer 2 has just lost their job, has a payout and needs to generate an income rather than spend their capital. Buyer 2 will be far less likely to negotiate the price down. Buyer 1 would be happy to put in a low offer and wait.

Who will buy?

The conventional – and arguably tried and tested – process for small and medium business sales is to advertise widely using media and websites. Steps include getting valuation/s, writing an information memorandum and undertaking internal due diligence, followed by large scale advertising and marketing to potential buyers. Then qualifying buyers, handling inquiries, assessing offers, negotiating final offers and coordinating legal requirements.

This "bait and wait" approach may not always work well for legal practices. It's a one way mindset of selling the business to the buyer. It favours the buyer as the seller gives out commercially sensitive information, negotiates down on price and is led by advisers seeking fees. It tends to ignore hidden costs of time, reputational risk and stress.

As an alternative, consider targeting the "natural owners" as potential buyers of your law firm. Natural owners are people with a good understanding of your industry although they are rarely actively looking.

Finding the natural owners requires a new mindset. Start to engage now. Research and identify potential buyers from your staff, suppliers, long standing customers, competitors and supporters. You tend to know who's who and you can access specialists such as head-hunters. Next aim to understand the opportunities (financial and non-financial) your business can bring to potential buyers with their different needs. Summarise your key business information. Actively target and contact buyers who could be interested, ask questions to establish credentials and find out needs, motivations and strategy. Be creative about advertising, for example, using an expression of interest process to attract buyers prepared to put in the effort of an offer.

For law firms, the most likely buyers are your employees. Also consider competitors such as firms looking to expand their customer base, service areas or geography, or lawyers seeking to set up on their own.

Need an adviser?

It will nearly always be worthwhile using professional advisers as it is difficult to be objective about your own business. However if your business is worth less than $100,000, it may not be economic. Pick your advisers well. Make sure they understand the legal profession, have strong experience in business sales, can project manage and can deliver. Use an expert for financial valuation. Use a broker for the sale. Be clear about what you want when briefing your advisers.

For law firms, the most likely buyers are your employees.

Tips

Understand that you will be on a roller coaster ride during the sale process. To help keep strong, pick trustworthy advisers, understand your acceptable outcomes for a sale, accept that potential buyers will come and go, and ensure you have a backup plan.

Summary

When you sell your small or medium-sized legal practice, while you have an expert financial valuation of your business, remember that each potential buyer will value your business differently according to their needs. Understand the sales process and how to find the best price and buyer. Use professional advisers. With time and understanding on your side, prepare your legal practice to build and improve its value. ●

JUDITH BENNETT is a lawyer, LIV Practice Support Committee member, university lecturer and management consultant for law firms at www.Business4Group.com.

practipscolumn@liv.asn.au

ORDER RULES

Drafting good orders starts with a clear understanding of what your client requires.

Poorly drafted orders can result in the orders being of no effect. In extreme situations a practitioner might be held negligent if there is a resulting loss as a consequence of poorly drafted orders.

Whether drafting orders before litigation has commenced, during litigation, or even by consent, the drafting of good orders starts with a clear understanding of what your client requires. Where possible, and before drafting, practitioners should obtain specific instructions as to the outcomes sought by the client. These instructions should be confirmed in writing.

Here are some suggestions for drafting effective orders.

- Use tight drafting. Keep sentences and clauses to a reasonable length. If any sentence contains more than one idea or concept then consider breaking it into two sentences. To assist, read the order and where the word "and" appears, consider if it can be replaced with a full stop. Do this for all conjunctive words; for example, "notwithstanding".
- In addition to simplifying the structure, drafters should also simplify the language. When not required for a technical reason, remove legalese and use plain English. Lawyers tend to use words that are very long that don't always assist in understanding the order.
- Reduce the use of subjective phrases. While phrases like "as soon as practicable" are common it is better to be objective. For example, "within seven days". That way all parties have a clear understanding of the requirements. This helps in reducing arguments.

Orders should be drafted in such a way that the parties and the courts can easily understand what is required by the orders.

- Where possible give the authority for an order. If an order is based on a statutory provision then cite that authority. An example of the order is: Pursuant to s81 of the *Family Law Act* 1975 . . ."
- Consider giving explanations to orders either at the end of the order or within the notations. An example is: To avoid confusion the parties understand that the school terms and holidays occur as gazetted by the relevant state authority.

Finally, a practitioner should always seek instructions before settling a matter. The operation of the orders should be fully explained to the client along with how the orders relate to the outcomes that the client was seeking. It is recommended that the client "sign off" on any orders and where possible hard copies of the orders should be given to the client before the orders are made. ●

> If an order is based on a statutory provision then cite that authority.

Remember that during negotiations or litigation, the range of outcomes available to the client can change. Practitioners should be mindful of the original outcomes sought by their client and advise them if the landscape has changed. This will assist the client in understanding why any proposed orders differ from what the client had originally envisaged.

FABIAN HORTON is a lecturer at the College of Law. Practice tips are provided by the College of Law.

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MANNERS AND MEDIATION

Good manners and common sense are important for successful mediation.

As mediation becomes more popular, assuring the quality of mediation services has become an increasing challenge. Mediation operates with few formal restrictions or structures for quality control. The very foundation of its success is attributable to the confidential nature of it, but with that shroud of confidentiality comes a lack of comparative analogy between a good mediation and a bad one.

There is no customary practice for the various types of mediation models and styles in play, which may or may not be guided by private agreement, legislation, professional rules or practice standards set by particular bodies and institutions to which the mediator subscribes. At the end of the day, much of what constitutes a mediator's competency comes down to understanding the process, facilitating good communication between the parties, good manners and common sense.

In truth, few parties have sued mediators for injuries stemming from mediation-specific conduct, and none of those suits has resulted in an enforced legal judgment against a mediator. In some cases, participants in a badly conducted mediation will have lost nothing more than the time they invested in the mediation and whatever fees they have paid to the mediator. In less fortunate circumstances, however, participation in a failed mediation may cost disputants psychologically, strategically and financially. The tale of the poorly conducted mediation will find itself in the book of war stories for many years, which not only affects the reputation of the individual mediator, but also the reputation of the ADR process.

Many poor behaviours relate to the mediator being oppressive or unfair and usually point to a failure to take the parties' personal and emotional needs into account. The consequence of this failure could possibly open up any settlement agreement to challenge. Much has been written about the matter of *Tapoohi v Lewenberg*,[1] in which Mrs Tapoohi claimed that the mediator breached the mediation contract and was negligent. The affidavit material stated that an in principle agreement had been reached late into the evening when the parties and their lawyers were hungry, tired and worn out, as well as needing to obtain specialist tax advice. It was alleged that the mediator insisted that the terms of settlement be signed that night, saying words to the effect, "We are doing it tonight. That is the way I do it".

The mediator then dictated the terms with little input from the parties or their lawyers. On a summary judgment application brought by the mediator, Habersberger J dismissed the application and held that it was not beyond argument that the mediator could be in breach of contractual and tortious duties.

Mediators are also not always as neutral as they could be. Accusations of systemic bias and sustained and unconscionable duress to settle have been reported,[2] as have accusations of power imbalance where the mediator has allegedly not controlled a bank seeking to enforce its securities against an individual mortgagor. The mortgagor complained that the mediator caused him stress, anxiety, agitation and exhaustion, about which the mediator was later subpoenaed to give evidence.[3]

While there is nothing prohibiting a mediator from meeting with the parties' legal representatives (excluding the parties themselves), the decision to do this needs to be carefully balanced with the fundamental principle of mediation, which is that the primary responsibility for the resolution of a dispute rests with the participants.

> . . . the primary responsibility for the resolution of a dispute rests with the participants.

According to the Law Council of Australia's Ethical Guidelines for Mediators issued in August 2011, "A mediator facilitates communication, promotes understanding, assists the parties to identify their needs and interests, and uses creative problem solving techniques to enable the parties to reach their own agreement". Parties generally want to participate in the process and are disappointed when they cannot. There have been surveys done revealing that parties have been left out of the mediation for most of the day experiencing a "legal takeover", or were left literally sitting out in the cold.[4]

Mediators can be granted immunity by legislation, usually where the mediation is court ordered and court-annexed, but the immunity clauses inserted in private mediation agreements are generally void for infracting s7.2.11(2) of the *Legal Profession Act* 2004 which states: "An Australian lawyer . . . must not make any agreement or arrangement with a client to the effect that the lawyer will not be liable to the client for any loss or damage caused to the client in connection with legal services to be provided on or after the date of the agreement . . . to the client for which, but for the agreement . . . the lawyer would be liable". Section 1.2.1 defines "client" to include "a person to whom or for whom legal services are provided". Lawyers who mediate provide legal services to the parties to the mediation and should think twice before inserting an immunity clause in the mediation agreement.[5]

The diversity of mediation practice has meant that the boundaries of acceptable mediator behaviour are not clearly defined. It would be wise for mediators to follow the National Mediator Accreditation Standards (NMAS) Practice Standards (or their own similar standards if set by a different body). These standards, if they were to be read carefully and carried out in practice, address the behavioural matters touched on here, including impartiality and procedural fairness, as well as many other core competencies expected of mediators. Somewhere between the lines are those intangible things called empathy and courtesy, which equally contribute to a successful mediation. ●

ALEX FOGARTY is a member of the Victorian Bar and an accredited mediator with the Victorian Bar. She is a panel mediator with VCAT and a member of the LIV ADR Committee.

1. [2003] VSC 410 (21 October 2003).
2. *Bank of NSW v Freeman* (unreported SCNSW, 31 January 1996, Badgery-Parker J).
3. *National Australia Bank Ltd v Freeman* [2000] QSC 295 Ambrose, J.
4. Tania Sourdin, "Poor Quality Mediation – A System Failure?", Australian Centre for Justice Innovation. 15/2/2010 p6.
5. Mary Anne Noone, "Liability Matters for Lawyer Mediators", (2007) 81(10) *LIJ* 52.

NEW COLUMN

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SAVE THE DATA

Here are some common IT problems practitioners need to get to grips with.

Am I exposed if I don't upgrade my Windows XP computers?

Absolutely. Windows XP was a wonderful operating system however no more updates or security patches from Microsoft means that the operating system becomes more vulnerable to attack or malicious code every day. Don't let your data or systems be compromised.

How do I know if my backups are working?

A high percentage of practice managers don't know enough about their backups. It's one thing to say the IT guy takes care of it, however actually knowing whether your data is backed up, and even recoverable, affords a good night's sleep. Any backup software will support notifications so don't leave it up to the IT guy to tell you when something goes wrong. Make sure you receive a notification on success or failure of your backups.

Can I be productive with a tablet?

There are definite benefits when using a tablet, but you need to make sure that a number of points are addressed. As most practice management applications will only run on a Microsoft operating system, make sure you try Windows 8 before making the investment as it works very differently from Apple's iPad for example. If you don't mind the different user interface, next step is to make sure your applications actually support Windows 8. Finally, I always recommend selecting a tablet that supports a docking station, which allows you to connect your tablet to a larger external monitor and devices when back in the office.

What is Cloud?

Cloud is quite simply a large number of powerful computers connected to each other delivering services via a network or internet connection. Common examples of these services include email, internet banking and even video conferencing.

Is my data safe in the Cloud?

The answer to this can be found in the terms and conditions of the service provider engaged to provide the Cloud service. As the Cloud has exploded into every industry, there are many service providers looking to benefit from its growth with a generic offering that may not be suitable for a firm's specific requirements. Also be aware that a lot of providers don't even have their infrastructure located in Australian data centres and are subject to different privacy and security regulations.

More storage, again? Managing data growth and security

A technology side effect we continue to see is the amount of data that is created every day, whether from documents, large digital scans or enormous file and email databases. It is becoming rare that data is deleted or even archived, so it becomes very easy for the amount of information available to actually become a problem. Servers have a finite amount of space available when compared to Cloud offerings. If you find that you need to keep all of your information, consider archiving or moving your data to a Cloud service that is secure, easily accessible and that you are comfortable with.

> Cloud also offers many benefits that would normally cost you a significant amount to achieve should you have your own file server . . .

Why use the Cloud instead of a file server?

There are many different ways to answer this question, though cost and convenience tend to be the two main factors that influence the decision on which direction to take. As a file server can cost you thousands of dollars to purchase, maintain, support and upgrade, considering a Cloud service starting at around $100 a month (depending on data and users) is an excellent alternative. Cloud also offers many benefits that would normally cost you a significant amount to achieve should you have your own file server including offsite backups, fast and easy access from any location and device along with high levels of data protection and security.

Is the paperless firm just a myth?

While it can certainly be challenging to completely remove paper from any firm, there are definitely methods to capture existing physical files for secure digital storage along with reducing unnecessary printing and paper and print wastage. These include follow-me print where a user must swipe a card at the printer before the job is completed, stopping "forgotten" prints and making sure sensitive documents are only available to those who printed them. Finally, complete Scan to Cloud and even Scan to Matter solutions are also available for document capture including automatic Cost Recovery.

My IT costs are out of control, what can I do about it?

Look around, ask what other firms are doing with their IT. As technology continues to become more flexible in terms of delivery to applications and data from any location and device, operating costs are also beginning to drop. In a few years, spending thousands on a server will be a thing of the past and a majority of services will be stored and secured in data centres. Consider adopting a fixed cost model per user for all services from desktops and laptops to cloud services, offering an easy to manage head count cost for all hardware and software utilised by the practice.

How can I keep up with technology?

Consider renting technology so that it can be refreshed and upgraded easily without any capital outlay. As law firms tend to be slow when refreshing their hardware, staff productivity can be affected very quickly, thus reducing their efficiency in simple day to day tasks as they wait for an application or information to respond. ●

NICHOLAS CARR is managing director of BOAB IT (www.boabit.com.au) which is part of the LIV Member Benefits Privileges Program.

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THE NEW NORMAL

There are a few key ways to make your everyday systems green and enable your office to be environmentally friendly with minimal effort.

Often it seems like a massive effort to be more environmentally friendly, constantly considering power, paper and water use and feeling constrained in what we do.

But many of the most impactful changes are also the easiest; it's all about putting in place systems that encourage us to be green every day without even thinking.

Lighting and electricity

One of the easiest and most financially beneficial upgrades is to encourage your firm to switch to LED lighting. In a recent move, the Sydney Opera House upgraded all of its concert hall lights to LEDs. These lights have a life span of about 50,000 hours each and use much less power. The move to LED lighting is expected to reduce the electricity bill at the Opera House by 75 per cent (about $70,000 per annum) and will mean 2000 fewer light bulbs each year.

Creating easy switching off processes can also save firms a great deal of energy and money. Too many offices have lighting control boxes tucked away – moving switches close to exit doors and encouraging the last person to leave to simply switch them off is one of the easiest ways to reduce energy consumption. LED lights also have the advantage that they can be switched on and off around 6600 times before they will lose their energy – meaning even if you switch them on and off five times a day you're still looking at a 3.5 year life span.

Toilet paper

An easy way to have a more ethical and environmentally friendly office is to use ethical brands of toilet paper such as Who Gives a Crap (http://au.whogivesacrap.org/) which is 100 per cent recycled and gives 50 per cent of its profits to WaterAid to build toilets and improve sanitation in the developing world. Better yet, it has free same day delivery. This is exactly the kind of systematic and easy change that a firm can make with minimal extra effort.

Creating easy switching off processes can also save firms a great deal of energy and money.

Waste

So often we are encouraged to recycle but it's such a hassle to sort out our different types of waste. This is why it's great that an increasing number of firms have introduced three types of bins: landfill, recycling and organic waste. When three types of bins are simply part of the kitchen, people are often happy to pick the right one without even thinking.

Another way to support responsible use of waste is to put cartridge and battery disposal bins next to your printers so that toxic products can be easily recycled.

Air conditioning

One of the easiest ways to reduce your energy consumption is to modify the temperature on your air conditioning to reflect the season. For maximum comfort the thermostat should be set between 23-25°C in summer and 18-21°C in winter.

In summer, increasing the temperature of your air-conditioning system by 1°C may reduce energy consumption and your bill by around 10 per cent.[1]

Many people want to support the environment and it can be done easily if you make it part of your firm's everyday systems. ●

CLAIRE TONER is a solicitor at King & Wood Mallesons.

1. Origin Energy, Heating, Ventilation and Air Conditioning, www.originenergy.com.au/4397/Heating-ventilation-and-air-conditioning.

LEGAL ACTION

NEW JOB? NEW LOCATION? NEW STAFF?

For a free *LIJ* listing, email your details and colour photograph (minimum 30mm wide x 40mm high at 300dpi) to jmills@liv.asn.au. This column also draws on information sent to the LIV Member Services section.

On the move

Burrell Family Law
Suzanne Stewart, formerly of Ryan Carlisle Thomas, has joined as a family lawyer.

Higgins Legal
Peter Higgins has joined as a solicitor.

Kliger Partners
Colin McCaul, formerly of Cridlands MB Lawyers, has joined as a senior associate in the property team.

Maddocks
Michelle Dixon has been appointed chief executive officer.

Rigby Cooke Lawyers
Sam Eichenbaum, formerly of M+K Lawyers, has joined as a partner in the workplace relations team.

New contact details

Best Hooper
Level 9, 451 Little Bourke Street, Melbourne 3000.

Dangerfield Exley Lawyers
Suite 1242, 1 Queens Road, Melbourne 3004.

Higgins Legal
43 University Street, Carlton 3053. Ph: 9013 0023 Fax: 8456 5994 Email: admin@higginslegal.net.

Thomas Daly Wolf
Clamenz Evans Ellis Lawyers has changed its name to Thomas Daly Wolf.

Update Your 2015 Diary

Please make the following amendments to your 2015 LIV Legal Directory and Diary.

p45 please add:

Callahans Lawyers
Suite 6, 93-97 Plenty Road, Bundoora 3083
Ph: 9467 7299 Fax: 9467 7399
Email: callaw@bigpond.net.au

p64, please add:

Hall, John
9A Matthieson Street, Highett 3190
Ph: 0429 313 211
Email: jhmelbourne@bigpond.com
Web: www.johnhall-mediation.com

NEW ADMISSIONS

The following people were admitted to practice as Australian lawyers and as officers of the Supreme Court of Victoria on December 9 2014. The *LIJ* welcomes them to their chosen profession.

ADIANTO, Ellen
AITKEN, Harry
ALDRED, Jasmin
ALLEN, Nicholas
AL-QAWASMI, Abdulhameed
AMANATIDIS, Alycia
AMIRTHALINGAM, Anuseehan
ANDERSON, Lia
ANTHONY, Conganige
ARCHER, Sarah
ASHBY, Alice
AZFAR, Mark
BARRY, Pippin
BATSAKIS, Stephanie
BATTEN, Nicholas
BERKOWITZ, Frances
BOSZ, Andrew
BRODIE, Frederick
BROWN, Claire
BULMAN, Scott
BURCHELL, Laura
BURKE, David
BUSCEMA, Michael
BUTCHERS, Alyssa
CAMILLERI, Christian
CAMINHA, Kylie
CAREW-REID, Jane
CAREY, Mark
CHAN, Andrew
CHANDRAMOULI, Archana
CHAUDHARY, Mona
CHURCHES, Phoebe
COLE, Jake
CORMIE, Edward
CRAFTI, Nilay
CRAIG, Jessica
DENHAM, Aisling
DIXON, Hannah
DODD, Joanna
DOWLING, Jacqueline
DOWNS, Michele
DRAKE, Hannah
D'SOUZA, Stephanie
DUNNING, Lauren
EASTOE, Lucy
EIPPER, Luke
ELEFTHERIADIS, Anna
ENGLISH, Kellie
ESLER, Elaine
FINLAY, Sally
FIRTH, Amanda
FOLEY, Rebecca
FOSTER, Roberta
FREIDIN, Lara
GERMANTIS, Erin
GHAZALE, Jinane
GILMORE, Sarah
GLEEDMAN, Raphael
GOLDING, Hollie
GORTON, Timothy
GOUGH, Robert
GRUTZNER, Kate
HANCOCK, Trent
HATTIE, Blaine
HAYLOCK, Emma
HICKEY, Thomas
HILL, Anthony
HOARE, Joshua
HOOGEVEEN, Anthony
HOSIKIAN, Narod
HOWARD, Michael
HUI, Carrie Kar Yan
JANIC, Nina
JEBB, Stuart
JOHNS, Katherine
JONES, Bradley
JONES, Lisa
JORDAN, Nicholas
KEKS, Fiona
KENT, Zoe
KWAS, Kathryn
LAW, Rachel
LE, Kim Thi
LEUNG, Loren Lok-Yan
LI, Cheuk Hin
LIAO, Huiwen
LIM, Si Ying
LIN, Yi
LIROSI, Talia
LOBB, Rebecca
LOUEY, Rebecca
LUBOFSKY, Grant
LYNCH, Margaret-Mary
MACASKILL, Angus
MANIATIS, Nathan
MANNING, Katie
MARTYN, Alison
MASON, Elizabeth
MATHER, Jeeviya
MATTHEWS, Tess
MCCONNELL, Nicholas
MCCOWAN, Andrew
MCCURDY, Ashlyn
MCDERMAID, Craig
MCGHIE, James
MCKAY, Georgina
MCMILLAN, Adrian
MCNAMARA, Angela
MEAD, Samuel
MILTON, Morag
MINOR, Camille
MITCHELL, Sarah
MOLONEY, Kevin
MONROE, John
MORRISSY, Samuel
MUCKERSIE, Jacqueline
MULCAHY, Sarah
MURPHY, Emma
NG, Natalie
PARKER, Chloe
PIRERA, Timothy
POLLARD, Catherine
POOLE, Sarah
POTTENGER, Sally
PRETTY, Bernard
PRICE, Kathrine
RADZAJ, Nicole
RAJADURAI, Inakshi
RALPH, Olivia
ROBERTS, Phoebe
ROUGHEAD, Sarah
ROWE, Maxwell
RUSSELL, Benjamin
RYAN, Eugene
SAYEGH, Nidal
SCHNEIDER, Scott
SHANMUGAM, Thirumalai Selvi
SHEHATA, Dina
SHERRY, Timothy
SIDNAM, Tessa
SINGER, Ilana
SINGER, Joshua
SINNI, Robert James
SIVA NATHAN, Meera
SOON, Sarah Ai-Lian
SOUTHWELL, Sarah
STAFFORD, Sophie
STEPHENSON-BARRETT, Kora
STEWART, Jeremy
STOJANOSKA, Snezana
STOJANOVA, Nadia
STOWELL, Katherine
STREET, Rebekah
SUJITHKUMAR, Thara
SULLIVAN, Tessa
SUTTON, Bridget
SWIFT, Julia
SYMES, Catherine
TAGLIABUE, Jesse
TAYLOR, Alicia
TAYLOR, Hilary
TELLING, Edward
THAI, Slany
THOMAS, Susan
TOBIN, Caitlin
TONKIN, Troy
TRAN, Main-Shing
TSALANIDIS, Elena
TURNBULL, Sonia
TWOMEY, Gerard
TYERS, Leonora
VALKENBURG, Jenna
WALFORD, Daniel
WANG, Zai Liang
WELLINGTON, Bethany
WERKMEISTER, Jade
WHITE, Samuel
WHITTAKER, Anna
WHITWELL, Huw
WILDE, Emily
WILLIAMS, Joanna
WILLSON, Jarryd
WILSON, Catherine
WOOD, Thomas
XI, Yu
YANG, Li
YUAN, Annie
ZERVAS, Kyriacos
ZHOU, Suzanne
ZHU, Katy Xiqin
ZIMET, Rebecca

TAKE A MOMENT

FAIRFAX SYNDICATION

LEGAL AID ON THE AGENDA: From left Gordon Lewis, John Dawson, Arthur Heymanson and Geoff Walsh.

A year to remember

My LIV presidential year 1974-75 was a wonderful experience for Judith and I.

We went to Fiji for a south west Pacific law conference soon after the constitution for democratic government in that racially divided country was established.

In 1975 at Easter we went to a conference in New Zealand where we heard about the recently established injury compensation scheme of which I have become critical because no information is collected in relation to occurrence of injuries for which compensation is claimed. No record is made for any injury prevention action to be taken. I found on my trip there last year this situation prevails.

1975 was, as we have all been recently reminded, the last year of the Whitlam government. There was a significant intervention in the field of government funded legal aid. The almost expired system of providing assistance for returned servicemen was rejuvenated and expanded with suburban offices set up. I was invited to attend these openings. I made reports to the Council where there was no discussion of the matter.

The Council members opposed to this federal government move into legal aid were so incensed that they took the steps of organising a requisitioned general meeting of the members calling on the LIV Council to take proceedings to stop the government from carrying on legal aid offices. The well attended meeting at Dallas Brookes Hall at the Masonic Centre called for a poll of members to vote in favour of the motion. Proceedings were instituted but discontinued when the government showed no intention of further supporting the legal aid offices after the dismissal.

The picture of the chairman's table at that meeting is published here with permission of *The Age*.

There was a move in the Council to make the position of LIV secretary, which had been Arthur Heymanson's title since he took the position after his return from war service, chief executive. The vice-president John Richards was very keen that we should be more active in providing services for members rather than just keeping members compliant with the regulations. We persuaded Arthur to take his overdue retirement and after due process the Council appointed Gordon Lewis, a solicitor from Hamilton, to be the new chief executive of the LIV at the closing stages of the year.

My career took a change when Judith and I bought a farm and moved there in the 1980s. I was then active in agri politics, particularly in aspects of farm safety. ●

JOHN DAWSON AM is an LIV life member.

LIV UPDATE

LIV COUNCIL UPDATE

The LIV Council meets each month to decide issues of importance to members, the legal profession and the community.

At the 18 December meeting, LIV Council farewelled departing councillors past-president Reynah Tang, Tracey Smail and Mark Woods, who retires after a record 23 years. Council identified key focus points, including legal aid funding review, for future lobbying of the new state government, discussed recent developments in the introduction of legal profession uniform laws (LPUL), due to be implemented in Victoria and NSW on 1 July, and endorsed the LIV's professional development strategy for 2015-2017.

Professional development strategy

The strategy seeks to position the LIV as the leader in the area of professional development for Victorian legal practitioners by enhancing online and peer-to-peer learning opportunities. The LIV's approach to PD is underpinned by the LIV's critical role in partnering with its members throughout their professional lives.

LPUL

On 28 November, 2014 the Legal Services Council (LSC) released draft rules and admission rules for public consultation. The LIV sought feedback and commentary from members on the uniform costs disclosure form for law practices, a critical component of the draft general rules. The form has been a significant issue in NSW and Victoria, in particular whether the form is fit for purpose and whether it meets the expectations of s174 of the *Legal Profession Uniform Law Application Act* 2014. After substantial debate, Council resolved to recommend to NSW and the LCA a simplified disclosure form developed by the LIV Cost Lawyers Committee.

Council also noted progress on LIV submissions on draft trust accounting rules and admission rules. A formal submission on proposed health assessment powers of the Board of Examiners will be made to the LSC.

LCA board

Council noted the retirement of Reynah Tang from LIV practitioner representative director on the Law Council of Australia (LCA) board. It endorsed the appointment of immediate-past president Geoff Bowyer in that position for 2015, in accordance with the Council resolution of 19 December 2013.

LIV lobbying priorities

Council noted the LIV's high level analysis conducted on the Victorian ALP 2014 election platform and the subsequent advocacy undertaken. The 2014 Call to Parties document was published in the August *LIJ* to which major parties responded in the September *LIJ* . LIV polices that align with the new government were identified on the following issues:

- Legal aid review
- Independent and well-resourced review of the Charter of Human Rights and Responsibilities
- Broadening IBAC's jurisdiction
- Legislating for advance care directives
- Royal Commission into Family Violence Prevention.

It was also noted that LIV president Katie Miller and CEO Nerida Wallace have met with Attorney-General Martin Pakula in support of a review of legal aid.

Annual reports ratified

Annual reports ratified were LIV Accredited Specialisation Board Annual Report 2014, Accident Compensation Committee (ACC) Annual Report 2014, Future Focus Portfolio 2014 Annual Report, Joint LIV/AMA/VicBar Medico-Legal Standing Committee Annual Report 2014, and Diversity Taskforce and LIVout Annual Report 2014. ●

LIV GOVERNANCE AND REPRESENTATION

PRESIDENT
Katie Miller

PRESIDENT-ELECT
Steven Sapountsis

VICE-PRESIDENT
Belinda Wilson

IMMEDIATE PAST PRESIDENT
Geoff Bowyer

5TH EXECUTIVE MEMBER
Sue Kee

LIV COUNCIL MEMBERS
Megan Aumair
Gerry Bean
Caroline Counsel
Cameron Forbes
Michael Holcroft
Simon Libbis
Anthony (Tom) May
Pasanna Mutha-Merennege
Sam Pandya
Misty Royce
Angela Sdrinis
Stuart Webb
Jing Zhu

To find out more about LIV Governance and Representation or to contact LIV Council members see www.liv.asn.au or phone the secretary to the Council on 9607 9372 or email councilsecretary@liv.asn.au.

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SECURITY v FREEDOM

The recent debate over mandatory telecommunications data retention raises important questions that apply to each of us regarding privacy, freedoms and security.

If passed, the proposed *Telecommunications (Interception and Access) Amendment (Data Retention) Bill* 2014 will force telecommunication companies to keep telecommunications data (or metadata) for two years. While potentially a more limited number of agencies will have access to this data, they will be able to obtain it without a warrant.

The *Telecommunications (Interception and Access) Act* 1979 (Cth), to which the amendments are being proposed, is now 35 years old and, in an increasingly virtual climate, clearly requires updating to effectively detect crime and prevent threats to national security. However, the Law Council of Australia (LCA) argues that the changes must be made with proper analysis and necessary safeguards to protect individual freedoms.

Any laws requiring data retention beyond the business needs of an organisation must be reasonable, necessary and proportionate to a legitimate purpose. It is here where the current data retention Bill's shortcomings emerge – it does not clarify for what purpose the data is being held. The full nature and scope of the retained data is also unclear and subject to change by the government through regulations.

Although the public is assured that the content of the data will not be retained, metadata can still reveal personal information such as who a person contacts, how often and where, thus raising privacy issues. This has implications for client legal privilege and professional confidentiality, because telecommunications data may disclose some detail about when, where and how often a client seeks legal advice.

The LCA is calling on the government to maintain the existing warrant process for telecommunications content and to develop a new warrant process to access metadata. The LCA believes that a warrant is required as a necessary protection of privacy because of the personal information that metadata can reveal. A warrant would ensure that information is only collected where there are sufficient grounds for doing so.

The LCA notes that efforts have been made in the proposed Australian data retention scheme to address a number of concerns raised by the Court of Justice of the European Union (CJEU). The Court declared the EU Data Retention Directive invalid on the basis that it did not contain sufficient safeguards to ensure that it was a necessary, proportionate and legitimate response in accordance with obligations under the Charter of Fundamental Rights European Union. For example, the proposed Australian scheme seeks to limit the nature of the data to be retained and to exclude web-browsing history.

However, the power of the Minister to alter by regulation the telecommunications data set and the range of agencies that have access to such data may not address the concerns of the CJEU. Furthermore, the scheme does not provide for any exception to persons covered, with the result that it applies even to persons whose communications are subject to the obligation of professional secrecy, such as the communications of a lawyer and client, a journalist and source, or a doctor and patient.

The experience with the EU Directive demonstrates that specific safeguards need to be developed for the proposed laws to be reasonable, necessary and proportionate. One such safeguard is to isolate and identify the nature of the telecommunications data to be retained. The LCA believes that a nexus must be established between the retention and access to such data and an identified intelligence and law enforcement objective. Additional safeguards include a robust warrant process; strict limitations on secondary disclosure of retained telecommunications data and on the ability of retained telecommunications data to be used for civil matters; specific oversight and reporting requirements; and appropriate destruction of telecommunications data obtained or retained.

The Bill would also need to be altered to accord with a number of the Parliamentary Joint Committee on Intelligence and Security's recommendations in its Report of the Inquiry into Potential Reforms of Australia's National Security Legislation (http://tinyurl.com/nkp-jpbp) from June 2013. For example, to ensure that the mandatory telecommunications data retention regime should apply only to metadata, not content, and that internet browsing data be explicitly excluded. While the Bill attempts to exclude such data, there are real questions as to whether it does so effectively. In addition, by leaving the technical implementation of the definition of metadata to the regulations, what is included can be varied from time to time as directed by the Minister, subject to disallowance by Parliament.

The LCA has made a submission to the Parliamentary Joint Committee on *Intelligence and Security on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill* 2014 and will continue to monitor this important issue as it seeks to uphold an appropriate balance between a secure state and a free nation. ●

DUNCAN MCCONNEL is president of the Law Council of Australia.

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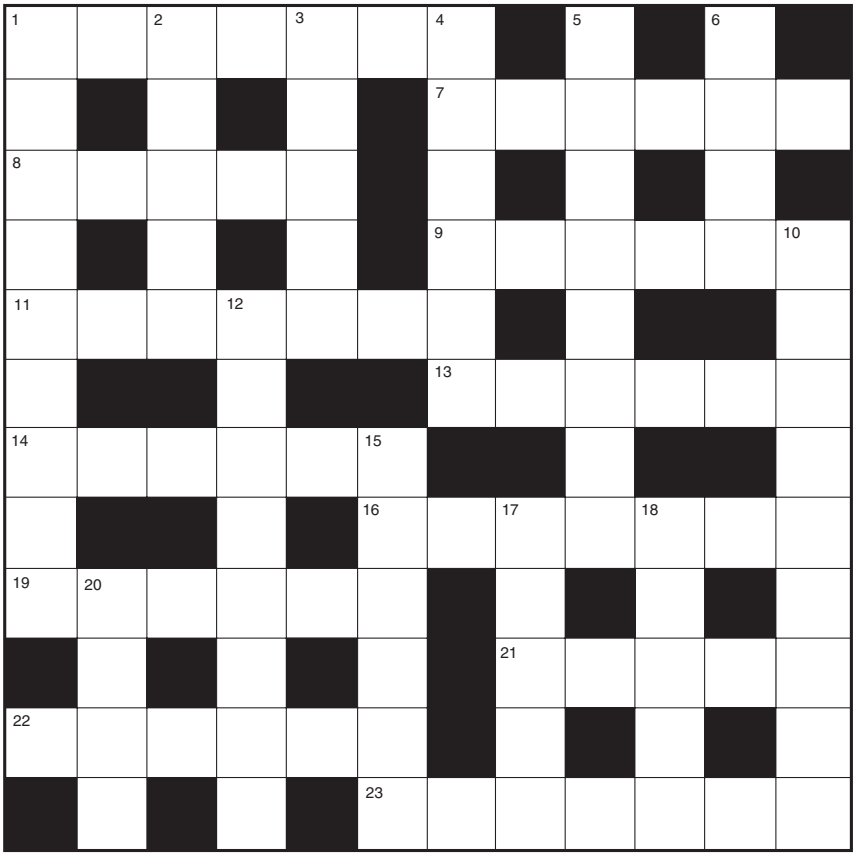
Letters of the Law

No. 168



Across

1 Detention in chaotic countryside (not Erin) (7)
7 Listen in for one wager (6)
8 Custom for you and me with time (5)
9 Cabinet for warder (6)
11 To that amendment title-holder excludes dill (7)
13 Unhealthy-looking male is required (6)
14 Mysterious priest in choir goes off (6)
16 Surety for receiver of time (7)
19 Lady: "Adam and me at play." (6)
21 Take away distress (5)
22 Thurible has banner sound (6)
23 So-and-so is a bad egg! (7)

Down

1 Sue can be found in this space (9)
2 Gaze at collective noun 'owls' (5)
3 Weighty production to be sure (no rut) (5)
4 Afraid to shout 'Ow' (6)
5 President nice to get back when caught in district (8)
6 Swoop on offspring! (4)
10 Tabasco made from coloured pelt (3,6)
12 Run over by military vehicle (8)
15 Goodbye from the Spanish oles (6)
17 Rice dish in Shiatsu: no thanks (5)
18 A shortage denoting regret (5)
20 Coach a wager (4)

Solution next edition.

Compiled by Stroz

Solution to Letters of the Law No 167

■	M	■	M	E	D	I	C	I	N	A	L
G	A	M	E	■	E	■	R	■	I	■	E
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REMEMBER WHEN ...

At the start of the legal year, this issue looks back at traditional services marking the opening of the judicial year.

Vic Bar News, Summer 2013, photo circa 1959

OPENING OF LAW TERM

Special Church Services

Judges, magistrates, members of the legal profession, and others serving in relation to the administration of justice will attend a service at St Paul's Cathedral at 10am on Monday to mark the opening of the legal year.

The service will be conducted by Archbishop Booth, and the address will be given by Rev Alan C. Watson, of Toorak Presbyterian Church. The lessons will be read by Sir Edmund Herring, Chief Justice, and Mr E. R. Reynolds, KC, chairman of the committee of counsel.

The cathedral choir, under the direction of Dr A. E. Floyd, will render the anthem.

At St Patrick's Cathedral there will be a Dialogue Mass at 8.30am. The occasional sermon will be delivered by Rev Father Thomas McNevin, who was a member of the legal profession before entering the priesthood.

These services are now a regular feature of the opening of the legal term.

Members of the public are invited to attend both churches.

A stained glass window in memory of the late Mr Robert J. Simpson will be unveiled by Mr Edgar, MP, at Cochrane st, Gardenvale, Methodist Church, at 3pm tomorrow.

The Argus, 1 February, 1947

Services open law year

The Victorian legal year will be opened this morning, after the summer vacation, with religious services in St. Paul's and St. Patrick's Cathedrals.

Archbishop Booth, assisted by the Rev. E. M. Eggleston, will conduct the 10 a.m. service at St. Paul's, and the Rev. J. Arthur Lewis, of Collins st. Baptist Church, will deliver the address. The first lesson will be read by Mr. Holway, Premier, and the second lesson by Mr. Menzies, Prime Minister.

Red Mass will be celebrated at St. Patrick's Cathedral at 8.30 a.m. The celebrant will be the Rev. Father M. J. Killeen, who was formerly a member of the legal profession. The occasional sermon will be delivered by Rev. Father D. J. Lewis.

Both services will be attended by members of the judiciary, legal profession, and the Crown Law Department, with law clerks, friends, and relatives.

The Argus, 1 February, 1950

Annual Law Services

The tardiness of members of the Profession in replying as requested to the circular which everyone received embarrasses those who are responsible for the arrangements at St. Paul's Cathedral. Please note and reply at once.

The following are the arrangements :—

St. Paul's Cathedral 10 a.m. Monday 3rd February. The procession will move off in the usual manner but those taking part are asked to be ready to do so at 9.45 a.m. The Sermon will be delivered by the Most Reverend Frank Woods Archbishop of Melbourne and the Lessons will be read by Mr. R. M. Eggleston Q.C., Chairman of the Bar Council and Mr. J. McC. Hambleton, President of the Law Institute. At the conclusion all members of the profession will join in the procession to The Cathedral close and there disperse. The service will be broadcast by 3DB the same evening.

St. Patrick's Cathedral 8.30 a.m. Red Mass will be said by Bishop Fox and the Sermon will be by the Reverend P. Gleeson S.J., Rector of Newman College. Judges and Barristers will robe in St. Patrick's College, Grey Street for the Procession at 8.20 a.m.

Temple Beth Israel, Alma Road, St. Kilda, 8 p.m. Friday 31st January. The address will be delivered by Mr. Justice Dean. Members of the profession are asked to assemble at the Temple at 7.45 a.m.

Melbourne Hebrew Congregation, Toorak Road, South Yarra. 10 a.m. Saturday 1st February.

LIJ, January, 1958

HIGHS AND LOWS

Lawyers worry about all sorts of things. They worry about their CV and qualifications, the depth of their legal knowledge, their presentation skills and the ability to relate to clients.

But do they worry about their voice?

Research in the US has found that, for males at least, the pitch, frequency and timbre of your voice can be a determining factor in the ability to be persuasive and ultimately a success in your profession. If you don't believe it, try telling your dog to sit in a low pitched voice and a high pitched voice and see which one works. If it's my dog it will be neither, but that's just my dog.

A study at Duke University's business school of 792 CEOs found those with lower-pitched voices typically manage larger firms, make more money and last longer in their jobs than higher-pitched peers.

Actors, orators and even the most awful dictators know the persuasive power of the voice. Martin Luther King said "I have a dream" but it was his deep powerful voice that gave the words impact. Remember Darth Vader telling Luke Skywalker "Join me, and together we can rule the galaxy as father and son", Dirty Harry saying "Go ahead make my day" and Sean Connery introducing himself to female conquests as "Bond, James Bond"? Now imagine the same phrases uttered in Woody Allen's voice.

Hollywood knows that vocal pitch can show authority, menace and even play a part in seduction while a squeaky voice is generally comic or pathetic. Singer Barry White is a case in point. So, too, is Russell Crowe. Rusty's velvety vocals surely helped him nab the lead role in *Gladiator*. When Maximus Decimus Meridius said, "At my signal, unleash hell," we knew he meant business. As did the NY hotel front desk clerk when the actor used his telephone voice.

I have marvelled at the way some male barristers from decidedly humble backgrounds adopt the voice patterns of minor royalty as they progress towards taking silk. They have obviously worked out that deep silky Anglo tones impress both judges and jurors.

Researchers at the University of California Los Angeles found public speakers with range in their voices could use that power to influence or inspire. This makes sense. How many of us have almost lost the will to live when we sat through a uni lecture or a conference speech given by someone with a boring monotone voice?

UCLA researchers recorded the voice patterns of various foreign leaders and asked male and female volunteers, who did not speak those languages, to rate the speakers. Those with a low-pitched voice were perceived as big and dominant, while those with high voices as small and submissive. This begs a question. Would Gough Whitlam be so revered if he had sounded like Christopher Pyne?

Don't go overboard in the lower register, however. University of Chicago scientists studied 60 recordings of male advocates in the US Supreme Court and it appears the masculinity of the voices helps predict the outcome of cases. Less masculine sounding voices were more likely to win, surprising the scientists who explained it thus: 'Lawyers who think they're going to lose may project a different kind of voice, perhaps overcompensating by sounding more masculine.'

Even if you don't have a persuasive or dominant voice you should not fall silent according to UCLA acoustic scientist Dr Rosario Signorello.

"The voice is a tool that can be trained," he said. "Singers and actors train their voices to reach higher or lower frequencies. A leader-speaker should do the same."

I wonder if he could train my dog? ●

Do you ever come across amusing incidents related to the law? Of course you do. Then why not contribute to *WADR*? By email to wadr@liv.asn.au, by fax on 9607 9451 or by mail C/- *LIJ*, 470 Bourke Street, Melbourne 3000.

ISTOCKPHOTO

STYLE COUNSEL: Clothes4U founder Veronika Whittaker

Dressing up

Retired solicitor Veronika Whittaker has put her fashion sense to good use.

When Veronika Whittaker worked for the LIV in compliance in the early 1980s, the dress code for women in the legal profession was ultra-conservative.

"If you wanted to be taken seriously we imposed upon ourselves the conservative suit like our male counterparts," Ms Whittaker said.

The retired solicitor now uses fashion to help boost the job prospects and self-esteem of disadvantaged women through her not-for-profit shop Clothes4U on the Mornington Peninsula.

With pro bono assistance from Norton Rose Fulbright senior associate Mia Matic, Ms Whittaker launched the award-winning charity in 2013 in a spare bedroom before moving the boutique into a converted garage. Today it operates from a shopfront on Boneo Road, Rosebud.

"Our clients range from 16 years to 60 plus and live in an environment where housing is largely unaffordable and there is high unemployment," Ms Whittaker explained.

"Many women have been physically and sexually abused, they are single mothers, refugees, parolees, or suffering from mental health issues and homelessness."

Friends, family and the community donate clothing, shoes and toiletries.

"Women come to us for clothing to wear to court proceedings, job and rental interviews and funerals or Centrelink, school and DHS appointments," Ms Whittaker said.

The boutique, now run by 26 volunteers, helps dress more than 35 women each month and gives away more than 250 items, taking into account each woman's body shape, likes and dislikes, and their reason for needing clothing.

"I want the women to come into a beautiful environment where they can try on clothes and for the hour they spend with us be pampered and feel safe," said Ms Whittaker.

"Most of them say that no one has ever paid them so much attention – there is always a lot of laughter and tears."

To fund Clothes4U, the committee runs grassroots fundraising campaigns including sausage sizzles, comedy nights and, of course, fashion shows.

Retiring five years ago from the law and a lifestyle where her mind was "fully engaged" was daunting, Ms Whittaker said. Moving to the peninsula, the mother of three knew no one, but found volunteering a way to meet people while giving back to the community.

"Lawyers have so much to offer. What better way to use those skills than by serving your community in retirement," she said. "Clothes4U gave me an opportunity to see on a day-to-day basis the impact you can have on other peoples' lives."

And, while Ms Whittaker and her team plan to expand the not-for-profit to offer education programs for girls in danger of leaving school and on how to prepare for the interview process, Clothes4U has already been recognised for its good work. It received a 2014 RACV Good Citizens Program award, while the George Hicks Foundation and other local supporters have recently contributed funds to help the boutique move into a bigger shop front in 2015.

"I love what I do," said Ms Whittaker, "but the women we serve deserve more".

For more information visit www.clothes4urosebud.org.

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