QLS PROCTOR

JUNE 2020

COVID-19'S LEGACY FOR JUSTICE

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Special leave to a Pell

COVID-19
The digital mediator

FIRST NATIONS
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Our pandemic legacy

Some changes worth holding on to

It didn't take any of us long to realise that practice in the midst of a COVID-19 pandemic was going to be quite different to what we were used to.

And having essentially settled into our new routines, perhaps we should all now take a look around to identify what has changed for the better.

Several things that have created greater access to justice come to mind immediately.

The more effective use of technology in the courts – specifically phone or video links – for virtual appearances suggests there would be significant cost and efficiency benefits for all parties if many administrative or procedural matters could continue to be conducted in this way post-COVID-19. This is of particular importance to regional, rural and remote practitioners and clients.

The courts' use of alternative, electronic means for appearances on shorter directions and interlocutory matters, and the lodging of various forms and documents electronically are further examples of cost saving and time efficiencies that improve access to justice for all concerned.

There is also a promising trial program allowing for electronic filing of a number of probate-related documents.

Additionally, the positive social and safety benefits of using technology such as videoconferencing for domestic violence matters are immediately obvious.

Besides avoiding direct contact, these changes offer convenience, cost savings associated with travel and related expenses, time savings as a result of reducing waiting times in courtrooms and other benefits, some as simple as reducing the need to print documents.

We have also seen procedural changes in Queensland watch houses and in corrective service centres, with the advent of an email service and electronic funds transfer for inmates.

More recently, we have seen emergency legislation that now permits different conferencing arrangements for electronic signing and witnessing using communications technology. The ***Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Regulation 2020*** ⇔ permits electronic signing and virtual witnessing of wills, enduring powers of attorney and advanced health directives. The Society advocated for these measures to assist practitioners in servicing their clients, given the challenges of the COVID-19 confinement, isolation and quarantine restrictions.

Once again there are very strong arguments supporting the need for retention of some, if not all, of these initiatives post-COVID-19, as it would offer an ongoing benefit for those in remote areas, for example, as well as significant cost savings.

Our QLS policy team and the volunteers on many of our QLS committees have been extensively involved in the consultation required for the development of these and other innovative changes, and on behalf of the profession I thank them for their extraordinary efforts over the last nine weeks. The profession and the community have benefitted from this contribution.

With many services moving online, agencies in the justice sphere have had to grow and refine their interactions, and we will be working to ensure that this heightened operational cooperation between all agencies continues into the future.

We would also like to see a continuation of the extraordinary cooperation and consultation that has characterised the work done by government, the courts, justice agencies and the profession during this pandemic.

The willingness of all to engage in meaningful consultation with the aim of progressing the interests of justice and those in the justice system has been outstanding.

In this month's special COVID-19 feature, *Proctor* explores the changes we'd like to see retained – a coronavirus legacy for the future of our profession, as it were.

This month there are several more informative articles, including a conversation with the Chief Magistrate on how the Magistrates Court has adapted, a look at digital mediation and the appropriate tools for practitioners, work-from-home protocols for firms and individuals, and more.

Our strategic plan

QLS Council has updated our strategic plan for 2017-21 in light of the COVID-19 pandemic. For example, one of the key amendments is modifying our purpose to include supporting our members and the profession to navigate through the challenges of COVID-19.

The current strategic plan runs through to 30 June 2021, so this revision will take us through the last quarter of this financial year and the final year of the QLS four-year strategic plan.

In other Council news, we would like to thank all those who submitted expressions of interest in the Council vacancy. It is anticipated these will be considered at this month's Council meeting and that Council will announce its new member in the near future.

Luke Murphy
Queensland Law Society President

president@qls.com.au
Twitter: @QLSpresident
LinkedIn: linkedin.com/in/luke-murphy-5751a012

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What's your routine?

The crucial need to maintain your wellbeing

By now, many of us have well and truly been operating in a work-from-home mode for the longest period of our careers.

It's been a big learning curve, but I have observed many individuals and organisations who have handled the changes successfully.

Whilst I have been able to work from the office much of the time, for me the two most important learnings about working from home have been operating to a daily routine and looking after my wellbeing.

Here's how I have been managing both.

- I have set up an organised and tidy permanent work space – with privacy, light, a good chair and desk and some indoor plants. I am able to raise my laptop/iPhone to head height for Zoom/Skype calls – in other words, the space is as professional and comfortable as I can reasonably make it.
- I work to a daily routine – get dressed in work clothes, plan the day's log-in and log-off times in advance, schedule daily substantial exercise (before breakfast is best for me), take small breaks (walk around the block, pop out and buy a takeaway coffee, chat to the neighbours, collect mail, etc.), plan meals and meal times in advance and eat healthily. Schedule a lunch break and plan an evening activity at the end of the work day – outside is my preference – a short walk, some gardening, wash the car.
- Things I avoid when working from home include watching television, recreational reading, taking the laptop to the lounge or surfing online. I preserve all these activities for outside of work hours, which helps me distinguish work and home life.

Everyone will have a different approach and different domestic responsibilities and obligations to coordinate with work. We also have different needs and preferences for interacting, socialising, creating and physical movement. The key to working well from home is to find the routine that works for you, build a wellbeing plan into that routine and stick to it.

I'd like to stress the wellbeing plan because, at QLS, we believe that a solicitor's health and wellbeing is fundamental to the sustainability of their practice, and a core element of their professional competence.

Following on from this, actively protecting and improving your health and wellbeing is not optional or a 'nice to have' (or maybe something to do when you eventually find the time). It is crucial to ensure that you remain mentally, emotionally and physically able to serve your clients to the best of your abilities.

Unfortunately, looking after our most valuable resource – our physical and psychological health and wellbeing – tends to be the first thing to fall by the wayside when things get stressful, challenging or difficult, as they currently are. This can negatively impact on our resilience, making us less able to deal with problems in a constructive and proactive way, less productive and less able to be there for others who need us at home or at work.

QLS regularly publishes short wellbeing articles to provide you with new ideas, practical suggestions and useful strategies to boost your wellbeing, grow your resilience and enjoy life.

You can find them in your weekly *QLS Update* email newsletter, on the front page of the QLS website, and promoted via our social media channels. Make sure you follow us on LinkedIn, Facebook and Instagram to get all updates and other resources, including bi-weekly short recorded wellbeing talks to help you deal with current challenges.

This month in *Proctor*, our extensive COVID-19 feature section explains the actual protocols that should be in place for any staff or firms operating under work-from-home arrangements. We also look at some of the ramifications for both employers and employees as restrictions ease and many return to the workplace.

I would like to take this opportunity to remind all members of the fully confidential services that LawCare provides for them, their staff and immediate families. These services are provided by the independent organisation, Converge International, through qualified and highly experienced counsellors.

They include Money Assist, which offers access to financial experts who provide money management coaching to help with financial concerns; Career Assist, to help with career development planning, resume and job-seeking assistance, interview skills and vocational counselling; Employee Assist, for coaching, mentoring and counselling to achieve success; and Family Assist, to help proactively deal with a range of personal and work-related issues.

Other services cover coaching and advice to assist managers and supervisors dealing with a variety of difficult or complex people issues; strategies, tools and coaching for those dealing with difficult workplace and personal situations; and nutrition and lifestyle advice.

LawCare services are available by calling 1800 177 743, or see the LawCare page at **qls.com.au** (log-in required).

Finally, a reminder that more assistance is available through three new QLS services aimed specifically at issues related to the COVID-19 pandemic. I spoke in detail about these last month – the Employment Law Advice Service (ELAS), the General Manager Support Service (GMSS) and the Government Funding Assistance Service (GFAS), which offers guidance and support for those navigating their way through COVID-19.

For more information or to ascertain your eligibility for these three services, please see the **QLS Ethics and Practice Centre** page (or call 07 3842 5843).

Rolf Moses
Queensland Law Society CEO

Now, more than ever, we're here for you. We want to help practices keep their doors open and help practitioners understand the impact of COVID-19 on their jobs.

Support services for COVID-19 related practice issues

Employment Law Advice Service—for individuals and practice managers

General Manager Support Service—for practice managers

Government Financial Assistance Service—for practice managers

For more details on each service or to ascertain your eligibility, contact the QLS Ethics and Practice Centre now.

FREE
FOR MEMBERS

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COVID-19

Providing an independent solicitor's certificate

Can I interview the client by videoconference?

BY STAFFORD SHEPHERD

If all the circumstances are such that a person-to-person interview is not possible, then the use of videoconferencing is a possibility if you have been requested to provide an independent solicitor's certificate for a third-party guarantor, surety mortgagor, or indemnifier for a principal borrower.

As a matter of caution, you should ensure that you are able to undertake this interview in circumstances where the third-party guarantor, surety mortgagor, or indemnifier are in the absence of the principal borrower.

You must take reasonable steps to ensure the persons who are receiving the independent advice are not the subject of undue influence and you should ensure your file note records the steps you have taken.

You must carefully read the independent solicitor's certificate available from **qls.com.au** to ensure that you can comply with the explanations and advices you are to give as the certifying solicitor.

A videoconference will not exclude you from undertaking verification of the identity of the third-party guarantor, surety mortgagor, or indemnifier. You will need to modify your retainer agreement and the certificate to reflect the circumstances under which the interview is taking place.

The new (***Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Regulation 2020***) now permits the remote witnessing of deeds. The acknowledgment which is to be given by the third-party guarantor, surety mortgagor, or indemnifier should be modified to reflect the circumstances of the interview. Practitioners should, however, remember that it is not possible to certify documents remotely. The certification with respect to the guarantor's certificate should also be modified to reflect the fact that the certificate will not be able to be handed to the third-party guarantor, surety mortgagor, or indemnifier.

Solicitors should also read carefully the checklist on our **website** for the providing of independent legal advice. For those solicitors who are Lexon insured, you should also review the Lexon material.

Solicitors should be mindful of the risks involved by the use of **videoconferencing** and it would be prudent to confine the provision of a certificate in all circumstances to existing clients. A comprehensive file note and preferably the recording of the interview (with the client's consent) should take place. If you have any doubts as to the suitability of videoconferencing then you should not undertake this as a means of interviewing the third-party guarantor, surety mortgagor, or indemnifier.

You should also insist that the third-party guarantor, surety mortgagor, or indemnifier read the document fully prior to the interview. It is not sufficient for you to confirm merely that the third-party guarantor, surety mortgagor, or indemnifier has read through the document.

Open questioning and enquiry as to the third-party guarantor, surety mortgagor, or indemnifier's understanding of the true position will be required. Solicitors are reminded that they must satisfy themselves that the third-party guarantor, surety mortgagor, or indemnifier has freely made the statements which are referred to in Part D of the certificate, and appear to have an understanding referred to in that part.

If it appears to you that the third-party guarantor, surety mortgagor, or indemnifier does not have an understanding, do not sign the certificate.

You will not be in a position to remotely witness the third-party guarantee documents. Personal presence is still required for such execution.

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

This month's COVID-19 features, from page 20

COVID-19

Courts launch family law property arbitration list

The Family Court of Australia and the Federal Circuit Court of Australia have established a National Arbitration List.

The list will be managed by dedicated national arbitration judges – Justice Wilson in the Family Court, Judge Harman in the Federal Circuit Court and Justice Strickland as the coordinating appeals judge.

All matters referred to arbitration will be placed in the National Arbitration List. Any application for interim orders sought to facilitate the arbitration by arbitrators or parties will be dealt with by the relevant national arbitration judge electronically.

Applications for registration of arbitral awards issued by arbitrators will be dealt with by the same national arbitration judge. Similarly, applications for review of an arbitral award will be conducted by the relevant national arbitration judge.

Chief Justice Alstergren said, "The Courts have long supported the use of alternative dispute resolution as a quicker and more affordable option for litigants to resolve their disputes, rather than continuing to trial.

"The introduction of the Arbitration List will ensure consistency and timeliness and the determination of such applications will be given considered priority. While arbitration has traditionally and commonly been used in commercial litigation, our Courts are very keen to support the wider use of arbitration in family law for property matters."

CLC funding commitment welcomed

Queensland Law Society has applauded the State Government's significant funding commitment to provide access to justice for Queenslanders.

QLS President Luke Murphy last month welcomed the five-year commitment to provide $119 million in funding for the state's community legal centre (CLC) sector.

"The milestone of guaranteeing five years of funding allows CLCs to plan their operation and work toward meeting the increasingly overwhelming demand for their legal services," Mr Murphy said. "The funding announced today is a mixture of increased federal and significantly increased Queensland Government support over the previous three-year funding round ending in June this year."

Mr Murphy said that, while the funding was very welcome, the demands for Queensland community legal centre services had never been higher since the global outbreak of the coronavirus.

"But there is no doubt this additional funding will go toward meeting that need, as will further support from the Commonwealth Government as a part of the recovery package for the Australian economy," he said.

Appointment of receiver for Harris Sushames Lawyers, Loganholme

On 23 April 2020, the Executive Committee of the Council of the Queensland Law Society Incorporated passed resolutions to appoint officers of the Society, jointly and severally, as the receiver for the law practice, Harris Sushames Pty Ltd t/a Harris Sushames Lawyers.

The role of the receiver is to arrange for the orderly disposition of client files and safe custody documents to clients and to organise the payment of trust money to clients or entitled beneficiaries. Enquiries should be directed to Candace Gordon, at the Society on 07 3842 5846.

COVID-19

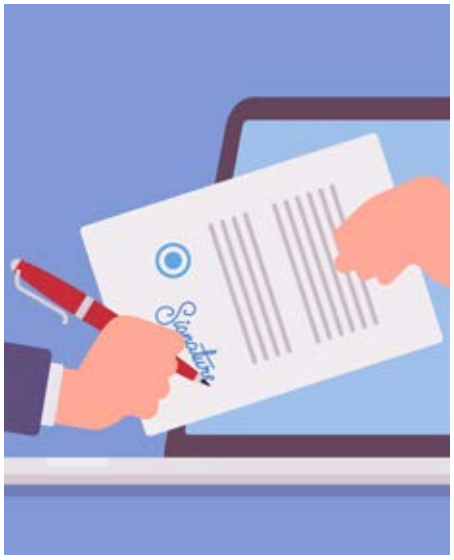
QLS applauds electronic signing laws

Queensland Law Society has welcomed new State Government regulations to permit electronic signing and virtual witnessing of wills and enduring powers of attorney in response to challenges caused by the global Coronavirus pandemic.

QLS President Luke Murphy said solicitors had been facing serious challenges in assisting clients to make legally binding wills and get their affairs in order with quarantine and isolation requirements.

"Consultation with the Queensland Government has been excellent and we are pleased to see this measure being made as a result of crucial emergency legislation," Mr Murphy said. "The new law permits different arrangements for electronic signing and witnessing using communications technology of wills and enduring documents, subject to certain protective requirements to mitigate against unwanted outcomes.

"QLS looks forward to working with the Government on other measures



to overcome legal impediments caused by the current law in assisting Queenslanders with the public health requirements of dealing with COVID-19."

Resilience of a Lyon

"The resilience that PEXA has provided the firm is astronomical."

— Stacey Drane
Conveyancing Paralegal for Principal Solicitor David Colwell at Colwell Lyons Lawyers

The personal and professional unrest caused by COVID-19 has been tangible across the world. Like most businesses, Colwell Lyons Lawyers had to move quickly to protect its employees while simultaneously maintaining its business continuity throughout the global crisis.

Stacey Drane, Conveyancing Paralegal for Principal Solicitor David Colwell at Colwell Lyons Lawyers, stated that the firm's adoption of electronic settlements has allowed it to be agile and flexible in its response to the current situation.

"The resilience that PEXA has provided the firm is astronomical. We were instantly able to reassure our clients that their settlements could still proceed, and safely. We were also able to protect our staff by offering them the ability to work from home and minimise their exposure to close person-to-person interactions. Something that would have been impossible without digital transactions", Stacey shared.

Since the onset of COVID-19 restrictions, an increasing number of Queensland firms have embraced electronic settlements, with an excess of 770 firms now registered to transact online.

"Three quarters of our files are electronic now – it's fantastic. However, we would prefer if it was 100%. For the quarter that are still paper transactions, our law clerks are at risk attending settlement and still racing around to bank branches with cheques. Online settlements are much safer, and easier!"

Cybercrime costs Australian businesses $29 billion each year, with Queensland as one of the three most targeted states[1]. Strong cyber security measures have never been more critical for law firms as security experts are warning of spikes in cyber-crime attempts during this time. To bolster its cyber security, Colwell Lyons Lawyers offers its clients PEXA Key as a secure channel to communicate trust and bank account details.

"**PEXA Key adds an extra layer of security and resilience to our service.** On top of our verbal security checks, clients who use PEXA Key confirm their bank account details again with the app, protecting their investment from potential cyber threats."

Stacey also mentions that her clients love PEXA Key for the added, novel experience of tracking their settlement in the palm of their hands.

"Our clients have loved using PEXA Key, especially our investor clients. They've never been able to follow the conveyancing process before. It's removed the anticipation associated with settlement and instead added excitement to the journey. It makes sense. We track everything now, our uber, our food delivery, our parcels, why not our property settlement?"

1 Cyber Security Statistics in Australia 2020: Beyond the Figures of Cyber Crime, www.greenlight-itc.com/cyber-crime-security-statistics-australia/, accessed 27 April 2020

If you'd like to speak with PEXA about transacting online, please contact **Rukshana.Sashankan@pexa.com.au**.

PEXA


Brodie Hatswell


Sarah Ford


Claire McGee


Rachel Tierney


Krystal Bellamy


Duncan Hutchings


Catherine King


Danielle Natoli


Kara Thomson

Career moves

Broadbeach Law Group

Broadbeach Law Group has announced the promotion of **Brodie Hatswell** to associate.

Brodie is a commercial litigator with experience in estates, corporate disputes, contract and business disputes, insolvency and building/construction litigation. He is an experienced court advocate but has the strategic skills to guide clients to a commercial result outside of court where possible.

Gilshenan & Luton

Gilshenan & Luton has announced the promotion of **Sarah Ford** to the position of senior associate, and **Claire McGee** and **Rachel Tierney** to the positions of associate.

Sarah, who joined the firm in 2013, represents clients in criminal defence, domestic violence, and occupational discipline. She also represents government agencies in statutory prosecutions. Sarah is a member of the Queensland Law Society's Occupational Discipline Law Committee and the Women Lawyers' Association of Queensland committee, and she is also the chair of the WLAQ Criminal Lawyers Sub-Committee.

Claire joined the firm in 2015 and is a criminal and professional misconduct lawyer. In the occupational discipline arena she focuses on matters involving health practitioners. She has a keen interest in workplace investigations, following a previous role as an adjudicator.

Rachel joined Gilshenan & Luton in 2017 and represents clients in a wide range of criminal law offences. Rachel also has experience in domestic violence, child protection and disciplinary matters, QCAT hearings, coronial inquests and regulatory prosecutions.

HopgoodGanim Lawyers

HopgoodGanim Lawyers has welcomed **Krystal Bellamy** as a senior associate in its private enterprise team in the Brisbane office. Krystal has 11 years of legal experience, eight of those focusing on estate and trust administration and litigation, acting for executors, administrators, trustees and beneficiaries.

Hughes & Lewis Legal

Hughes & Lewis Legal, which was formed in 2018, has announced the addition of four senior solicitors to its team. **Duncan Hutchings**, **Catherine King**, **Danielle Natoli** and **Kara Thomson** have joined the practice as legal consultants. The insurance law practice focuses on workers' compensation, CTP claims, public liability and medical negligence.

Proctor career moves: For inclusion in *Proctor* career moves, please email details and a high quality photo to proctor@qls.com.au. This is a complimentary service for all firms, but submissions are edited at the editor's discretion.

ON THE INTERWEB

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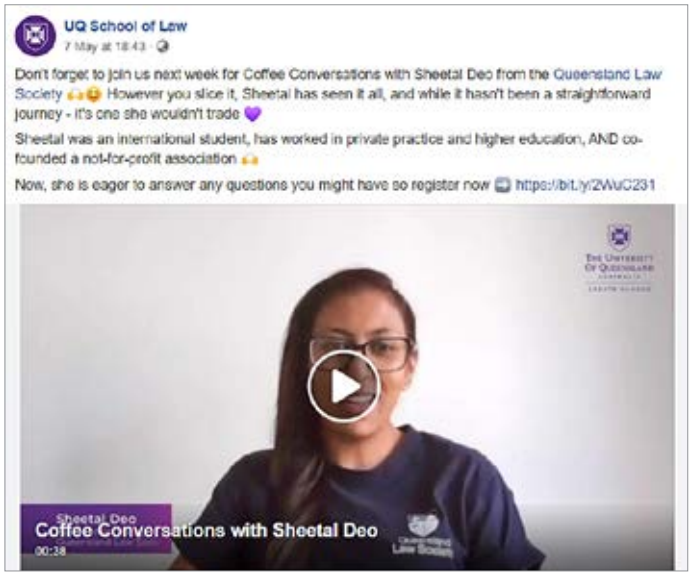

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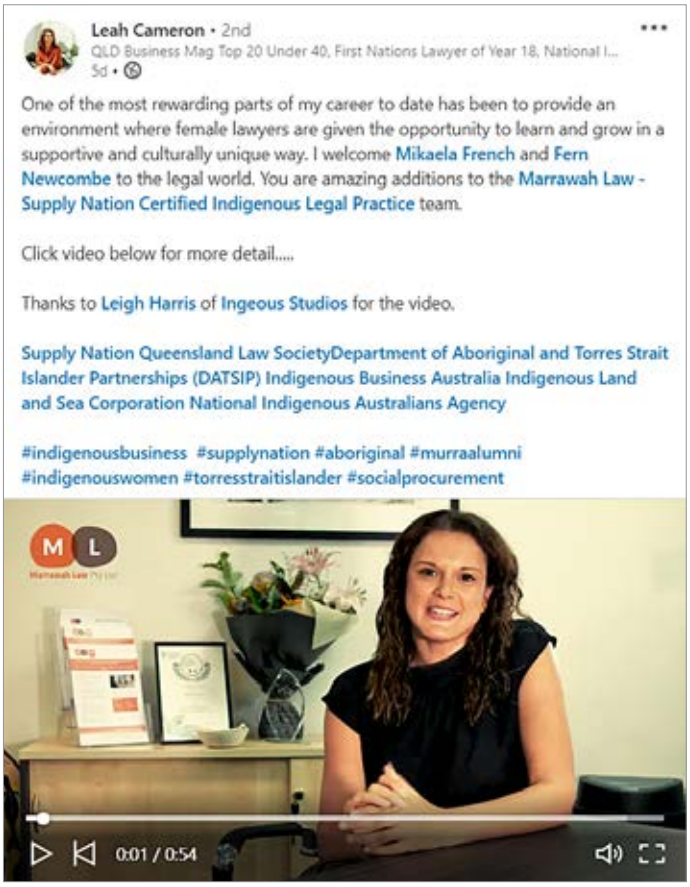

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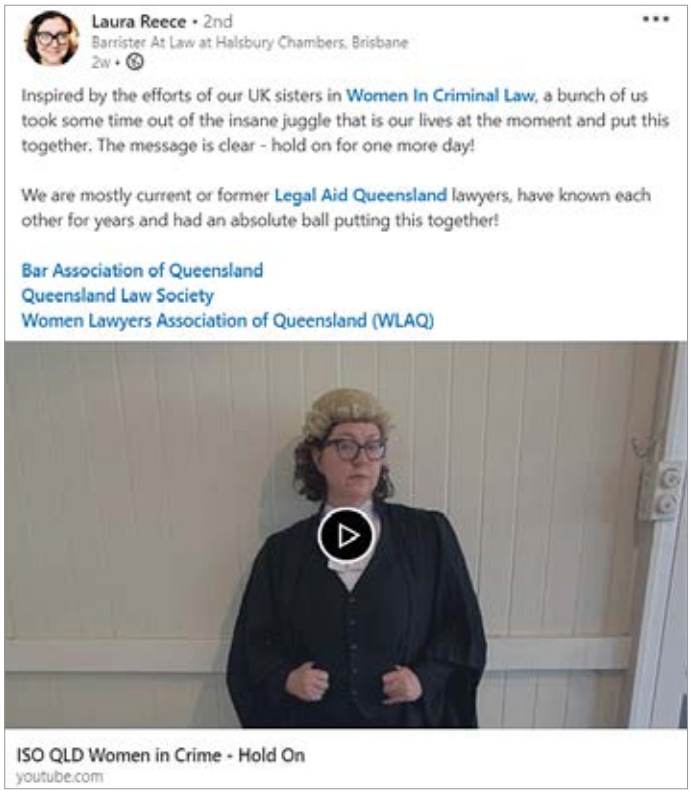

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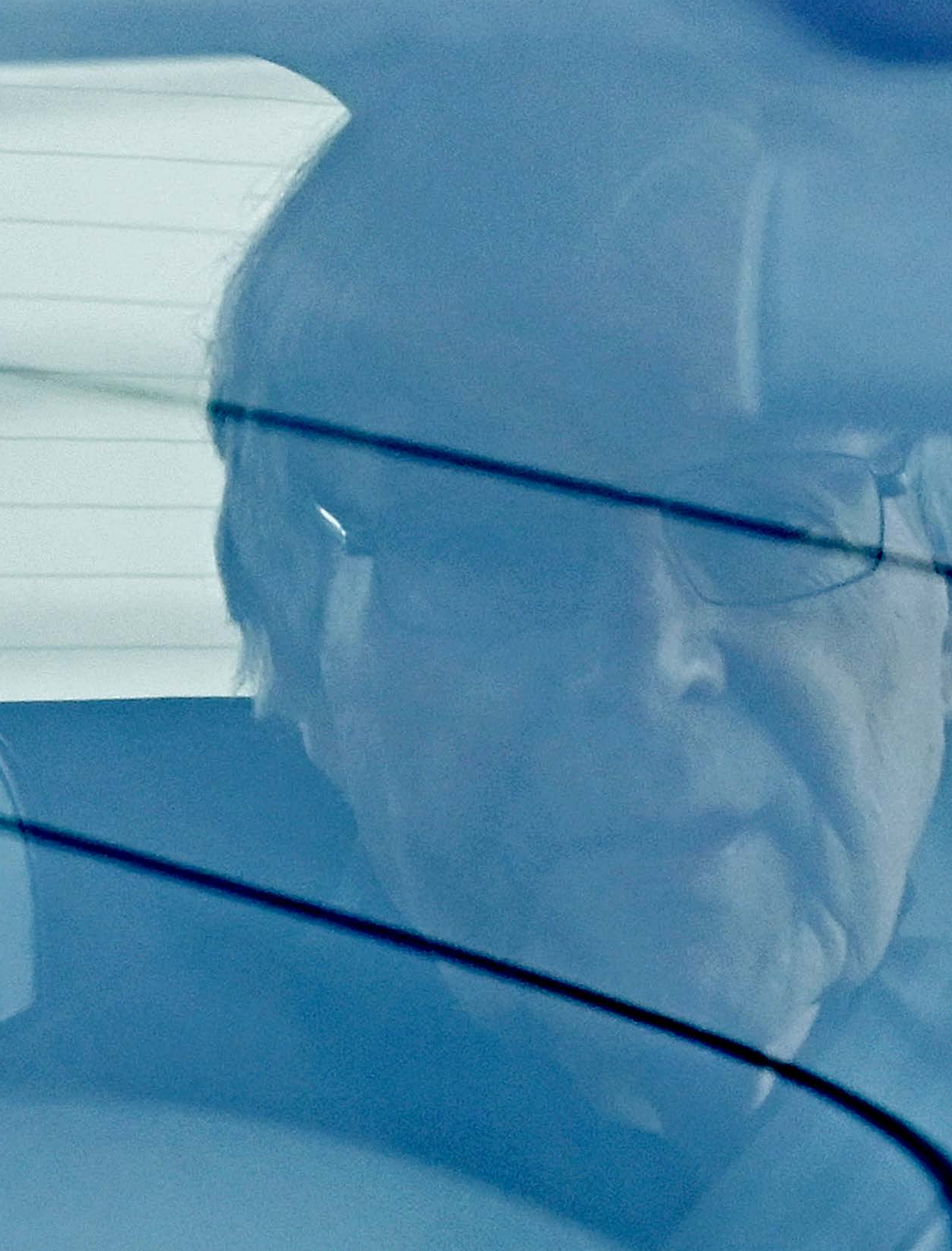


SPECIAL LEAVE TO A PELL

Pell v The Queen [2020] HCA 12

Cardinal George Pell leaves Barwon Prison on 7 April 2020 in Geelong, Australia. (Photo by Quinn Rooney/Getty Images)

BY CHRISTOPHER STACKPOOLE

A unanimous High Court in *Pell v The Queen* (*Pell*) overturned the decision of the Victorian Court of Appeal to uphold the verdict of a jury that Cardinal George Pell had committed five child sex offences.

That was because there was "a significant possibility that an innocent person has been convicted because the evidence did not establish guilt to the requisite standard of proof".[1]

Though the High Court held that the complaint's evidence contained no discrepancies or inadequacies, and did not require corroboration, evidence from other witnesses indicated that Cardinal Pell would not have had a reasonable opportunity to have committed the offences. That means that a reasonable jury must have entertained a reasonable doubt as to Cardinal Pell's guilt.

Commentators have criticised the decision on the usual grounds – that it failed to give sufficient weight to the complainant's testimony, or it did not respect the function of juries in our adversarial system of justice, and that it is difficult to understand how the High Court could find that a jury must have had a reasonable doubt when the Court of Appeal agreed with the jury.

Some grounds are fallacious.[2] Others, meritorious. I will leave these debates to others. I enquire into a more urgent matter on which there was no reasoned decision – whether special leave to appeal should have been granted at all.

HM Prison Barwon, Geelong, where Cardinal George Pell was held (Photo by Quinn Rooney/Getty Images)

The High Court has jurisdiction to entertain appeals from state courts. That jurisdiction is regulated by Parliament.[3] The main constraint is that the High Court must give special leave to appeal before it can entertain an appeal. And in deciding whether to grant special leave, it must have regard to whether:

a. the application involves a question of law that is of public importance or on which there has been disagreement between and within state courts; and
b. the interests of the administration of justice require consideration by the High Court of the appealed decision.[4]

The reason for these limits on the appellate jurisdiction of the High Court is that we live within a world of scarce resources in which individual justice is not an absolute value. It competes with other values, such as public education, healthcare, environmental protection, law enforcement, and all other things that contribute to our lives and are within the domain of the State.

However, even if individual justice was prior to all other values, when public resources are scarce, allocating disproportionate resources to ensure justice in one case takes away resources for the adjudication of all other cases. This delays and reduces the quality of justice across the system.

So, even in a society in which justice was all that mattered, one could not escape that sacrifices must be made in achieving individual justice in each case to ensure a fair distribution of justice. That means the State must allocate only those resources proportionate to making a decision well-founded in fact and law in the circumstances of each case.

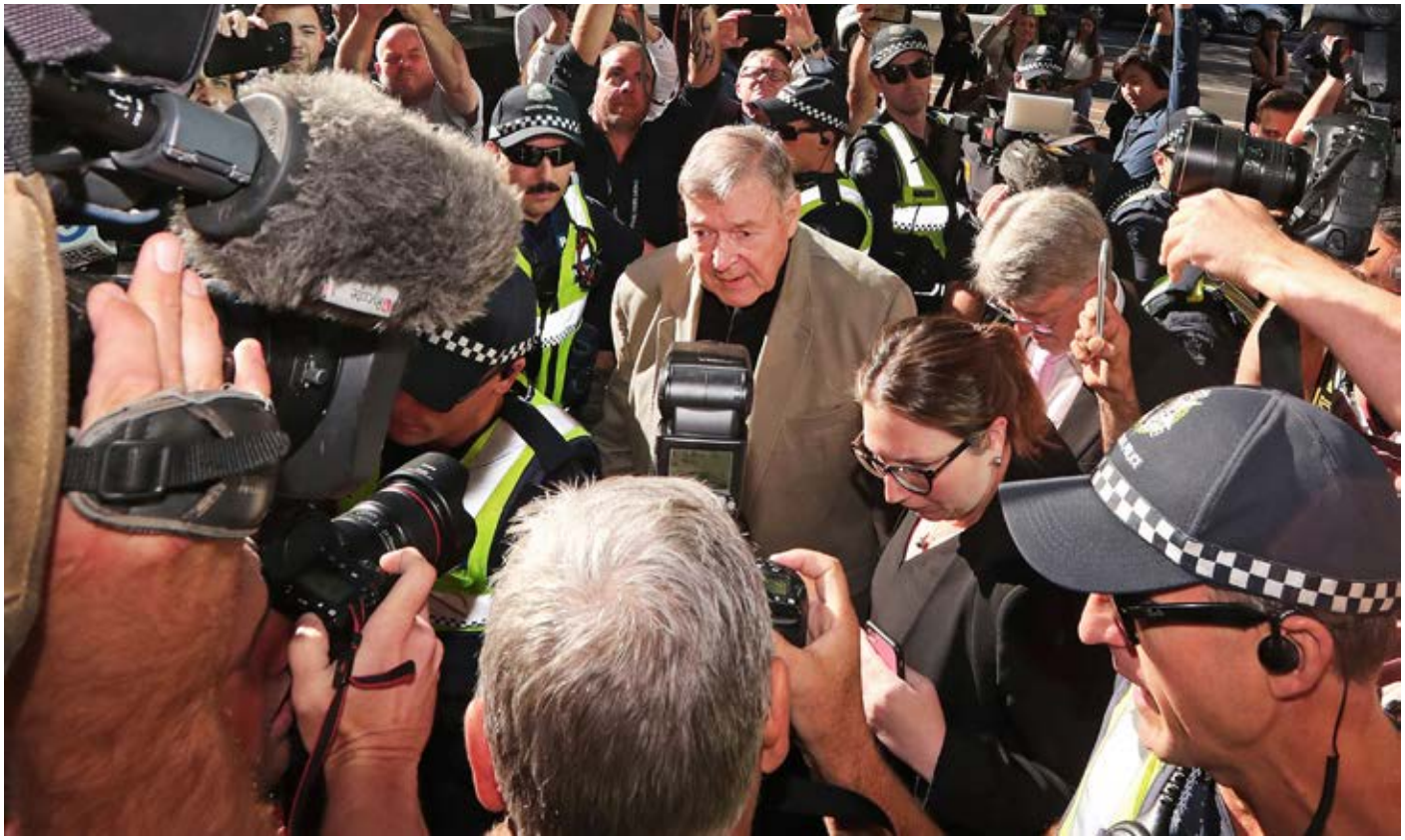
This balance has been struck in Australia through providing an accused with an entitlement to appeal from the decision of a trial judge or jury to the court of appeal in each state or territory. That is because there is a diminishing marginal return on each appeal. In most cases the judge and jury will arrive at the right decision. If they get it wrong, the Court of Appeal in most cases will get it right.

It is possible that we could provide further entitlements to appeal to ever-higher courts. This might improve the probability of arriving at a correct decision by an additional marginal increment with each appeal. But if our resources are scarce, and we allocate no more to our justice system, additional appellate courts will take resources from more efficient lower courts, which delays justice and increases the likelihood that errors will be made in under-resourced lower courts, self-defeatingly increasing the need for appeals.

However, even if we had unlimited resources for our justice system, the State could never be certain, no matter the number of appeals, that a correct decision had been reached. And, the mere fact that an appellate court is constituted by more experienced judges does not mean there is no risk that it will reverse a correct decision, especially when the ground of appeal relates to questions of fact or certain areas of law (that is, evidence) with which lower courts will often have more experience.

For this reason, in *Smith Kline*, the High Court held that: "[T]he Court, in exercising its jurisdiction to grant or refuse special leave to appeal, gives greater emphasis to its public role in the evolution of the law than to the private rights or interests of the parties to the litigation."[5] That means that when the High Court must decide whether it should grant special leave, it is not sufficient that an injustice has been done to the appellant. There must also be some public interest to justify granting special leave. That will include when the case presents an opportunity for the High Court to develop or clarify an important principle, or when it would be in the interests of the broader administration of justice.[6]

The High Court in *Pell* did not articulate the reason it thought special leave to appeal should have been granted. But it allowed the appeal on two grounds – first, that the Court



Cardinal Pell arrives at Melbourne County Court on 27 February 2019. (Photo by Michael Dodge/ Getty Images)

of Appeal examined each piece of evidence to determine whether it was inconsistent with A's [the complainant's] account, and whether it remained realistically possible it was true.[7]

This is an error of principle because it concerns the manner in which the Court of Appeal reasoned in drawing inferences from the evidence about the truth of A's account. However, there is reason to doubt that the High Court was right in allowing this ground of appeal. The Court of Appeal had held that "nothing in the…evidence…leads us to the conclusion that the jury must have had a doubt…*in isolation or the context of the other evidence. Taking the evidence as a whole*, it was open to the jury to be satisfied of Cardinal Pell's guilt beyond reasonable doubt." (*emphasis added*)[8]

If this is taken seriously, it is hard to see how it could be said that the Court of Appeal reasoned in a piecemeal manner. But even if the High Court's criticism was justified, there would still need to be some public interest to justify granting special leave to appeal. Its decision did not develop or clarify the law. It just restated existing law.[9]

That might have been in the public interest if there was widespread belief, or the Court of Appeal had stated, that evidence *should* be assessed on a piecemeal basis. But there is no such belief, and the Court of Appeal did not make that statement. Given that no court, including the Victorian Court of Appeal, has held that evidence should be assessed in a piecemeal way, this was not a reason to grant special leave.

Second, the Court of Appeal erred in holding that it was reasonably open to the jury to conclude that it had no reasonable doubt that Cardinal Pell had committed the alleged offences. The Court of Appeal had held that, though there was limited opportunity for Cardinal Pell to have abused A, there was a narrow interval of time in which those offences could have occurred, and that because the evidence of A was compelling, it was open to the jury to be satisfied that Cardinal Pell was guilty.

The High Court held that though it was *possible* Cardinal Pell had committed the offences, the evidence as to his positioning after the service, being accompanied by his Master of Ceremonies, and the foot traffic near the sacristy, meant no reasonable jury could have had no reasonable doubt that he was guilty. This is not a matter of principle. It is a matter of what inferences should have been drawn by the jury on the available evidence. This alone cannot be a reason to grant special leave to appeal.

So, if there was no matter of important principle, was granting special leave to appeal in the interests of the administration of justice? It might be thought that preventing the imprisonment of an innocent person is in the interests of the administration of justice.

If the mere fact there was a reasonable argument that Cardinal Pell should not have been convicted was sufficient to grant special leave, it means that in all criminal cases in which that low threshold could be met the High Court should grant special leave to appeal.

That would be true if it was known Cardinal Pell was innocent.

But that was not the High Court's decision. It held that, on the evidence, the jury *must* have entertained some *doubt* as to whether Cardinal Pell had committed the alleged crimes. Perhaps, then, it should be sufficient to grant special leave to appeal that Cardinal Pell should not have been convicted. That cannot be right. As the High Court held in *Warner v The Queen*:

"This Court is not a court of criminal appeal. Applications for special leave in criminal cases where the ground relied on is in substance that the verdict is unsafe or unsatisfactory are not likely to succeed. This Court cannot and should not wish to undertake a general supervisory role of courts of criminal appeal on questions of fact."[10]

If the mere fact there was a reasonable argument that Cardinal Pell should not have been convicted was sufficient to grant special leave, it means that in all criminal cases in which that low threshold could be met the High Court should grant special leave to appeal.

That is not the law. It intrudes on the general supervisory jurisdiction of state and territory courts of criminal appeal. And it limits the resources available for the High Court to discharge its public function in cases with a legitimate public interest.

It might then be thought that it was *so* clear that Cardinal Pell should not have been convicted that, if the conviction were allowed to stand, the decision would undermine public confidence in the courts. That might be true in rare cases. However, there is little evidence the Court of Appeal's decision to uphold the jury's verdict had seriously undermined public confidence in the Australian judiciary.

Perhaps this is all too quick. After all, the High Court's discretion to grant special leave is broad and not confined to those matters which are specified in s35A *Judiciary Act 1903*. Stepping back, this was a high-profile trial in which Australia's highest-ranking religious official had been charged with serious child sex offences involving the abuse of a position of power. Is not *his* conviction of such public importance that there was a public interest in the High Court entertaining the appeal? No. That which is interesting to the public is not always in the public interest. As held in *DPP v Smith*:

"The public interest is a term embracing matters, among others, of standards of human conduct and the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and the well being of its members. The interest of the public is therefore distinct from the interest of an individual or individuals."[11]

Cardinal Pell's trial did not relate to standards of human conduct or the functioning of government. It had no bearing on the good ordering of society or the general well-being of its members. That a matter attracts media attention or relates to an accused occupying a public office is never a sufficient reason to grant special leave to appeal. If it were otherwise, we would have two tiers of justice: one for those appellants who occupy a public office, another for those of lesser stations. That is inconsistent with the rule of law as it makes access to justice before superior courts depend on irrelevant antecedents.

Compare *Liberato*.[12] The South Australian Court of Appeal dismissed an appeal of four men convicted of rape, even though the judge misdirected the jury, because there was no miscarriage of justice. The appellants appealed on the ground that the Court of Appeal failed to take a view of the evidence as a whole and the effect of the misdirection on the jury. The High Court refused special leave to appeal because it raised no matter of general importance which, if wrongly decided, would seriously interfere with the administration of justice. There is no difference in principle between *Liberato* and *Pell*.

No justice system is perfect. People are wrongly convicted. Tragically, some are innocent. Others are not. Usually, as with Cardinal Pell, we don't know. But, with scarce resources, we must do the best we can with what we have. Rights to appeal must end somewhere. Where they end must depend on principle. In Australia, as in many other common law jurisdictions, such as England, rights to appeal to the highest court are conditioned on there being a public interest in the hearing the appeal. That cannot, and does not, mean that public figures should receive a different quality of justice.

Perhaps Cardinal Pell is innocent. If so, that the High Court granted special leave to appeal is a good thing. An innocent man was saved from wrongful conviction. That does not mean it was the right thing to do. Hard cases really do make bad law.

Christopher Stackpoole is a Clarendon Scholar reading for a Master of Philosophy in Law at the University of Oxford. The views that he expresses are his own.

Notes

1 *Pell v The Queen* [2020] HCA 12, [9].

2 Ben Matthews and Mark Thomas write that Cardinal Pell succeeded in his appeal to the High Court of Australia on a 'legal technicality': Ben Matthews and Mark Thomas, 'How George Pell Won in the High Court on a Legal Technicality' (*The Conversation*, 7 April 2020) theconversation.com/how-george-pell-won-in-the-high-court-on-a-legal-technicality-133156, accessed 13 April 2019. This claim is disappointing and undermines public confidence in our legal institutions without justification. To overturn a decision on the ground that a reasonable jury must have entertained doubt as to the guilt of Cardinal Pell is not a legal technicality.

3 Constitution, s73(ii).

4 *Judiciary Act 1903* (Cth), s35A.

5 *Smith Kline & French Laboratories (Aust) Ltd v Commonwealth* (1991) 173 CLR 194, 217-281.

6 *Morris v The Queen* (1987) 163 CLR 454, 475.

7 *Pell v The Queen* [2020] HCA 12, [41].

8 *Pell v The Queen* [2019] VSCA 186, [351]. See also: [93], [241] (Ferguson CJ and Maxwell P).

9 *SKA The Queen* (2011) 243 CLR 400, 409; cited with approval in *Pell v The Queen* [2019] VSCA 186, [93].

10 *Warner v The Queen* [1995] HCATrans 90 (30 March 1995).

11 *DPP v Smith* [1991] 1 VR 63.

12 *Liberato v R* [1985] HCA 66 (17 October 1985).

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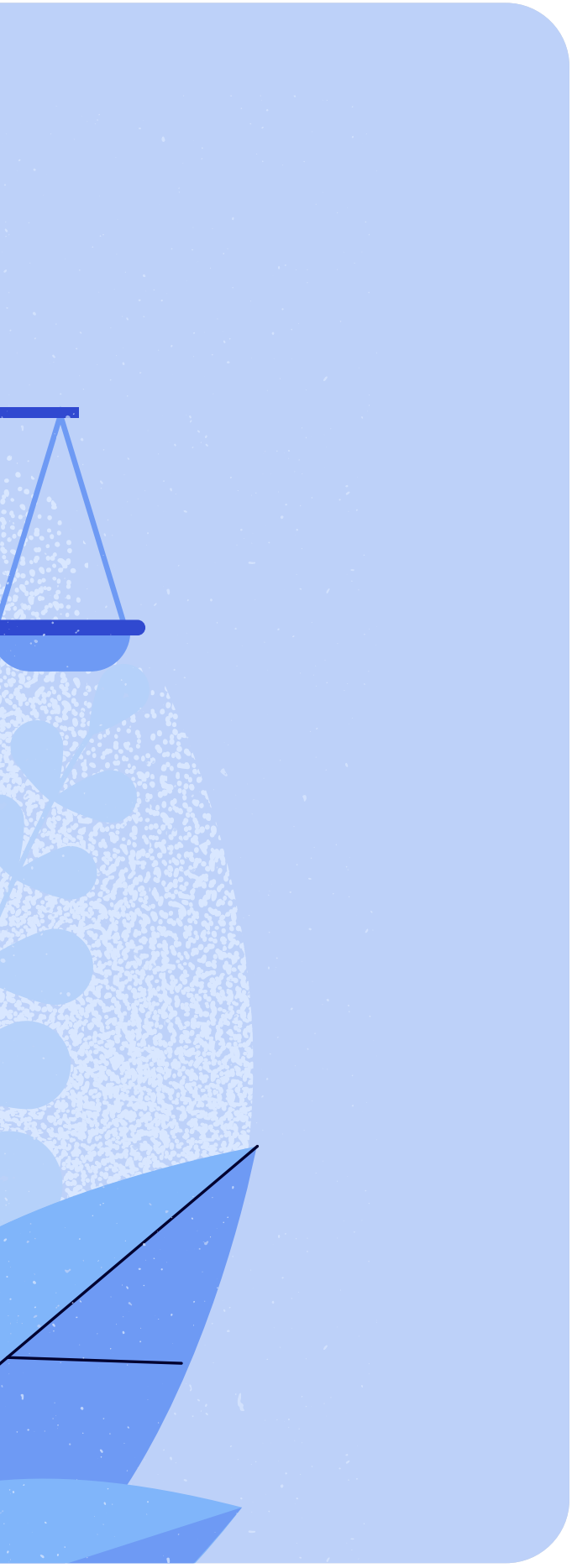


COVID-19's legacy for justice

Six months ago no one would have foreseen this year's drastic changes to our professional lives. And just a couple of months back, few would have thought that we would now be cautiously optimistic that life was returning to 'normal'. But what is the new 'normal', and is COVID-19 leaving a legacy that will improve the legal landscape for good? This month's special feature ventures into areas where COVID-19 is likely to leave a lasting impression, for better.

Back to the 9 to 5

Can you make the transition out from under the doona?

BY JOELENE NEL

"Tumble outta bed and
I stumble to the kitchen
Pour myself a cup of ambition
Yawn and stretch and try
to come to life
Jump in the shower and
the blood starts pumpin'
Out on the street the
traffic starts jumpin'
With folks like me on the
job from 9 to 5."[1]

Life has been anything but '9 to 5' during coronavirus.

Many of us may only tumble out of bed much later than we usually do, stay in our PJs and

shower after midday, and there has been no real traffic to speak of.

But as we transition out of the 'lockdown life' of COVID-19, will our work life go back to the same humdrum of a Monday-to-Friday routine and, if it does, what will it look like and how will we cope?

At the time of writing this article, Queenslanders have just received the news that within the week we will be able to travel up to 50km from our home, picnic with family (never before has one been so excited about a family picnic!) and shop for clothes and shoes (there is an argument that shopping for shoes is an 'essential outing'). Below I share some ideas around what work life may look like, as we continue to live with COVID-19, and how to navigate that.

Simply the best

I suggest we take the best parts of the work life that was thrust upon us during COVID-19 and identify what lessons we learned and try continuing those practices.

For employees: If working from home meant that you could have breakfast with your children and spend a bit more time with them in the morning, or get home early to enjoy a walk before it gets dark, then speak to your employers to see if a more flexible work arrangement can continue.

For employers: If you had staff who were not very tech savvy and the sudden change that COVID-19 brought with it meant they had to quickly get up to speed on their IT skills and use of technology, then see if you can encourage and support those staff in continuing to learn those skills. It is a great chance to identify new (and better) ways of running the office and do away with systems and procedures that may now be redundant.

Everyone should also reflect on what practices were implemented during the pandemic to keep staff connected and supported, and see how those can be harnessed to ensure team spirit and firm culture remain stronger than ever as we embark on our world as we begin to emerge from 'under the doona' of the COVID-19 pandemic.

Changes

The gravity and enormity of what we have (and will continue) to face arising from the pandemic has been a stark reminder that 'the only constant is change'. No one can predict what changes the coming weeks and months may bring, and we all need to be prepared for more change.

For employees: You are not alone in feeling vulnerable about what the work changes may be and how you will cope with them. Speak with your employer about what your home life may look since COVID-19 arrived and see if your work arrangements can accommodate those ongoing changes (these may be caring for children or elderly relatives, different parenting arrangements). Be mindful that even the current arrangements may be transient in nature, so you will need to have ongoing discussions with your employer about this.

For employers: Communication with staff will be more important than ever, and you should try to understand how your staff might have been affected by COVID-19. Different areas of firms (and areas of legal practice) may be affected differently. It can't be a one-size-fits-all approach, nor can it be viewed that there will only be a finite number of changes; this may be an organic and evolving situation for some time, and you should put regular reviews and updates in place to monitor this.

The office dynamics will be different when we first return, with 'work-from-home life' having provided many with autonomy that they have never had before. Some may find the return to the office much needed and welcomed; others may find it harder to get back into the groove of life in the office.

Everyone will have unique stresses and responsibilities arising from COVID-19. No government announcement will magically alleviate the mindful process that should happen in moving into our anything but normal world, that life will now offer. We need to figure out, together, what life can look like in community, in work, and at home – this will be a changing landscape.

Lean on QLS

QLS has been pivotal in keeping the legal community up to date with changes, supporting us with our challenges, and assisting and encouraging us to reach out during this time. That offer of support and guidance continues to be provided in several ways:

1. QLS has offered a most generous support package to members, consisting of membership, practising certificate and indemnity insurance premium subsidies.
2. QLS has not only extended the CPD year to 30 June 2020 to give solicitors extra time to complete their required units, but it is producing free CPD on-demand content.
3. QLS is offering members, via the Ethics and Practice Centre, free employment law advice of up to two hours from experts. This is designed to help members with employment law issues arising from the impact of COVID-19 and support small practices which need advice on how they can best manage their staff during the pandemic.
4. QLS is now offering a General Manager Support Service (GMSS) with up to two hours of free advice to help members with general practice management issues arising from the impact of COVID-19. For example, how to pivot the practice, manage your budget or any other commitments, including loss of cash flow and restructuring teams/personnel.
5. QLS has established a Government Financial Assistance Service (GFAS), providing members with up to three hours of free advice, designed to help members in accessing government support due to COVID-19, by guiding them through the different (State Government and Federal Government) support offerings, help members understand what is available to them for their particular situation, and finally guide members on how to access assistance and lodge any necessary applications.
6. QLS has expanded the LawCare initiative, to include amongst its services, Money Assist, where members are suffering as a result of financial stressors.

For up-to-date information, please visit QLS online:

- **qls.com.au/For_the_profession/COVID_19_Resources** ⇔
- **qls.com.au/Knowledge_centre/Ethics** ⇔

Whatever hours you may be working, and wherever you may be working from either now or in the future, there is no doubt that we can all harness lessons, skills and experiences which we have learned from our work life during the COVID-19 pandemic and carry those forward with us.

As the legal profession, we still all have a desire to practise good law. If we continue to be kind to ourselves and others as we tread lightly on the road out of this pandemic, we can feel united as a community. Like Dolly said, our working life is all about "folks like me on the job from nine to five".

Joelene Nel practises as a family lawyer and mediator, and is Associate Director at McLaughlins Lawyers on the Gold Coast. Joelene is an active member of the Gold Coast District Law Association and a member of the Queensland Law Society Wellbeing Working Group. Inquiries about the Wellbeing Working Group can be directed to r.niebler@qls.com.au.

Note

[1] The title song of the film *9 to 5*, written and sung by Dolly Parton.

The digital mediator

How technology is setting the new standard

BY DONNA COOPER

The COVID-19 pandemic is challenging us to adapt to a society reliant on technology.

For mediators, it has created an immediate need to become familiar with the available videoconferencing platforms and to quickly become adept at using them.

When mediating via video we inevitably lose some of the nuances of non-verbal communication and the sense of immediacy it creates when encouraging parties to settle. However, it provides mediators with the opportunity to see the lawyers and parties, and ensures that our clients continue to have the opportunity to participate in negotiations and achieve early settlement.

When clients do not have access to an adequate internet connection for videoconferencing and need to participate from a separate location to their lawyers, videoconferencing platforms usually offer audio-only options.

To participate effectively via video, participants will need a computer, laptop or tablet with a good internet connection and a webcam, microphone and speaker. Provided we use the right platform, one of the main benefits of videoconferencing is that we can create virtual 'breakout rooms' where parties and their lawyers can have separate discussions.

In some platforms, such as Zoom, mediators can move between these 'rooms' without their lawyers and parties having to disconnect and reconnect to the technology. In other platforms, such as Microsoft Teams, parties have to physically disconnect from one meeting and reconnect to the next one. If you are starting to use video platforms, you should practise setting up and using the breakout room function before the day of your mediation as, if you make a mistake, you may end up with the plaintiff's lawyer in the same virtual room as the defendant and their client in the defendant's lawyer's room.

Some platforms also allow for the mediator to create separate file storage spaces where designated groups of participants can access the relevant documents.

Mediators will need to confer with participating lawyers about whether clients will come into their legal representatives' offices for the mediation or will be linked into the session. There are several benefits to clients attending at their lawyers' offices for mediations, and it can be achieved while following any necessary social distancing guidelines.

Many clients are not accustomed to using technology and it can provide them with a sense of security to consult with their lawyers in person. In family matters where there are issues of domestic violence, clients can feel safe in the knowledge that they will not be in the same location as their former partners but will have their lawyers in person for moral support.

When in their lawyers' offices, there is no risk that clients may have unauthorised people sitting in the background or overhearing discussions. Also, clients will not be distracted by other family members, children or work colleagues. If clients take part from home, background noise and the quality of internet connections can be issues.

However, in some cases it will be more practical to have clients linked into the session. It is helpful to organise a practice with all participants prior to the day of the mediation so everyone understands how to join the meeting and to check whether webcams, microphones and speakers work. Mediators should send an initial invitation to all participants and then follow up with a reminder invitation on the morning of the mediation so that participants can easily locate the link to join.

On the day of the mediation it is helpful to get people to join the session about 15 minutes before start time so that you can iron out any problems. As part of your opening statement you can reiterate how the session will work and what will happen if anyone's connection is lost. Clients can become quite anxious if a link drops out and they haven't been made aware of what the procedure will be to reconnect them.

Your 'Agreement to Mediate' can be adjusted to suit the online circumstances. If clients will be in separate locations to their lawyers, you may want to include a provision that participants will not record the mediation and will not share the conference link and password and any online chats or documents with any unauthorised person.

Also, that the client will be the only person in the room and that they will have privacy, unless consent has been obtained for a support person. You may also want to include a clause that participants will immediately inform the mediator and other side by the online chat function or by telephone if at any time they are able to see or hear any discussion taking place in a separate virtual room.

If an agreement is reached, some platforms facilitate the sharing of documents and, if not, they can be shared via email. If the clients are with their lawyers, they can sign the agreement and the final version signed by all parties can be scanned and a copy provided to clients and lawyers. If a scanner attached to a computer is not available, there are scanning and electronic signature apps available to use such as DocuSign, PleaseSign and SignRequest.

The following is a brief snapshot of some of the current features of available platforms:

Platform: Zoom

Brief info: The mediator sends the participants an email with a link and the participants simply click on the link to join the meeting. All participants can be seen on the screen and the person talking will be highlighted.

If an agreement is reached, some platforms facilitate the sharing of documents and, if not, they can be shared via email. If the clients are with their lawyers, they can sign the agreement and the final version signed by all parties can be scanned and a copy provided to clients and lawyers.

Cost: The cost of a subscription starts at about $21 a month, depending on what features you require.

Who incurs the cost: Only the mediator needs to purchase the subscription and send out the invitations.

Whiteboard facility: There is a facility for a whiteboard and the mediator can use it to write up an agenda, options, offers and draft an agreement, if appropriate.

Exchange of documents: Documents can be exchanged via email prior to the session. During the session, the mediator and any participants can 'share' a document by using the screen share facility. Documents can also be added into the joint session so several participants can work on them.

Advantages: There are two main advantages of this platform over Microsoft Teams and Cisco Webex. First, you only need to send one invitation to each party. Second, the internal breakout room function means that the mediator can start with everyone in joint session, move lawyers and parties into virtual breakout rooms and then move between rooms without needing parties to hang up and reconnect. This platform and Microsoft Teams also have a virtual meeting room facility so, at the outset, the mediator can admit parties and lawyers one by one into the mediation. During the session, the mediator can send written messages to all participants via the chat function, or to selected participants, for example, to advise they are about to enter their virtual meeting room to talk with them.

Disadvantages: Mediators have to ensure that prior to the mediation they configure the settings to allow them to organise manual breakout rooms so that the program doesn't automatically match the lawyers with the wrong clients.

Security: Zoom states that all transactions are encrypted. Zoom has recently addressed some of the security concerns that allowed unauthorised people to access meetings. The mediator can create a different identification number for each mediation and can now also provide parties with a password that is required to join the session. The recently added virtual meeting room function ensures that at the outset of the mediation the mediator can admit people one by one into the session and, once all people are present, there is a meeting lock function so no further participants can gain access to the mediation.

Platform: Microsoft Teams

Brief info: The mediator sends out an invitation link to the participants' email addresses and they click on the link to join the meeting. If the mediator wants to use breakout rooms, they will have to send a separate invitation to each party for each room they will be able to access.

Cost: There are free starter options so check whether they meet your requirements. A plan starts at about $7 a month, depending on the features you require.

Who incurs the cost: The mediator incurs the cost and sends out the invitations.

Whiteboard facility: There is a facility for a whiteboard, and the mediator and all participants can see and use it during the session.

Exchange of documents: If you want participants to view a document, you can share your screen. Documents can also be added into the joint session so several participants can work on them.

Advantages: This platform is used by many courts so will be familiar to lawyers. The mediator can set up a number of channels or 'meetings' for each set of discussions, one for the joint session, one each for the lawyers and their parties' and one for the lawyer discussions. The mediator needs to send each party an invitation for the channels they will participate in. Where lawyers will have a private meeting room, one lawyer can send the other lawyer an invite so the mediator cannot access this room. The benefit is that, within each channel or 'meeting', the parties can confer by video link and can leave a meeting and join another meeting they have access to.

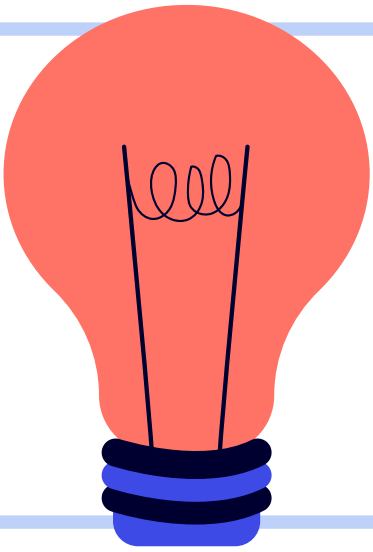
Disadvantages: Having to create a separate channel and invitation for each meeting group takes time. To move between meeting rooms, parties have to physically hang up from one meeting and join the next meeting using the email invitation link. Some mediators find it easier to use Teams for the joint meeting and then to phone each lawyer separately to have private meetings. Some set up the separate channels and then ensure they have the lawyers' mobile phone details so they can text to advise when they can reconnect into a particular room.

Security: The provider states that the service is secure and that all connections are encrypted. The platform provides storage space in the cloud. This platform has a virtual lobby and the mediator admits participants into the joint session via the lobby and then can lock the session.

Platform: Cisco Webex

Brief info: The mediator sends out the invitation link and pin number, and the lawyers and parties click on the link and key in the pin number to join the session.

Cost: A plan starts at about $18.95 a month, depending on the features you are needing to use.



Some helpful resources

J Somerville, 'Concierge duties during COVID-19: the expanding skillset of an online mediator' (7 May 2020), **r3resolutions.com.au/concierge-duties-during-covid-19-the-expanding-skillset-of-an-online-mediator** 🔗.

Clare Fowler, 'Mediating with Zoom' (March 2020) Mediate.com, **mediate.com/articles/online-mediating-zoom.cfm** 🔗.

Cloisters, 'Virtual Settlement Meetings/Mediations: A Short Guide on Hosting Through Microsoft Teams' (26 March 2020), **482pe539799u3ynseg2hl1r3-wpengine.netdna-ssl.com/wp-content/uploads/2020/03/Guide-Virtual-settlement-meetings-with-MS-teams.pdf** 🔗.

Who incurs the cost: The mediator incurs the cost and sends out the invitations.

Whiteboard facility: There is a facility for a whiteboard, and the mediator and all participants can see and use it during the session.

Exchange of documents: Documents can be 'shared' by any participant using the screen share function of their computer and worked on by any participants. All participants can see real-time changes to drafting.

Advantages: This platform is easy to use and has fairly clear audio and visual quality. During the session the mediator can send written messages to all participants or send a private message to one participant.

Disadvantages: This application can be glitchy if the internet connection is poor. At present it does not have waiting room or breakout room facilities. If you want to have private sessions, you will need to ask a lawyer and client to exit the site and then contact them, for example by text message via the lawyer's mobile phone, when you are ready for them to re-join.

Security: The provider states that the service is secure and that all connections are encrypted. The platform provides storage space in the cloud.

Platform: Modron

Brief info: This is a purpose-built platform for mediations. It can also be used for court and tribunal hearings, and has been used by the Victorian Civil and Administrative Tribunal. The mediator sends the participants an email and participants click on the link to join the meeting.

Cost: There is currently a monthly subscription fee of about $299 a month and there a 14-day free trial available. Modron is also offering a 20% discount for Resolution Institute members for the duration of their subscription.

Who incurs the cost: The mediator incurs the costs of the subscription and sends the invitations.

Document-sharing facilities: There is a facility called 'Spaces' that allows the mediator to set up separate discussion and document spaces for different groups. The plaintiff team of lawyer/s and client could have their own space for discussions and the sharing of documents, as can the defendant team. There can also be separate spaces set up for experts.

Exchange of documents: Documents can be exchanged via the document-sharing spaces. During the session the mediator and any participant can 'share' a document that is on their computer with everyone else in the session. For example, if one lawyer has a draft agreement, this can be shared in a joint space and worked on by the lawyers during the session and all participants can view the real-time changes to drafting.

Advantages: An advantage is that this platform has been tailor-made for legal disputes. The 'Spaces' facility can be used to set up spaces for people to have discussions and to access documents. It can also be used to store documents. Different types of files can be shared and stored – video and audio files and written documents. The program also has an archiving facility.

Disadvantages: This platform is more expensive than some of the other options.

Security: Modron says it has a high level of security and that all transactions are encrypted. There also is also a storage space for files in the cloud of up to 50GB.

Conclusion

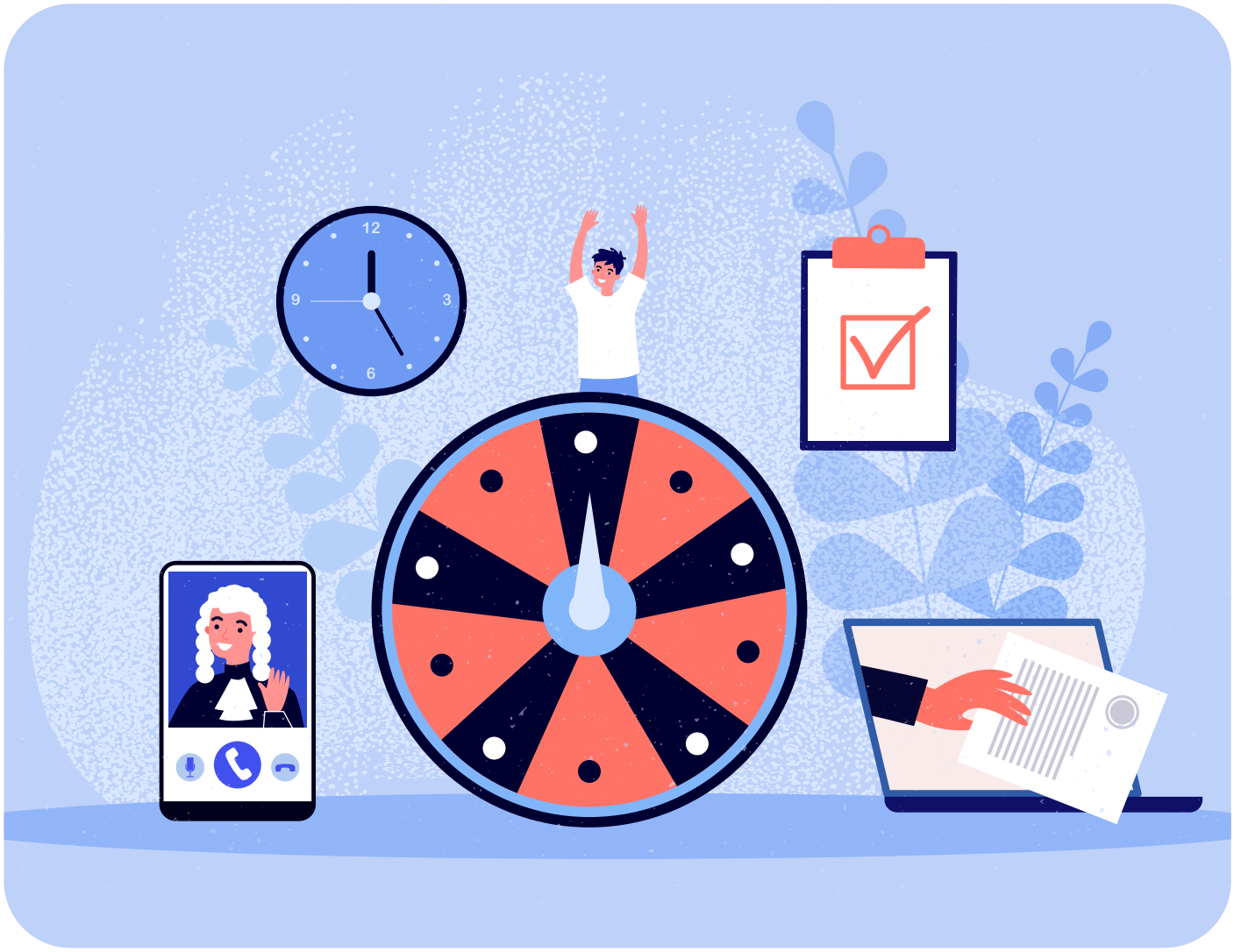
In summary, bespoke mediation platforms such as Modron have the advantage of replicating an in-person mediation environment as well as being able to create separate files spaces, which would be particularly helpful if you have multiple parties and experts. It is, however, a more expensive option.

In contrast, platforms such as Zoom are less expensive and offer the breakout room facility, so that the mediator does not have to keep organising to disconnect and reconnect the parties when having separate meetings, as is the case when conducting telephone mediations.

With the change to the way we are all doing business during the current pandemic, there are obviously many advantages and disadvantages of using videoconferencing for mediations. It will be interesting to see in the future if, even after our return to a 'normal' world, we continue to make increased use of videoconferencing platforms due to the convenience and time savings.

This article appears courtesy of the Queensland Law Society Alternative Dispute Resolution Committee. Donna Cooper is a Senior Lecturer in the QUT Faculty of Law, a nationally accredited mediator, registered family dispute resolution practitioner and a member of the committee. The author would like to thank Toby Boys, Courtney Barton and Clare Dart for their assistance in providing user feedback on their preferred videoconferencing platforms.

Note: The information on videoconferencing platforms is based on user experiences. Queensland Law Society does not endorse any of these products.



Choosing our pandemic legacy

What changes should stay beyond COVID-19?

BY MATT DUNN

The COVID-19 challenge has caused disruption to the way we live and work like nothing in living memory.

Governments, businesses and institutions have had to respond to that challenge by changing their operations – sometimes simply stopping what they do, and sometimes by finding innovative new ways to get things done.

The COVID-19 challenge has also brought with it the freedom to experiment, along with an expectation that not all of the changes that have been quickly implemented will work. In effect, we have had a sandbox in which to trial new ways of doing things without the high expectations.

It may well be beneficial to continue some of the innovative solutions beyond COVID-19. In this article, we explore some of the changes that may be worth keeping after the current pandemic has passed.

The courts

Courts have issued a swathe of new operational procedures via practice directions to respond to the operational challenges of COVID-19 and social distancing.

These measures have included making appearances by phone or videolink wherever possible, with defendants being encouraged to make use of electronic pleas of guilty and adjournments, where available.

There would be a sustained benefit if matters of an administrative or procedural nature – such as callovers, mentions and adjournments – could continue to be conducted by alternate means. This would have the benefit of reducing travel costs for parties, reducing the number of transports for defendants on remand or in custody, and also reducing imposts on court time.

Greater access to justice can flow from leveraging technology to reduce costs to the public in engaging in litigation, especially in appearances on shorter directions and interlocutory matters.

Complementing the existing electronic lodgment of certain documents in the Magistrates Court, the Principal Registrar of the Supreme and District Courts has approved certain *Uniform Civil Procedure Rules* (UCPR) forms for electronic filing in the Supreme and District Courts (**Approval 1 of 2020** ⇔).

This includes three forms to be filed with the court to obtain a consent order of the registrar – Request for consent order of the registrar (Form 59A), Proposed draft order (Form 59), and Affidavit (Form 46). Also capable of electronic filling generally is the Notice of discontinuance (Form 27).

In addition, an electronic probate pilot is running and provides electronic filing of a number of probate-related documents for estate matters for legal firms participating in the trial. Post-pandemic, it would be highly desirable to see the probate pilot a success and extended to all matters, and the classes of general court documents which can be electronically filed to be significantly broadened.

New use of technology such as videoconferencing may have a role to play in domestic violence matters, to assist in distancing parties in preference to physical attendance at mediations, court and other occasions. The altered and flexible methods to create and lodge evidence before the courts may be especially useful in these matters as well, given physical attendance can be difficult or have safety implications in some circumstances.

With the passage of the Justice and Other Legislation Amendment Bill 2019 on 20 May 2020, changes have been made to section 652(3) of the *Criminal Code* relating to proceedings to transmit charge for summary offence. It will no longer be a requirement for a written transfer application to contain a sworn declaration of the charged person under the *Oaths Act 1867*. The change will facilitate guilty pleas more efficiently.

Probate

Supreme Court Practice Direction 10/2020 relates to altered processes for informal wills impacted by COVID-19. It permits a registrar to constitute the Supreme Court, instead of a judge, to hear and decide applications to dispense with the requirement that a party be physically in the presence of the testator when signing a will.

This change has brought cost savings to Queenslanders seeking probate in these circumstances and saved time for judicial officers who can now focus on other, more substantive legal issues. This initiative is only for documents executed between 1 March 2020 and 30 September 2020, but would ideally be considered for a place in post-pandemic practice.

Collaboration through technology

With the advent of COVID-19 restrictions, agencies across government have had to move more of their services online.

Many of these services have impacts across a number of agencies, for example, increased use of videoconference court hearings in criminal law matters involves collaboration between lawyers, the Office of the Director of Public Prosecutions, Queensland Police, and the Departments of Justice and Corrective Services.

Previously many of these groups operated in a more discrete fashion, but the pandemic has required agencies to collaborate to design ICT systems and responses that cross organisations. It would be very beneficial to all if this heightened operational cooperation between the arms of government, the courts and the profession was to continue after COVID-19.

Legal Services Award

On 8 April 2020, the Fair Work Commission made determinations varying a number of awards, including the *Legal Services Award*, by inserting temporary provisions to provide employees with:

- two weeks of unpaid pandemic leave
- the ability to take twice as much annual leave at half their normal pay if their employer agrees.

The new arrangements apply from the first full pay period from 8 April 2020 and continue until 30 June 2020, unless extended.

Applications have been made to the commission for additional flexibility measures to be introduced in the *Legal Services Award*. Providing employees and employers with greater flexibility to agree under this award benefits all, and it would be a positive outcome if this were to continue into the future.

Watch houses

During the pandemic, people who have been arrested, particularly young people, have had to be held in regional watch houses for extended periods due to limited transport options. It is hoped that as restrictions ease and things return to normal, stays in watch houses will decrease and people on remand can be transferred quickly to appropriate centres.

However, while in watch houses detainees have been able to instruct lawyers by telephone or videoconferencing devices in interview rooms. Providing confidentiality can be maintained, being able to access technology to gain instructions in these facilities in future would be beneficial, particularly in regional and remote locations.

Correctional facilities

Correctional facilities have been a focus for COVID-19, with reports from overseas that prisons have been significantly affected by the pandemic. The *New York Times* has reported that there have been more than 42,000 Coronavirus infections and 432 deaths amongst inmates and staff at state prisons, federal prisons and local jails in the United States.[1]

Through good management, the situation in Queensland has been very different, but there have been a number of new initiatives that have been implemented that may be worth keeping post-COVID-19.

Queensland Corrective Services (QCS) has established an email system for prisoners and now has electronic funds transfers (EFT) for prisoners' trust bank accounts. Arising from a recommendation in the report by the Crime and Corruption Commission's Taskforce Flaxton, these measures were originally aimed at strengthening the barriers to contraband entering prisons.

Commissioner Martin said in a QCS release: "With the new service, email is sent to the prison, where it is printed off and provided to prisoners after being vetted by officers, in the same manner that mail is presently screened.

"Prisoners do not have access to computers with internet access, but if a reply is requested, the prisoner is given a reply sheet to write a response. This is then scanned by officers and emailed to the recipient."

It may well be beneficial to continue some of the innovative solutions beyond COVID-19

Previously QCS received money orders and physical money at visitor processing locations which then had to be banked in prisoners' trust accounts. The new EFT system removes cash handling by QCS staff and also removes another avenue for infections to enter the prisons.

Telehealth is also now likely to be a positive change for the management of correctional centres and the welfare of prisoners. Using this technology should make it easier to get the assistance of remote health providers such as psychologists, psychiatrists and other specialists, as well as reducing the need to facilitate visits or prisoners transports outside the facility.

One of the most impactful benefits that could flow for practitioners and the justice system would be the increased use of videoconferencing for appearances for prisoners and those on remand. A reduction in prisoner transports is both positive from a health perspective but also may permit resourcing to be directed to programs and other justice reinvestment opportunities.

Witnessing land title documents

From 6 April 2020, the Registrar of Titles set out new witnessing options for land title documents in response to COVID-19. While the preference of the registrar was the use of e-conveyancing to address the majority of concerns about social distancing and witnessing, alternate methods were set up for witnessing paper-based documents. This permitted the witness to view the individual signing the instrument live via some form of video link, provided that:

- reasonable steps had already been taken by the witness to verify the identity of the individual and ensure the individual was the person entitled to sign the instrument; and
- the witness was an Australian legal practitioner or a qualified witness in the employ of a law firm or financial institution.

Despite these arrangements being a temporary response to the COVID-19 challenge, there would be benefit in more flexible document witnessing options being continued for legal practitioners.

Executing documents and oaths

New legislation passed in response to the global Coronavirus pandemic has significantly altered the witnessing and execution of a range of Queensland documents.

The **Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Regulation 2020** was made under the Queensland COVID-19 emergency response legislation and allows for the electronic execution and virtual witnessing of wills, enduring powers of attorney, advanced health directives, affidavits, statutory declarations, deeds, some mortgages and general powers of attorney.

These measures assist in overcoming the challenges of COVID-19 and provide access to justice for those in isolation and benefit those in regional and remote Queensland where face-to-face witnessing is difficult and costly.

These changes will operate to 31 December 2020. Embedding the changes, with appropriate safeguards, into the general law would be of significant benefit to Queenslanders given our disparate population and need for innovative solutions to improve access to justice.

Electronic conveyancing

The COVID-19 challenge has seen a marked increase in the take-up of e-conveyancing for property settlement. While paper settlements have continued throughout the pandemic, many firms have chosen to move at least some of their settlement operations to electronic form as a safeguard and defensive measure.

Embracing this innovation has been slowed to date by a number of factors, including some regulatory compliance issues and infrastructure issues – such as unreliable internet networks in parts of regional Queensland. However, the pandemic has shown us that flexibility in the use of settlement methods is, at least, an important part of disaster preparedness.

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

Notes

[1] nytimes.com/interactive/2020/us/coronavirus-us-cases.html?action=click&module=Top%20Stories&pgtype=Homepage&action=click&module=Spotlight&pgtype=Homepage#states.

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Queensland Law Society®

Returning to a new, improved ‘normal’ in the Magistrates Courts

BY TONY KEIM

The year 2020 has already established itself as one that none of us will ever forget.

It is only June and already we’ve all been exposed both personally and professionally to innumerable, unforeseeable, life-altering and intense challenges as a result of the global coronavirus pandemic.

Those challenges have had profound and even tragic outcomes for almost all of the more than 7.5 billion who inhabit our tiny planet.

Here in Queensland, the legal profession has been confronted with its own unique set of issues – perhaps none more so than the state’s Magistrates Court, where social distancing is nigh on impossible as it deals with more than 90% of all criminal matters that ordinarily require defendants, legal representatives, prosecutors, witnesses and the judiciary and court support staff to be physically in the same room at the same time.

But with necessity being the mother of invention, Queensland's Chief Magistrate Terry Gardiner (*pictured below right*) spoke to *Proctor* to explain how the court and his fellow 100 magistrates have overcome a myriad of problems and issues, and how as a result there may be improvements to the way courts 'do business' in a post-COVID-19 world.

"After the initial declaration of the pandemic, the (COVID-19 response) practice direction was issued on 27 March to restrict people coming into the courthouses, because regrettably a lot of the courthouses are not built for social distancing," Judge Gardiner said.

"And we don't have expansive common areas that allow for large groups of people to gather. So we were very conscious of the hardship caused to the solicitors, especially the criminal law practitioners, who depend on the courts to be open for their livelihood and to assist clients.

"Currently this practice direction allows practitioners to bring matters on to be dealt with. The courts are (and have been) open and have the capacity to deal with matters, and I encourage all practitioners to list matters and have them determined.

"I myself have been doing sentencing over the phone and by video. Solicitors have been appearing via video from their offices into the court. I've had practitioners in (actually in) court cross examining witnesses by video."

Judge Gardiner said a new practice direction – expected to be released in mid-June – would continue to focus on minimising people's physical presence in courthouses.

However, he said it would also make special provisions for prosecutors and solicitors to come to court if they wished to.

"To the extent we can, we will be trying to normalise things," he said. "So that's where we are (right now)."

Judge Gardiner said that one of the biggest 'benefits' to come out of the COVID-19 pandemic was the building of strong collegiality between the judiciary, the Queensland Law Society, the Queensland Bar Association, Police Prosecutions Corp, the Department of Corrective Services, Youth Justice, the Queensland Civil and Administrative Tribunal, Parole Board Queensland and "importantly", the Government, to find solutions to the problems facing the profession.

"The leadership of the Chief Justice (Catherine Holmes), QLS President Luke Murphy and President of the Bar Association Rebecca Treston QC has been outstanding," he said.

"The response of (all 101 Queensland) magistrates is something I am very proud of and they have managed all of the challenges thrown at them and are transitioning to clear the workload with determination.

"We have had a huge increase in the uptake of telephone and video communication. This has demonstrated that we can operate without having the huge physical presence of people in courthouses.

"There has been a large increase in the sentencing of prisoners by video and it has resulted in significant reductions of costs of transporting prisoners from correctional centres. And importantly, there has been a large uptake of electronic adjournments by practitioners and also the emailing of documents to the registry that would usually be tendered if there was a physical presence in the court. So there are a lot of things that have been working pretty well.

"In saying that, there have been a few challenges as well. The Magistrates Court is the engine room of the criminal justice system in Queensland. It deals with in excess of 200,000 defendants facing more than 455,000 charges each year. It deals with 95% of criminal lodgements in the state and our 101 magistrates sit at 33 courthouses where there are resident magistrates and they circuit to (courts in) 81 other communities throughout the state.

"So one of the main challenges when the pandemic commenced was to ensure that domestic violence aggrieved (complainants) could continue to apply for protection orders in person, and that has continued. We have also sought to ensure people in custody can apply for bail and equally have their sentences determined, so there is no risk of them serving more time in prison than they would otherwise be sentenced to.

"Initially when the (social distancing) restrictions were put in place, physical appearances had to be minimised and thousands of matters that were before the courts had to be adjourned. That placed a significant strain on the registry. But, the registries (across Queensland) have met all the challenges and we are now in a position to start clearing the backlogs.

"The remaining challenge is to clear the backlog as efficiently and quickly as possible."

Judge Gardiner said he was optimistic the backlog challenge could be overcome with a return to the hearing of matters in which defendants and legal representatives could appear in person.

"The Magistrates Courts are large enough to accommodate the (legally required) four square metre social distancing expectations. It's really the common areas outside the courts that are the problem, because people usually congregate in those areas.

"We've learned a lot of lessons from this pandemic and the Magistrates Court (ordinarily) operates on paper files. The increased use of technology over the last two months has highlighted the need to transition to a paperless court. This, when it happens, will ultimately relieve a lot of the pressure on the registry from handling of paper files.

"Pleasingly, the Attorney-General (Yvette D'Ath) knows the work of the court well and has always been responsive to the courts' needs.

"But I believe more can be done to electronically reduce the physical presence of people in courts, particularly at long callovers when on some days a magistrate can mention 100 to 200 matters.

"So in respect to the future, there is always going to be a need for a level of physical presence in courts, especially for trials and sentences. But in the future, I expect more appearances will be accommodated electronically.

"We're proposing to introduce an electronic application that will extend electronic adjournments to all court events…for practitioners to get dates for sentencing hearings and other standard orders to accommodate the progression of committal hearings.

"I can also envisage sentences for minor matters to continue being done via video and I can envisage the more expansive use of video to receive evidence of some witnesses, such as corroborating police, experts or uncontentious witnesses. So we will continue to identify innovative ways to do the business of the courts."

Tony Keim is Queensland Law Society Media Manager.

Photo courtesy of the Supreme Court Library Queensland

Work-from-home protocols

BY SHANE BUDDEN

Queensland Law Society is committed to ensuring the safety of our members, colleagues and the community, and the information below is intended to assist you in achieving that goal during the COVID-19 outbreak.

What measures should law firms take?

The primary strategy adopted by the Federal and State Governments is one of **good hygiene**, **self-isolation**, and **social distancing**. QLS members and their places of work should endeavour to follow this advice to ensure that we play our part in the efforts to combat the current pandemic.

Should I have a warning on my correspondence?

Yes. The current strategy involves limiting the opportunity for virus transmission, which means clients must be notified of the measures you are undertaking in light of the COVID-19 risks. Of necessity these notifications will need to be sufficiently plain to avoid miscommunication, and to effectively protect staff. QLS suggests wording along the following lines:

[Firm name] is firmly committed to the health, safety and wellbeing of its clients and staff. For that reason we have adopted measures developed by Queensland Law Society based on advice from the Federal and State Governments. If you have been diagnosed with COVID-19, are experiencing ***symptoms associated with the virus*** *or are otherwise feeling unwell, please DO NOT COME TO OUR OFFICE. In such circumstances you should follow* ***the advice of the Australian Government Department of Health.***

We have the capacity to consult with you and provide advice via [insert communication options]. Unless specifically instructed by us to do otherwise, please telephone us on [contact details] to arrange the best way for us to continue to assist you with your legal service needs.

Should I have a warning at office entrances?

Yes. If you are maintaining a staff presence at your office during the course of the COVID-19 outbreak, you will need to take further steps to ensure the health and safety of staff and clients. QLS suggests a notice at the entrance to your office or offices along the following lines:

[Firm name] is firmly committed to the health, safety and wellbeing of its clients and staff. For that reason we have adopted measures developed by Queensland Law Society based on advice from the Federal and State Governments. If you have been diagnosed with COVID-19, are experiencing symptoms associated with the virus or are otherwise feeling unwell, please DO NOT ENTER THESE PREMISES. Please contact us on [contact details] to arrange the best way for us to assist you with your legal service needs.

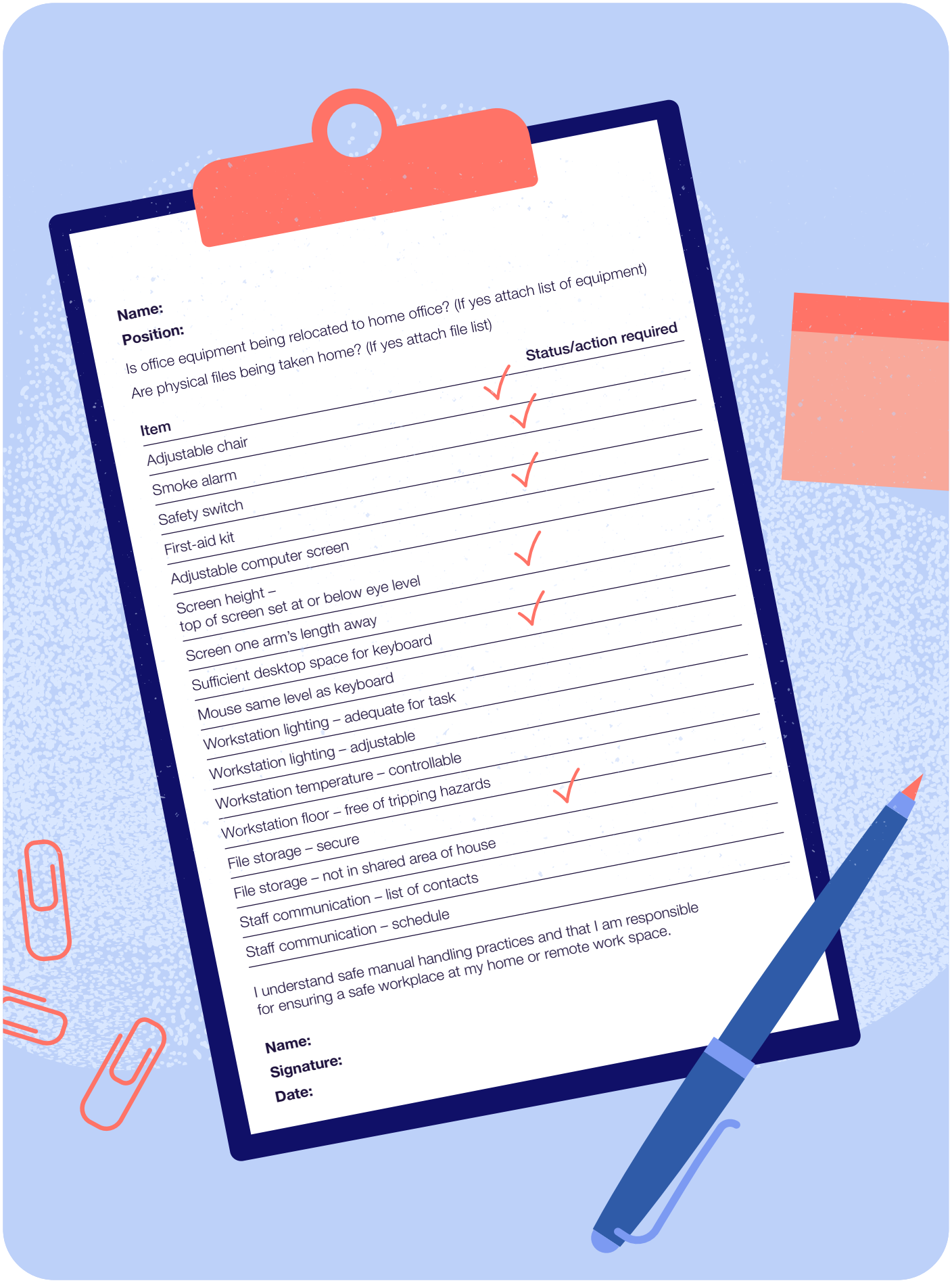
Should I transition to a work-from-home format?

If you are capable of transitioning to a work-from-home format, QLS recommends that you do so. Maintaining strict social distancing is key in fighting this outbreak and you, your staff and your clients will be safer if contact is limited to digital methods.

QLS recommends the implementation of the following work-from-home protocols:

- Home work environment – firms should ensure that staff's home offices have an adjustable chair, adjustable computer screens, ergonomically safe set-up, and functional safety switches and smoke detectors; a basic first-aid kit should also be on the premises.
- Firms should also ensure that safe, secure file storage options exist (if physical files are to be taken home) and that all staff working from home have complete contact lists.
- If staff are working online and from electronic files, cybersecurity will be a priority. The widespread move to work from home, and the general disruption caused by COVID-19 will be seen as an opportunity by cyber-criminals; COVID-19 scams have already been circulated, and residential cybersecurity is rarely as robust as that in the workplace. The following measures should be adopted in light of this:
  - Private devices and networks should be avoided (if possible) when accessing work data, and if home wi-fi networks are being utilised, steps should be taken to ensure robust password protection and other security.
  - Free networks, such as those in cafes and other public places, should be avoided; even those with passwords carry great risk, as any customer will be provided with the password.
  - More information can be found on the **QLS website**.
- Staff should have a complete list of contact numbers for the firm, and a communication schedule should also be put in place to ensure staff remain supervised and are not isolated.
- Staff should complete and sign the checklist opposite to ensure that they are aware of these issues and have taken steps to address them.
- For more information on workstation ergonomics, see Office of Industrial Relations, *Ergonomic guide to computer based workstations* (2012).

Shane Budden is a Queensland Law Society ethics solicitor.


Name:
Position:
Is office equipment being relocated to home office? (If yes attach list of equipment)
Are physical files being taken home? (If yes attach file list)
Item
Status/action required
Adjustable chair
Smoke alarm
Safety switch
First-aid kit
Adjustable computer screen
Screen height – top of screen set at or below eye level
Screen one arm's length away
Sufficient desktop space for keyboard
Mouse same level as keyboard
Workstation lighting – adequate for task
Workstation lighting – adjustable
Workstation temperature – controllable
Workstation floor – free of tripping hazards
File storage – secure
File storage – not in shared area of house
Staff communication – list of contacts
Staff communication – schedule
I understand safe manual handling practices and that I am responsible for ensuring a safe workplace at my home or remote work space.
Name:
Signature:
Date:

COVID-19 makes documents electronic

BY MATT DUNN

Of all the emergency measures implemented to meet COVID-19, one of the most anticipated by the Queensland legal profession was the regulation to alter the law relating to the execution of documents.

Social distancing, isolation and quarantine had frustrated many attempts to conclude legal documents due to statutory obligations to execute with wet signatures or for a witness to be in the physical presence of the signatory at the time of signing.

The salve to these issues came in two parts. The first was the ***Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Regulation 2020*** 🔗, published on 15 May 2020, dealing with the electronic signing and witnessing by audio-visual technology of wills, enduring powers of attorney and advanced health directives.

The second and final tranche was the ***Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Amendment Regulation 2020*** 🔗 published on 22 May 2020, dealing with electronic signing and witnessing by audio-visual technology of affidavits, statutory declarations, deeds, some mortgages and general powers of attorney.

The two tranches together came to form the ***Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Regulation 2020*** 🔗, which will operate until 31 December 2020.

The new regulation provides that a witness, signatory, substitute signatory or other person may be present by audio-visual link for the making, signing or witnessing of a will or an enduring document. However, it prescribes only 'special witnesses' who can witness documents by audio-visual technology, including Australian legal practitioners and specially approved justices of the peace and commissioners for declarations.

It also provides that an advance health directive certificate may be signed by a nurse practitioner.

On affidavits, the regulation provides that a person can be present for the making of the document by audio-visual link, it can be made in electronic form and signed electrically. These permissions are subject to the proviso that certain factual material and statements must be made in the jurat, including that:

- The affidavit was made in the form of an electronic document.
- The affidavit was electronically signed by the signatory or substitute signatory.
- The affidavit was made, signed and witnessed in accordance with the regulation.
- Either the contents of the affidavit were true or the contents were true to the best of the knowledge of the person making the statement.
- The signatory understood that a person who provided a false matter in an affidavit commits an offence.

The regulation provides a similar model of operation for statutory declarations as it does for affidavits, altered to suit the declaration's inherent qualities. Interestingly, the regulation also permits a statutory declaration not witnessed by audio-visual technology to be witnessed by the broader group of witnesses contemplated by the *Statutory Declarations Regulations 2018* (Cth), section 7.

With respect to oaths and affirmations, the regulation permits an authorised person to be present by audio-visual technology for the taking of the oath, but this is expressly said not to apply to oaths of allegiance or oaths of office.

The new regulations make a number of changes to the law of deeds in Queensland for the time of COVID-19, most notably by providing that deeds may be in electronic form and electronically signed. It no longer needs to be written on paper or parchment, and to be sealed to be considered a deed under the temporary law. Critically, the regulation also dispenses with the requirement for a deed to be witnessed.

On general powers of attorney, the regulation permits them to be made electronically and signed electronically. If a general power is to be executed by a corporation, it no longer needs to be witnessed, however an individual granting a general power of attorney must have a witness, which can be a special witness by audio-visual technology.

The regulation also clarifies that mortgage documents evidencing a mortgage to be lodged by electronic conveyancing can be signed electronically.

The new regulation has been broadly welcomed by the profession. The relevant question now is: How many of these temporary changes should be incorporated into the general law of Queensland?

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

Lexon
INSURANCE

Support for the profession through COVID-19

Recognising the significant impact the COVID-19 pandemic is having on the profession, on 15 April 2020 Queensland Law Society Council announced a $9 million support package which included a $5 million subsidy for practices insured with Lexon in the 2020/21 year.

The effect of the subsidy is to deliver a 'one-off' 20% reduction in base levy rates compared to 2019/20 – meaning the 2020/21 subsidised rates are now the lowest since the adoption of the model based on gross fee income (GFI) in 2007/08.

The ability to provide a subsidy in these challenging times was in no small part due to the careful and prudent management of insurance reserves held to meet future claims and the profession's strong commitment to risk management which has lowered overall claim values in recent years.

In addition to the financial aid mentioned above, Lexon has been responding to the numerous new risk issues that have arisen out of COVID-19 with no fewer than 11 risk releases since early March 2020 covering areas that include conveyancing, wills, enduring powers of attorney, solicitors' certificates, commercial negotiations, leasing, verification of identity and cyber remote working risks, to name a few. We know that you are finding this information of value as we have received the greatest number of weekly 'hits' ever to our website during this period.

Top-up insurance now available!

QLS Council has arranged with Lexon to again make top-up insurance available to QLS members who would like the additional comfort of professional indemnity cover beyond the existing $2 million per claim provided to all insured practitioners.

This option is available at very competitive rates and practitioners have the choice of increasing cover under the Lexon policy to either $5 million or $10 million per claim. Details can be found with your renewal documentation.

Areas of law practised in Queensland

The graphic below depicts the comparative size of the areas of law (by GFI) practised by Lexon insureds over the period from 2016 to 2019.

Personal injuries work remains the largest area of activity – consistently at or about 19%. Some interesting trends are starting to emerge in other areas, with residential conveyancing continuing to diminish – dropping almost 1% from last year to 10.6% – and commercial conveyancing remaining at long-term lows. This reflects the more subdued property market.

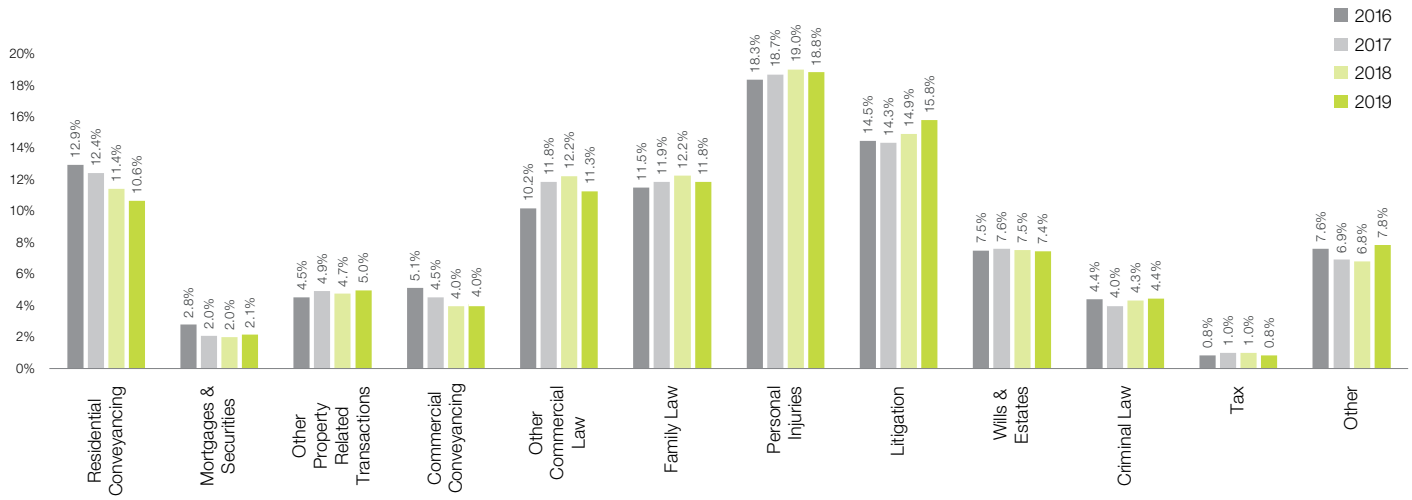
On the other hand, we have seen an increased trend of activity in litigation. Going forward, the data we collect will continue to reflect the ever-changing economic conditions.

Lexon-insured practices generated around $2.3 billion of GFI in 2019, having grown over 4% year on year. We expect there will be a substantial retreat from this growth rate going forward due to the COVID-19 pandemic.

I am always interested in receiving feedback, so if you have any issues or concerns, please feel free to drop me a line at michael.young@lexoninsurance.com.au.

Michael Young
CEO

The comparative size of practice areas from 2016 to 2019



Introduction of general cyber deterrent excess from 1 July 2020

The profession's claims experience has been materially improved by the outstanding and internationally recognised risk management work our insured practices have undertaken since late 2007.

The emergence of cyber claims and the significant proportion of our portfolio (by value) that they now comprise means we need to take further steps to keep the profession's claims experience as low as possible. Cyber criminals have been increasing their efforts to take advantage of you and your clients during the COVID-19 pandemic.

A cyber-related deterrent excess (an additional amount equal to twice the standard excess up to a maximum of an additional $40,000) has been in place for conveyancing matters since December 2017. It applies when we receive a claim which could have been prevented if some simple prescribed steps had been undertaken by a practice. From 1 July 2020, Lexon will be extending this concept *across* ***all practice areas***.

Final terms of this general cyber deterrent excess will be published on Lexon's website, but key aspects address the following:

- Where an amount of more than $10,000 has been transferred to the wrong bank account **by you** and those wrong bank account details were contained in an electronic communication (including email, fax, social media, text, instant messaging, chat app) and your practice did not first contact the apparent sender by **previously verified** contact details (a telephone number) to confirm the authenticity of the communication.
- Where an amount of more than $10,000 has been transferred to the wrong bank account **by someone else** (for example, your client) and you failed at the initiation of the instructions to alert the client and any other relevant transferring parties in writing that they should not act on any communication from you requesting a transfer of funds without first making contact by **previously verified** contact details (a telephone number) to confirm the authenticity of the communication.

Lexon has already developed tools to assist practices in complying with these requirements.

IT system checks

With work from home the new norm during COVID-19, we recommend taking IT advice now about your systems and devices. Our Cyber Consultant, Cameron McCollum, has prepared Lexon's Cyber Security – IT Systems LastCheck and 8 Steps to Enhance your Cyber Security while working remotely, both of which list items to take advice on.

The LastCheck is based upon Cameron's extensive analysis of the cyber claims we have seen. Whilst these system-related issues are not currently part of the new deterrent excess regime, they may reduce the risk of having to rely on the measures above by preventing your practice being penetrated in the first place.

Did you know?

- Lexon works closely with Queensland Law Society, Law Foundation Queensland and Solicitor Assist to ensure that practitioners who find themselves at risk of claim events are provided with practical support to see them through times of crisis.

  On a number of occasions Lexon, at its own cost, has arranged for independent assistance for practices through our free HelpNow Program where (by way of example) a practitioner may have been unexpectedly incapacitated or otherwise is unable to manage potential claim events. If you find yourself in such a situation, please contact us to see what help may be available to you.

  If you are a sole principal practice and would like to have access to the HelpNow program in the event of an emergency, please make sure you have in place an enduring power of attorney with a financial power or, if an ILP, an attorney for the entity. Otherwise, Lexon is unable to deploy its HelpNow program unless and until a receiver is first appointed to the practice.
- Acquiring another practice or taking on a principal or legal staff from another practice may activate the 'Prior Practice Rule'. This can affect how your levies are calculated and could mean you assume responsibility for the acquired entity's claims performance. You can find out what to look out for and ways to minimise this risk – like using the Acquisition Endorsement – in an information sheet available on the Lexon website (lexoninsurance.com.au).

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Prevention is better than cure:

Health justice partnerships in Queensland

BY MONICA TAYLOR

The emergence of health justice partnerships across Australia in recent years reveals great potential for integrated service system responses to clients' intertwined legal and health problems.

A health justice partnership (HJP) is a model of service delivery that embeds legal help into health care settings such as a hospital or a community-based medical centre.

At first glance, immersing lawyers within existing health structures may challenge a legal practitioner's view about the primacy of a person's legal issue. However research is clear that most people do not recognise that they have a legal problem and are more likely to consult a doctor or health worker instead of a lawyer when things go awry.[1]

HJPs increase access to justice by reaching vulnerable population groups that would be very unlikely to seek out legal help. There is a growing body of evidence that shows health outcomes improve when a patient's legal problems are addressed; HJPs are therefore a powerful tool to address health inequities shaped by the social determinants of health.[2]

HJPs especially support people experiencing family violence, the elderly at risk of elder abuse, people living in poverty, Indigenous peoples and people with culturally and linguistically diverse backgrounds.

HJPs in Australia

Inspired by the medical-legal partnership movement in the United States, HJPs started to appear in the Australian context in the early 2000s. In 2016, a national centre for excellence for health justice partnerships, known as Health Justice Australia, was founded. Its role is to support the expansion and effectiveness of health justice partnerships at a national level through research, mentoring and driving systems change.[3]

A 2018 census conducted by Health Justice Australia found that Queensland currently has seven HJPs in operation, five in major cities and two in outer regional areas. New South Wales and Victoria dominate the Australian HJP landscape; together these two states operate 58 partnerships in urban and regional settings.[4]

Across the country, the legal partners connected to HJPs are almost exclusively public legal sector organisations.[5] Community legal centres and state-based legal aid commissions are leading efforts to implement and sustain HJPs. Every Queensland-based HJP has a community legal centre as its legal service partner.

Community legal centres are ideally placed to deliver these services because they have a deep knowledge of multidisciplinary service collaboration and a holistic, trauma-informed approach to legal practice.

HJPs in Queensland

A quick summary of HJPs across Queensland demonstrates the diversity of approach:

- A HJP pioneer, LawRight, currently operates three HJPs throughout Queensland; one at the Mater Hospital (Young Adult Health Centre) in South Brisbane, one in Cairns in partnership with the Wuchopperen Health Service, and one with Footprints in Brisbane Inc., a non-profit community-based health and disability service. LawRight HJPs assist clients with civil law matters including debt, guardianship and administration, mental health law, discrimination and other civil law problems. Wuchopperen is community-controlled Aboriginal and Torres Strait Islander health service and all clients identify as Indigenous. Collaboration between service stakeholders has resulted in the creation of Law Yarn, a unique diagnostic tool to help clients identify legal problems in pictorial form using Indigenous imagery and artwork.
- The Central Queensland Community Legal Centre (CQCLC) in Rockhampton delivers the Central Highlands Health Justice Partnership with the Emerald Medical Clinic. The HJP lawyer lives in Emerald and is embedded within that local community, reflecting the CQCLC's commitment to localised support for the Central Queensland region. Patients of the clinic are able to access free and confidential legal advice in most areas of law, with social work support delivered by a CQCLC project officer. Community Legal Centres Queensland will soon launch a new HJP in the Central Queensland region of Blackwater.
- Women's Legal Service Queensland partners with Logan Hospital, Redlands Hospital, QEII Jubilee Hospital, Princess Alexandra Hospital (Gold Coast) and the Royal Brisbane and Women's Hospital. It also services Caboolture and Redcliffe hospitals, and a solicitor regularly visits the Young Mothers for Young Women program run by Micah Projects in partnership with the Mater Mothers Hospital, South Brisbane. The services provide legal advice to women who are victims of domestic violence about family law, DV or child protection matters. The legal appointments are generally coordinated by hospital social workers.

- Queensland's newest community legal centre, the Institute for Indigenous Urban Health (IUIH) operates a fully embedded HJP that takes internal referrals from its multidisciplinary primary health clinics throughout south-east Queensland. The service delivers culturally safe legal advice and support in most areas of law with a focus on family law, domestic violence, child protection and civil law matters including housing and tenancy, fines/debt and education.
- In 2018, *Caxton Legal Centre* partnered with Metro South Health to co-design and co-deliver the Older Persons Advocacy and Legal Service (OPALS) for the purposes of training health professionals to identify older persons at risk of, or experiencing, elder abuse, and providing those identified with specialised legal and social support services. This multidisciplinary, early intervention service is delivered by a Caxton lawyer based at the Princess Alexandra Hospital working with hospital social workers and a Caxton social worker based in the community.

Looking to the future

Health justice partnerships are relatively new in Queensland and there is still a lot of learning to be gained about ways to optimise service provision. Developing sustainable partnerships necessitates long-term investment in relationships, all of which takes time, energy and resources.

Getting to know the hospital or health service with whom you wish to partner also requires mutual respect for differing professional perspectives. Increasing the legal literacy of health workers is a common feature of many HJPs and often a key to their success. Regular evaluations of the impact of HJPs are important not only for accountability, but to demonstrate service effectiveness.[6]

Perhaps now more than ever, COVID-19 and the ongoing health impacts of climate change justify the importance of HJPs in addressing the multifaceted health and legal needs of vulnerable Queenslanders.

Resourcing the legal assistance sector in Queensland to continue to deliver HJPs and plan for new services in the future will reveal what we all know to be true; that prevention really is better than cure.

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

Notes

1 Christine Coumarelos et.al, (2012) 'Legal Australia-Wide Survey: Legal need in Australia.' Law and Justice Foundation of NSW, Sydney.

2 The World Health Organisation defines social determinants of health as, "the conditions in which people are born, grow, work, live and age, and the wider set of forces and systems shaping the conditions of daily life. These forces and systems include economic policies and systems, development agendas, social norms, social policies and political systems.", WHO, 'Social Determinants of Health', who.int/social_determinants/en.

3 healthjustice.org.au.

4 Suzie Forell and Marie Nagy (2019) *Joining the dots: 2018 Census of the Australian Health Justice Landscape*, Health Justice Australia, Sydney.

5 The one notable private law firm exception is Maurice Blackburn Lawyers in Melbourne, which partners with the Alfred Hospital and the Michael Kirby Centre for Public Health and Human Rights to deliver the HeLP Patient Legal Clinic, mauriceblackburn.com.au/blog/2016/february/01/patients-get-a-helping-hand.

6 For example, see the 18-month evaluation of the LawRight Wuchopperen Health Justice Partnership and Law Yarn: lawright.org.au/_dbase_upl/Final_Independent_evaluation_Wuchopperen_HJP_2019.pdf.

Preparing an affidavit (part 3)

BY KYLIE DOWNES QC

This article considers particular rules of evidence which apply to affidavit evidence to be adduced in a trial in the state courts.

Evidence relevant to credit of opponent's witness

As a general rule and in order to be admissible, the proposed evidence in a trial affidavit must be relevant. That means it must tend to prove or disprove a fact in issue on the pleadings.

An exception to this general rule arises when a witness' evidence is aimed at discrediting another witness.

For example, if the evidence of another party's witness is inconsistent with an earlier statement made by that witness, then a witness can give evidence of that earlier inconsistent statement if certain conditions are met.

Section 18 *Evidence Act 1977* (Qld) (EA) permits such evidence to be tendered to encourage the court to infer that the witness who made the prior inconsistent statement is unreliable or ought not to be believed. Section 18 provides: "If a witness upon cross-examination as to a former statement made by the witness relative to the subject matter of the proceeding and inconsistent with the present testimony of the witness does not distinctly admit that the witness has made such statement, proof may be given that the witness did in fact make it."

Other examples of evidence which might, depending on the circumstances, be admissible to discredit a witness includes evidence:

- that the witness has been convicted of a criminal offence,[1] especially one involving fraud, or has otherwise engaged in discreditable acts
- that the witness has been disbelieved on oath in another case
- of facts which tend to demonstrate bias, if that is not obvious from the witness' connection with the parties
- that the witness has some physical impediment which would render their evidence unreliable.

Rebutting allegation of fabrication of testimony

The general rule is that a witness cannot give evidence of what they said on a previous occasion to show that their present evidence is consistent with the earlier statement and they ought to be believed on oath.

If, however, it is suggested to your witness under cross-examination that they have fabricated or invented their testimony, or that it is a construction subsequent to the events in question, then evidence of an earlier consistent statement made by your witness may be admissible.

The prior consistent statement is not admitted as evidence of the truth of its contents but is admitted to seek to restore the credibility of your witness.

Exceptions to rule against hearsay

As a general rule, a witness cannot give evidence of any statement made out of court in the present proceedings and which is being tendered to prove the truth of the contents of the statement. There are three important exceptions to this rule:

Admissions against interest

By this evidence, a witness will have seen, heard or read something which came from the other party to the case (or their authorised agent) which either:

- supports your client's case, or
- contradicts or undermines the other party's case.

For example, A and B entered an oral contract but later disagreed about its terms. Before any court action was brought, A called C and said that he had a bad hangover on the day of his discussion with B, he did not have a good memory of their discussion and so B's version of what was discussed was "probably correct". C can give evidence of A's statement to him as evidence of the truth of its contents because it constitutes an admission against A's interest.

If you propose to rely on this exception to the hearsay rule, it is important to remember that the entire statement must be included in the affidavit.

Back to basics celebrates 20 years

The first Back to basics column, on drawing an affidavit, appeared in *Proctor* in June 2000.

Since then these popular columns have given new practitioners the key skills of day-to-day practice and refreshed more senior practitioners with a quick and easy guide to essential legal tasks.

Author Kylie Downes QC, a member of Northbank Chambers, has also compiled the columns into the *Back to Basics Book*, which has been adopted as a key text for various legal courses, with a third edition now in preparation.

Section 92 *Evidence Act 1977*

Section 92 EA permits documentary hearsay evidence to be admitted by a state court in civil proceedings if certain pre-requisites are met, namely:

1. Direct oral evidence of a fact would be admissible and the statement contained in the document tends to establish that fact, *and*
2. The maker of the statement in the document had personal knowledge of the matters dealt with by the statement. Personal knowledge of the maker of the statement may need to be established by other evidence such as evidence of the person's involvement in the matters referred to in the document. For example, the statement may refer to the content of oral statements at a meeting which the maker of the statement attended. Evidence could be adduced from another attendee at the meeting to prove that the maker of the statement was present at the meeting, *and*
3. The maker of the statement is called as a witness in the proceeding, *or*
4. One of the requirements of section 92(2) is met.

The requirements of section 92(2) include that the maker of the statement is dead or is unfit to give evidence by reason of bodily or mental condition; the maker of the statement is not in Queensland and it is not reasonably practicable to secure their attendance; the maker of the statement cannot with reasonable diligence be found or identified; or the court considers that undue expense or delay would be caused by requiring the maker of the statement to be called.

Now that witnesses are able to give remote evidence by telephone or by video-link, reliance on the fact of a witness being outside Queensland (without more) will usually not be sufficient to demonstrate that it is not reasonably practicable to have the maker of the statement give evidence in the trial. For similar reasons, undue expense or delay in calling a maker of a statement will be unlikely to be demonstrated if the maker of the statement is available to give evidence by telephone or video link.

Alternatively, section 92 EA permits documentary hearsay evidence to be admitted by a state court in civil proceedings if alternative pre-requisites are met, which are set out below. This is the most common aspect of section 92 EA which is relied upon in trials, and probably also the most misunderstood. As will be seen, an assertion from the bar table that the document is a 'business record' will not suffice. The elements are as follows:

1. Direct oral evidence of a fact would be admissible and the statement contained in the document tends to establish that fact, *and*
2. The document is or forms part of a record relating to any undertaking *and* made in the course of that undertaking, *and*

   Section 3 of the EA defines 'undertaking' as including public administration and any business, profession, occupation, calling, trade or undertaking.

   The critical issue will be whether the document forms part of the 'record' of the undertaking. There is no definition in the EA. Should you wish to rely on this part of section 92 to tender the document, you should locate authority which supports the recognition of the relevant document as being a record within the meaning of section 92. You should also prepare admissible evidence which shows that this requirement is satisfied.
3. The document was made from information supplied (directly or indirectly) by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information which they supplied. Again, evidence will need to be prepared and tendered to support this element. For example, if it was part of a person's role in an organisation to gather certain information and record it in the financial accounts of the organisation, then it may reasonably be supposed that the person had personal knowledge of the information which they recorded, *and*
5. The supplier of the information is called as a witness in the proceeding, *or*
6. One of the requirements of section 92(2) is met.

The requirements of section 92(2) include that the supplier of the information is dead or is unfit to give evidence by reason of bodily or mental condition; the supplier of the information is not in Queensland and it is not reasonably practicable to secure their attendance; the supplier of the information cannot with reasonable diligence be found or identified; or the court considers that undue expense or delay would be caused by requiring the supplier of the information to be called.

Section 1305 Corporations Act

This permits the admission into evidence of a book kept by a body corporate under a requirement of the *Corporations Act 2001* (Cth) (CA) and "is prima facie evidence of any matter stated or recorded in the book".

The term 'books' has a wide definition under section 9 of the CA. It includes a register, any other record of information as well as financial reports or financial records, however compiled, recorded or stored.

The more critical requirement is that the book must be kept by the body corporate under a requirement of the CA. Before seeking to tender a document pursuant to section 1305, you should satisfy yourself that the document is 'required to be kept' under a requirement of the CA and what that requirement is. It is not enough that the document was in fact kept; there must be a legislative requirement to do so.

The most common requirement which is relied on is section 286 of the CA, which sets out the obligation on companies to keep certain 'written financial records'.

Section 286 requires that companies keep written financial records that:

a. correctly record and explain its transactions and financial position and performance, and
b. would enable true and fair financial statements to be prepared and audited.

Section 9 defines 'financial records' as including (amongst other things) invoices, receipts, working papers and other documents needed to explain the methods by which financial statements are made up and adjustments to be made in preparing financial statements.

Section 1305(2) of the Act provides that if a book 'purports' to be one kept by a body corporate, it is taken to be a book kept as mentioned in section 1305(1), unless the contrary is proved.

However, that does not mean that any time a document is tendered on that basis, the court will accept that section 1305(1) is satisfied. Consideration will need to be given to adducing evidence to demonstrate that the book was kept by the body corporate as a matter of fact.

Conclusion

When proposing to include evidence in an affidavit which falls within an exception to an exclusionary rule of evidence, consideration will need to be given as to why it is said that the exception operates and how to establish that it operates, including by way of additional evidence if required.

If it is decided that an exception applies, it is recommended that ancillary evidence and any relevant cases and copies of any relevant sections of legislation be prepared and taken to court in readiness for an argument about admissibility, should one arise.

Kylie Downes QC is a member of Northbank Chambers and the editorial committee of *Proctor*.

Note

[1] See section 16 *Evidence Act 1977*, which permits proof of the conviction if denied.

In conversation with Angus Murray

BY SHEETAL DEO

Humanising the Queensland legal profession; one member at a time. A regular profile of members shaping our future profession.

> **"When things do not go your way, remember that every challenge — every adversity — contains within it the seeds of opportunity and growth."**
>
> Roy T. Bennett, author of *The Light in the Heart*

The subject of this month's feature is no stranger to the profession; particularly in relation to legal disruption, innovation and the future of legal practice.

Which is why, amidst the challenges and adversity facing practitioners, I spoke with Angus Murray.

Angus Murray is a partner at Irish Bentley Lawyers, a sessional academic at the University of Southern Queensland (teaching LAW3481 – Emerging Legal Tech Practice) and the Queensland University of Technology (teaching LWN409 – Trade Mark Practice), the Junior Vice President of the Queensland Council for Civil Liberties, the Chair of Electronic Frontiers Australia's Policy and Research Committee and a member of the Queensland Law Society Innovation Committee, but perhaps most famously – a co-founder and director of The Legal Forecast.

SD: Angus, thank you for agreeing to be the subject of this month's feature! You have a fair bit of involvement with QLS and the wider legal profession; would you mind telling our readers about yourself and your journey?

AM: I appreciate your invitation and it's been, and continues to be, an interesting journey! I credit my journey into the legal profession to a conversation I had with my late-grandmother in England when I was 12 years old. Although time may have distorted the memory of the conversation, the essence was that a career where I could engage in meaningful argument and affect change appealed to me, and I still stand working towards that goal.

As the first step in the journey to where I am currently, I enrolled in the first cohort of the University of Southern Queensland (USQ) in Toowoomba and I was fortunate to be able to be involved with the foundation of the USQ Law Society. During my undergraduate studies, I worked as a paralegal at Cleary & Lee Solicitors in Toowoomba, which gave me an earlier insight into legal practice and contextualised much of my undergraduate degree.

When I graduated my undergraduate degree, I took the bold step of moving to Stockholm, Sweden, to complete a Master of European Intellectual Property Law at Stockholm University, which was, in part, inspired by a passion for intellectual property law found in my Capstone Thesis at USQ.

I was one of 30 students in the masters program, with colleagues in the program being members the Swedish Supreme Court and European barristers.

Suffice to say, it was initially a very daunting place to be; however, I was fortunate to find incredible and lifelong friendships with my European colleagues and receive a high distinction award for my thesis entitled 'Copyright Enforcement for Internet Based Material Infringements and the Personal Right of Privacy: A Comparative Study Between Australia and the European Union Member States, with a Focus on the United Kingdom'.

After completing the masters, I returned to Australia with a keen interest in privacy and broader human rights law and a somewhat unusual background to be applying for graduate positions.

Although the difficulty with finding an open door into the legal profession was disheartening, I kept passion and motivation alive, and joined Electronic Frontiers Australia (EFA) to continue to have an outlet for academic and policy writing. I was elected to the board of EFA in 2015 and served on the board for two years; and I remain the Chair of the EFA Policy Committee.

I was also fortunate to be introduced to the Queensland Council for Civil Liberties (QCCL) by members of EFA based in Queensland and joined that organisation. I have served as a vice president of the QCCL since 2016. EFA and QCCL have both given me the opportunity to make submissions into parliamentary inquiries and give evidence on those submissions to parliamentary and Senate hearings across a broad range of human rights-related issues. I am deeply thankful for the large number of incredible friends and mentors I have made in connection to those organisations.

In relation to professional practice, I joined Irish Bentley Lawyers in 2015 and have steadily worked from solicitor to partner at that firm practising in intellectual property, tax and insolvency litigation. This growth has been possible because of a large and supportive network as well as a team that work together as friends.

In many ways, the struggle to find an open door into legal practice has been one of the biggest benefits to my career to date, as this struggle found me connected with a group of like-minded early career lawyers and, from that basis, The Legal Forecast was formed as a not-for-profit organisation focused on facilitating nexuses between the study and practice of law with a focus on technology and an underlying value of mental wellness within the profession.

I am confident that I would not be the person I am today without the incredible journey that I have been fortunate to take with my colleagues at The Legal Forecast. I am also fortunate that this passion drew me to the Queensland Law Society's Innovation Committee, where I have found myself surrounded by incredible and insightful people who are equally driven to make the legal profession the best that it can be.

In 2019, I was offered the opportunity to consolidate some of my learning into the co-development and lecturing of LAW3418

> **"For those joining the profession, remember what got you through tiring exams and late nights studying because that is likely to be the source of passion that will continue to motivate."**
>
> Angus Murray

– Emerging Legal Tech and Practice at USQ and to guest lecture in intellectual property law at QUT. It is, in my view, particularly humbling to be able to give back to students and to have, albeit in small part, the ability to have a role in the education of future lawyers as I am certain that we have new and exciting challenges constantly on the horizon.

SD: Where would you like to see the legal profession in five year or 10 years' time?

AM: I would like to see an increased focus on the importance of ongoing legal education and a stronger focus on human rights implications associated with the use of technology. There are great opportunities ahead and I would like to see the passionate curiosity of legal practitioners ensure that these opportunities are reached to their maximum with careful navigation away from negative implications.

SD: What do you think we can do, as a profession, to help realise that five-10 year vision?

AM: I strongly believe that a fundamental grounding in ethics and reinforcement of the importance of a passion for the practice of law will play a big role in the future of the legal profession.

SD: What would be your advice to someone who is just joining the profession?

AM: In my opinion, law is an incredibly rewarding career when it is approached with passion. For those joining the profession, remember what got you through tiring exams and late nights studying because that is likely to be the source of passion that will continue to motivate. I strongly advise that this is met with equal measure of finding people around you that share that passion, particularly if that can be found in mentor figures. There is nothing more powerful than a passionate network and the ability to draw on others when you need assistance and to provide assistance to others when you can.

SD: What are the benefits of joining associations such as QLS or The Legal Forecast?

AM: The biggest benefit of associations such as the QLS and The Legal Forecast is the ability to find kindred spirits and make lifelong friends.

The legal profession can be isolating and the stresses of practice can feel unbearable; however, these issues are felt by all of us and the advantage of joining an organisation is that issues can be discussed, banter can be enjoyed and passion can be sustained. This could be described as a 'professional network'; however, I believe that organisations that sit in the heart of the profession offer so much more and I am sure that those who are contributing to these associations will understand and those that don't should join!

Angus has spent his career not only practising the black letter of the law, but planting seeds of opportunity and growth for the future of the legal profession. His journey and commitment to professional and practice development is a timely reminder to all of us during these times of adversity to seek refuge in education because it is only when we know better that we can do better.

Visit the **QLS Shop** for continuing professional development resources, updated weekly.

Sheetal Deo is Queensland Law Society Relationship Manager – Future Lawyers, Future Leaders.

If you, or someone you know, ought to be featured in Lawyers of Queensland, please email s.deo@qls.com.au.

Improving your law library's collections

WITH DAVID BRATCHFORD, SUPREME COURT LIBRARIAN

As Queensland's leading law library, we are extremely proud of our collections, which we've been building and looking after since our foundation in 1862.

With more than 90,000 distinct titles in our physical spaces as well as our extensive online resources and heritage items, taking care of our collections is no mean feat. To help with this important work, we recently welcomed our new Principal Librarian Collections, Katie Haden, to the library.

Katie brings a wealth of knowledge and experience in the library sector and collections management to SCLQ and we are thrilled to have her on board. We interrupted her busy schedule to enable her to share with you more about her role and the role of the library Collections team.

What did you do before joining Supreme Court Library Queensland?

KH: I was the National Systems Librarian at the Attorney-General's Department Library, based in Melbourne at the Australian Government Solicitor. Before that I was a library systems and collections discovery support specialist at OCLC, which is a large global vendor in the library sector.

What does the collections team do, and why is it so important to the library and library users?

KH: We support knowledge discovery by delivering innovative collection solutions for Queensland's law library. We specialise in creating, maintaining, and providing access to the library collections, encompassing the main books and periodicals collection (including law reports, journals, and legislation), our electronic collections, our CaseLaw collections (including the official unreported judgments of Queensland courts and tribunals and the Queensland Sentencing Information Service), and our legal heritage collection.

Our goal is to make our collections even more accessible and discoverable; we create metadata records, update digital links, publish judgments, digitise and restore heritage items, and purchase items that will be accessed by library users all over Queensland. It's a big job, but we are very passionate about it.

What are you and your team working on at the moment?

KH: We are looking to the future! We're in the middle of some big behind-the-scenes technical projects to help us describe and maintain our collections more efficiently, including a new library management system and catalogue – this will help our library community find resources more easily and even discover resources and information they might not have known about.

We're also planning to create more records and digitised objects for our heritage items so they are visible in our online catalogue and collections to enable them to be accessed and explored remotely.

Visit **catalogue.sclqld.org.au** to browse the collections.

Did you know?

We offer free training and support in accessing and using our collections. Contact us (**sclqld.org.au/contact-us**) for help with searching the library catalogue and using the most relevant resources for your legal research.

The ongoing shame of deaths in custody

After 29 years, nothing has changed

BY JOSH APANUI

According to Sisters Inside CEO Debbie Kilroy OAM, it is "beyond outrageous" that more than 400 Aboriginal people have died in custody since the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) report was tabled on 15 April 1991.

Given a recent incident in the Northern Territory at the remote Yuendumu community, and another incident more recently in Victoria, the apparent government apathy for Indigenous Australians is concerning, and it appears that governments are reluctant to adequately address the Royal Commission's report and to further implement the majority of the recommendations.

Debbie said the ongoing narrative of Indigenous deaths in police custody could be largely accounted for by the failure of successive governments to implement the majority of the recommendations. She said this reflected the deep racism underpinning our dominant colonial culture.

Arguably, this deep racism lies in the heart of institutionalisation. The general public and many practitioners may not be aware of the ongoing mistreatment of inmates while being incarcerated, particularly First Nations women.

"The general public is largely unaware of realities such as strip-searching of women with a history of sexual assault; the 'replacement' of violent partners by violent male officers with similar arbitrary power over women prisoners' lives; and use of solitary confinement (against all medical advice) for people who are suicidal," Debbie said.

"Potential allies may be shocked into action by a campaign to require Australia to meet its human rights obligations in the treatment of women prisoners…this means engaging with socially-conscious non-First Nations people and giving them the understanding and means to contribute to social change."

However, this should not take authority away from Indigenous leadership or activism.

"Many want to contribute but don't know how," she said.

To understand potential solutions, it is necessary to have at least a basic understanding of relevant social factors and, just as importantly, a perspective on solutions that are sustainable and economically viable.

For Debbie, the solution is "to depower police and abolish prisons, although this is clearly a long-term goal".

Among other things, education is essential in helping the general community to understand the realities of incarceration, particularly for First Nations peoples. Debbie says that incarceration should be the last option, especially for minor, simple offences, because "imprisonment is in and of itself criminogenic…the more people are imprisoned, the more will return to prison".

She said the Queensland Productivity Commission had recently predicted that, on current trends, prisons alone would cost the Queensland economy $5.2 to $6.5 billion by 2025, excluding collateral costs for other social needs such as child protection or health systems. "The alternatives to imprisonment are significantly cheaper over both the short and long term," she said. "First Nations-controlled organisations should be the preferred designers and providers for all services to First Nations peoples.

"Services designed and provided by governments and other colonial organisations have been a demonstrable and abject failure, leaving vulnerable First Nations individuals and communities worse off. First Nations organisations must be allowed time to repair this damage, learn through experiences and experiment (including having failures), and progressively develop viable models of service for their own communities.

"Current models of tendering and service which emphasise short term 'outcomes' are totally unsuited to First Nations communities – funding should be highly flexible and the direction of services under control of the community, rather than funding providers."

Queensland Law Society encourages members of the profession to participate and contribute, becoming more culturally conscious and a part of the dialogue for positive change and just solutions.

For further developments in this area, see qls.com.au/rap ⇔.

Joshua Apanui is the RAP Coordinator at Queensland Law Society under a First Nations cadetship.

COVID, capacity challenges, and costs

WITH CHRISTINE SMYTH

Home detention gives us much to contemplate about COVID-19, nothing more so than our mortality in the face of a life-threatening pandemic.

With that, it seems there has been a rush by the general community to make wills.[2] However, the combination of section 10(3) Su*ccession Act 1981*, the uncertainty around what constitutes presence,[3] COVID-19 social distancing laws,[4] and lack of available witnesses[5] have conjured up circumstances in which a cauldron of conspiracies can thrive.

None more so than those around the validity of wills undertaken during this pandemic, particularly where they do not comply with the strict execution provisions. This is despite attempted innovations, such as law firm carparks becoming the site for drive-by executions[6] and the Queensland Government finally passing laws to provide a limited form of witnessing by audio-visual means.[7]

Unlike the general law,[8] wills do not carry a presumption of mental capacity. In any probate application, the propounder of the will carries the onus of proof.[9] However, where a will is rational on its face[10] and duly executed,[11] the presumption of capacity is in favour of the propounder.[12] Where it is not duly executed, then the onus shifts back. And it is at that point we might expect the cauldron to bubble over.

However, before your client(s) toil over their troubles and rush to litigate, they might pause and reflect on the decision of *The Estate of Milan Zlatevski; Geroska v Zlatevski (No.2)* [2020] NSWSC 388. That matter addresses the issue of costs arising from the substantive contested probate application.[13]

In the substantive matter, her Honour Henry J found the testator had testamentary capacity, granted probate of the will in solemn form and dismissed the cross claim by the deceased's son (the defendant),[14] ordering that he pay the costs of the proceedings.[15] The son, not dissuaded by his loss, then made an application to vary the costs order on the basis that his challenge to testamentary capacity was as a result of "the deceased's conduct and it was reasonable for him to have investigated the deceased's will".[16]

> **"Fair is foul, and foul is fair."**
>
> The witches' philosophy of life.[1]

The son contended that it was reasonable for him to raise the substantive challenge because of his father's conduct. First he contended that statements made by the testator to his solicitor about various transactions were based on delusions.[17] The court rejected that contention, distinguishing between delusion and mistaken belief.[18] Second, the son contended the deceased's action of excluding "his only son, from his estate and with whom the deceased lived with for 25 years"[19] was sufficient to justify the application.

Her Honour rejected both propositions[20] and dismissed his application for costs. In doing so she set out the following analysis of the law in relation to costs in probate litigation:

1. "The general rules applicable to the award of costs apply to probate litigation, as they do to other contested litigation. This means that the Court has a broad discretion to award costs and, ordinarily, orders for costs should 'follow the event', with the consequence that the unsuccessful party is ordered to pay the successful party's costs: *Civil Procedure Act 2005* (NSW), s98; *Uniform Civil Procedure Rules 2005* (NSW), r 42.1; *Walker v Harwood* [2017] NSWCA 228 at [52] per Macfarlan JA."[21]
2. "Two exceptions to the general rule that costs follow the event have been recognised to apply in probate litigation, being:
   (a) where the testator has, or those interested in the residue have, been the cause of litigation, the costs of the party who unsuccessfully challenged the will may be paid out of the estate; and
   (b) if the circumstances reasonably called for an investigation of the will, the costs may be left to be borne by those who incurred them.

   See: *Re the Estate of Hodges*; *Shorter v Hodges* (1988) 14 NSWLR 698 at 709; *Perpetual Trustee Co Ltd v Baker* [1999] NSWCA 244 at [13]-[14]; *Shorten v Shorten (No.2)* [2003] NSWCA 60 at [14]-[15]."[22]
3. "A case does not fall within the first exceptional category merely because a party raises a triable issue as to a deceased's testamentary capacity: *Shorten v Shorten (No.2)* [2003] NSWCA 60 at [27]."[23]

   Relevantly, "[i]n cases where a challenge is made to testamentary capacity, more than mental frailty or the incapacity of the deceased is required to say that the testator caused the litigation and that the case falls within the first exception: *King v Hudson (No.2)* [2009] NSWSC 1500 at [12]."[24]

The son relied on the quality of the instructions given to the testator's solicitor to evidence actions by the testator as justifying his cause to investigate.[25] He focused his submissions on the fact that the solicitor did not have a recollection of the instructions, independent of his notes, and that those notes did not record the solicitor administering a *Banks v Goodfellow* test, nor did the notes identify the solicitor adhering to 'best practice' in taking the instructions.[26]

On these points the court observed that there was no medical nor lay evidence of lack of capacity, no prior competing will, nor issues raising doubt as to the testator's capacity.[27] In fact, the court found that the solicitor's will notes were integral to assisting the court in coming to a view that the testator had capacity.[28] The detail in the notes and the cogency of the explanations recorded "demonstrated the deceased's testamentary capacity, rather than providing a reason for investigation of the will on that basis".[29] Ultimately, the son's challenge to the will was founded in the fairness or otherwise of the terms of the will[30] and he paid the costs for that exercise.

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Notes

1 William Shakespeare, *Macbeth*.
2 abc.net.au/news/2020-04-18/coronavirus-wills-finances/12155576.
3 Refer to my article in the May edition of *Proctor*, page 44.
4 health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/how-to-protect-yourself-and-others-from-coronavirus-covid-19/social-distancing-for-coronavirus-covid-19.
5 qld.gov.au/law/legal-mediation-and-justice-of-the-peace/about-justice-of-the-peace/search-for-your-nearest-jp-or-cdec.
6 ctpost.com/local/article/Attorneys-offer-drive-up-legal-service-for-15180636.php.
7 parliament.qld.gov.au/documents/tableOffice/TabledPapers/2020/5620T636.pdf, see section 9 and legislation.qld.gov.au/view/html/asmade/sl-2020-0072.
8 *Gibbons v Wright* [1954] HCA 17; 919540 91 CLR 423.
9 *Bailey v Bailey* [1924] HCA 21, (1924) 34 CLR 558, 570-572. *Re Hodges; Shorter v Rogers* (1988) 14 NSWLR 698, 704-707; *Worth v Clashom* [1952] HCA 67; (1952) 86 CLR 439, 453.
10 *Gomall v Masen* (1887) 12 PD 142; *Bailey v Bailey* [1924] HCA 21, (1924) 34 CLR 558; *Bull v Fulton* [1942] HCA 13; *Fisher v Kay* [2010] WASC 160, [83]; *Tobin v Ezekiel* [2012] NSWCA 285; (2012) 83 NSWLR 757,[44]-[45]; *Veall v Veall* [2015] WSCA 60, [168]; *Power v Smart* [2018] WASC 168, [604] *The Public Trustee v Nezmeskal* [2018] WASC 393, [44].
11 *Wheatley v Edgar* [2003] WASC 118; *Wade v Frost* [2014] SASC 162; *Tsagouris v Bellairs* [2010] SASC 147
12 *Shorten v Shorten* [2002] NSWSCA 73, [54].
13 *The Estate of Milan Zlatevski; Geroska v Zlatevski* [2020] NSWSC 250.
14 At [2].
15 At [3].
16 At [4].
17 At [11].
18 See *The Estate of Milan Zlatevski; Geroska v Zlatevski* [2020] NSWSC 250 at [17],[35],[81],[83],[112]-[148].
19 At [12].
20 At [13].
21 At [7]; for Queensland, the applicable rule is 681(1) of the *Uniform Civil Procedure Rules 1999*.
22 At [8].
23 At [9].
24 At [9].
25 At [11].
26 At [20]-[22].
27 At [20]-[28].
28 At [16]-[18] also at [28]-[29].
29 At [28].
30 At [32].

Elder abuse and the legal framework

QLS continues advocacy for reform

BY ANKE JOUBERT

The abuse and exploitation of older Queenslanders continues to be a significant concern for Queensland Law Society.

This year marks a decade since a joint report published by QLS and the Office of the Public Advocate shed light on the widespread under-reporting and lack of legal frameworks in civil and criminal law to support this community.

In the years since, QLS has worked with key stakeholders in continuing efforts to tackle elder abuse issues and the lack of legal frameworks capable of addressing them. The Society has worked tirelessly for more than decade advocating for law reform and raising awareness of senior citizens who suffer significantly from varying forms of abuse.

The 2010 report described the substantial impact of emotional distress, physical trauma, sexual, financial and social abuse, and neglect on the elder community and how their vulnerability was increased because of variations and changes in levels of capacity.

At the end of 2019, about 15.7% of Queenslanders were over 65.[1] By 2056, people over 65 are projected to make up quarter of the population,[2] a significant increase in a relatively short period of time. QLS has argued that the legal system could be a vehicle for change in leading a response to address the issues and the abuses which would significantly impact Australian society.

In considering the civil and criminal elements of existing laws, we have argued that the elimination of aggravated, punitive and exemplary damages from section 52 of the *Civil Liability Act 2003* (Qld) removed the largest components of damages that might ordinarily have been awarded to an older person.

While acknowledging the criminal law's recognition of age as an aggravating factor, we questioned why, if older people are considered particularly vulnerable, they have not been provided with similar provisions such as those made for children and the intellectually impaired. In particular, the 2010 report argued that a review ought to be undertaken by government to properly consider the creation of special offences to criminalise elder abuse, neglect or exploitation.

QLS also discussed the protective function of the guardianship regime established under the *Powers of Attorney Act 1998* and *Guardianship and Administration Act 2000*. We acknowledged that this regime was a shift in the right direction, however, even with the regime in place, but without requirements that enduring powers of attorneys (EPOAs) be registered and monitored, there is an absence of accountability mechanisms to monitor the activities of attorneys.

Related to this, we have also brought attention to the ways in which attorneys and family members take advantage of the finances of an older person, particularly in cases where dementia and other memory loss-inducing illnesses are present. Other key issues raised were the limitations of applying for domestic violence protection orders and peace and good behaviour orders due to these orders not applying to common categories of elder abuse or formal care relationships.

The report also discussed the significant, and welcome implementation of the aged care complaints regime. However, the Society noted that the complaints investigation scheme only applied to government-funded aged care facilities, hindering access to the critical function of the regime for many older persons.

In comparing the legislative regimes of several international jurisdictions, the report set out the benefits of creating discrete criminal offences and penalties intended to address elder abuse in its various forms. It argued that, although Queensland legislation and the common law provides some protection, the law ultimately fails to adequately protect against elder abuse and the vulnerability of older persons where there are circumstances such as dependence, frailty, immobility and impaired capacity.

Since the report's publication QLS and members of its Elder Law Committee, Succession Law Committee, and Health and Disability Committee have tirelessly advocated for amendments to key legislation and policies with the intention of improving legal protections for older persons.

In recent years these efforts have been assisted with the forming of a specialised working group to crystalise the Society's position on criminal justice aspects of the issue, with members of the Criminal Law Committee and Domestic and Family Violence Committee working alongside these committees.

The Society has played an integral role in education and awareness campaigns, one of which increased calls to the Elder Abuse Helpline through 2017 and 2018. We continue to work with the Elder Abuse Prevention Unit on these issues. After the Elder Law Committee and the Succession Law Committee's joint efforts on the Guardianship and Administration and Other Legislation Amendment Bill 2017, the amendments passed in 2018 included allowing the Queensland Public Guardian to investigate potential elder abuses after the death of the adult, which is a further significant step in the right direction.

These important changes demonstrate some of the progress made in Queensland, but as the 2010 report predicted, the scale of the problem continues to be revealed and it is clear that the current legal framework continues to fall short.

We note the recent introduction of discrete criminal offences in the ACT, and will scrutinise this proposal and supporting evidence in considering if a similar framework would be beneficial in Queensland. Additionally, a full review of the issues contained in the 2010 report is currently under way, led by a working group comprised of members and guests of the QLS Elder Law Committee in collaboration with the Office of Public Advocate.

The Society also acknowledges the increased vulnerability of this cohort during the COVID-19 pandemic to abuse, and how isolation requirements exacerbate the ability of perpetrators to continue abuse. The full impact of isolating requirements on persons affected by financial and physical abuses will not be known for some time. The current circumstances serve to emphasise the critical need to ensure that the laws in Queensland reflect widespread social values of protecting the most vulnerable in our society, including the elderly community.

Anke Joubert is a legal assistant with the Queensland Law Society legal policy team. This article was prepared under the supervision of senior policy solicitor Vanessa Krulin.

Notes

1 communities.qld.gov.au/resources/dcdss/seniors/population-fact-sheet.pdf.

2 abs.gov.au/AUSSTATS/abs@.nsf/Lookup/3222.0Main+Features12006%20to%202101?OpenDocument.

Court rejects return order over DV risk

WITH ROBERT GLADE-WRIGHT

Children – Hague child abduction convention – return order set aside

In *Walpole & Secretary, Department of Communities and Justice* [2020] FamCAFC 65 (25 March 2020), the Full Court (Ryan, Aldridge & Watts JJ) allowed the mother's appeal from Ainslie-Wallace J's order under the *Family Law (Child Abduction) Regulations 1986* (Cth) to return to New Zealand with her two children.

The parties cohabited in NZ where the father had many convictions for assault and other offences for which he was imprisoned. He was violent towards the mother, was imprisoned again for assault and in 2012 for contravening a domestic violence order. Their first child was born in 2016 in Australia. The father was deported in 2017 to NZ where their second child was born. In 2019 the mother was granted orders for the children to live with her, whereupon she and the children returned to Australia.

At the hearing of the father's application for a return order, Ainslie-Wallace J rejected the mother's case that there was a grave risk that a return would expose the children to harm or place them in an intolerable situation pursuant to reg.16(3)(b).

On appeal the Full Court set aside the return order. Ryan and Aldridge JJ (at [61]) adopted the dissenting judgment of Hale LJ in *TB v JB (Abduction: grave risk of harm)* [2001] 2 FLR 515:

"44. (…) Primary carers who have fled from abuse and maltreatment should not be expected to go back to it…We are now more conscious of the effects of such treatment, not only on the immediate victims but also on the children who witness it (…)

57. But it cannot be the policy of the Convention that children should be returned to a country where…they are at grave risk of harm, unless they can be adequately protected from that harm. Usually, of course, it is reasonable to expect that the home country will be able to provide such protection. (…)

59. …[But it] would require more than a simple protection order in New Zealand to guard the children against the risks involved here…"

Property – order set aside for denial of procedural fairness – unwarranted judicial interventions

In *Finch* [2020] FamCAFC 60 (20 March 2020) the Full Court (Ryan, Aldridge & Tree JJ) allowed the wife's appeal of a property order of the Federal Circuit Court. Her case was that excessive judicial intervention during the hearing denied her a fair trial. The Full Court agreed, at [14] eliciting from *Galea v Galea* (1990) 19 NSWLR 263 at 281-282 the following relevant legal principles:

"1. The test…is whether the excessive judicial questioning or pejorative comments have created a real danger that the trial was unfair. (…)

3. …whether such interventions indicate that a fair trial has been denied to a litigant because the judge has closed his or her mind to further persuasion, moved into counsel's shoes and 'into the perils of self-persuasion'. (…)

4. (…) It is important to draw a distinction between intervention which suggests that an opinion has been finally reached which could not be altered by further evidence or argument and one which is provisional, put forward to test the evidence and to invite further persuasion (…)"

The Full Court said ([24]-[25]):

"…[I]f one deducts the 35 minutes which the impugned interventions took from the length of the cross-examination of one hour and 59 minutes, there was a total of no more than 84 minutes of cross-examination, but it was interrupted by impugned interventions 45 times, thereby meaning that counsel, on average, was interrupted nearly every two minutes. (…)

[25] …Counsel for the wife was significantly impeded in conducting his cross-examination…"

In setting the order aside and remitting the case for rehearing, the Full Court said (from [59]):

"…[W]e conclude that [the] frequent…interventions were…wholly unwarranted, unduly personalised, demonstrated an unfortunate entry by the primary judge into the arena, and did not adequately undo the consequences of the very forceful initial expression of a 'preliminary view' by the primary judge. (…)

[66] (…) There is a real danger that the trial was therefore unfair, and hence miscarried."

Children – unilaterally relocating mother with infant ordered to return – unacceptable risk of harm rejected

In *Tandy & Eastman* [2020] FCCA 541 (19 February 2020) Judge Young heard the father's application for the return of a 20-month-old child (X) who was removed from Darwin to City B by the mother. The mother moved to Darwin to live with the father in 2015. They married in 2017, X was born in 2018 and they separated in 2019. The mother was the child's primary carer, although the father deposed that after separation he was spending "two or three nights a week with the child and some…times on the weekend" ([9]). The mother alleged family violence.

Judge Young said (from [23]):

"…[T]he mother has also annexed…SMS conversations between her and the father [in which] some of the father's language is boorish, immature and angry and might be interpreted as him reflecting his feelings about the parties' relationship breakdown. However, the language was not threatening.

[24] …I consider that the mother's family violence claims are not particularly forceful or compelling. (…)

[25] (…) While I accept that there have been unpleasant and distressing…verbal exchanges…I am not satisfied that there is any unacceptable risk of harm to the mother or to the child resulting from family violence."

In ordering the mother to return with the child to Darwin, Judge Young concluded (at [40]-[41]):

"I do not propose to make time orders. I think it is appropriate that the parties discuss this themselves. But I would expect…that the child spend substantial and significant time with the father. Whether the material would justify an equal time arrangement…I am far from sure about: again I would expect

the parties to discuss that. I don't have any concluded view about that and I haven't heard submissions.

…[T]here was some reference…to whether… the mother had a car, should she return to Darwin. …[I]f the mother is to return I expect her to be provided with a motor car, and a serviceable one at that."

Children – contraventions found proved but costs order made against applicant

In *Adam & Tan* [2019] FamCA 964 (13 December 2019) Carew J heard an application by a father against a mother alleging contraventions of a parenting order.

The mother and their 11-year-old child lived overseas. The father (who lived in Australia and communicated with the child by app on Sundays) alleged that the mother contravened the order by failing to facilitate telephone contact with him without reasonable excuse and not giving him 60 days' notice of the child's proposed travel from Country B (where the child lived) to Country D for a weekend. The mother emailed notice two hours before departure, despite obtaining a travel visa two weeks earlier. Those contraventions were found proved, but other contravention applications were dismissed.

Carew J said (from [40]):

"I have found that the mother contravened… the…order without reasonable excuse by failing to provide the required notice prior to travel. However, I do not intend to impose any sanction…The application by the father was, in my view, petty and unwarranted.

[41] I have found that the mother contravened…the…order without reasonable excuse on 2 June 2019 by failing to ensure the child was made available for the father's communication. However, I do not intend to impose any sanction. The mother was told by the child that the father had not called her (although she was mistaken) and, upon becoming aware of the father's difficulties with contacting the child, the mother has taken steps…to remedy the situation. The child now calls the father on Sundays…In my view this application was also petty and unwarranted. (…)

[43] The father has been substantially unsuccessful. While two counts…have been found in his favour I have not imposed any sanction or made any order. (…)

[44] The father also opposed the mother giving her evidence by electronic means, which required a separate hearing and the father's objection was dismissed. (…)

[47] I consider that an order for costs against the father is warranted in the circumstances of this case. …[T]he father has been at least substantially and arguably wholly unsuccessful in that not only were most of the alleged contraventions dismissed, the two that were established did not attract any sanction against the mother nor variation to the…order. I have found the father's conduct in relation to the proceedings to have been petty and unwarranted."

It was ordered that the father pay $2750 towards the mother's costs.

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

High Court and Federal Court casenotes

WITH DAVID KELSEY-SUGG AND DAN STAR QC

High Court

Criminal law – sexual offences against children – appeal against conviction by jury

Pell v The Queen [2020] HCA 12 (7 April 2020) concerned offences alleged to have been committed by the applicant, Mr Pell, in St Patrick's Cathedral, East Melbourne, in 1996 and 1997. The offences were allegedly committed after the celebration of Sunday solemn mass and within months of Mr Pell's installation as Archbishop of Melbourne. The victims of the alleged offending were two cathedral choirboys 'A' and 'B'.

Following a trial before the County Court of Victoria, Mr Pell was found guilty by a jury and convicted of one charge of sexual penetration of a child under 16 years and four charges of committing an act of indecency with or in the presence of a child under the age of 16 years. He appealed to the Court of Appeal of the Supreme Court of Victoria. That appeal, by majority, was dismissed.

In the High Court, Mr Pell contended that the Court of Appeal majority had erred in two ways. First, by finding that their belief in A required Mr Pell to establish that the offending was impossible in order to raise and leave a doubt. Second, by concluding that the jury verdicts were not unreasonable when there was a reasonable doubt as to the existence of any opportunity for the offending to have occurred.

The High Court unanimously accepted that the Court of Appeal majority erred. The High Court said that the unchallenged evidence of Mr Pell's movements after the mass, his always being accompanied within the cathedral, the timing of the alleged assaults and the priests' sacristy being a "hive of activity" after mass, gave rise to compounding improbabilities which required the jury to have entertained a doubt as to Mr Pell's guilt.

The High Court said that, notwithstanding that the jury found A to be a credible and reliable witness, the evidence as a whole was incapable of excluding a reasonable doubt as to Mr Pell's guilt. In relation to all five charges, there was a significant possibility that an innocent person had been convicted.

Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ jointly. Appeal from the Court of Appeal of the Supreme Court of Victoria allowed.

Evidence – admissibility – evidence obtained improperly or in contravention of Australian law

Kadir v The Queen; Grech v The Queen [2020] HCA 1 (5 February 2020) were two appeals concerning the admissibility in a criminal prosecution of evidence obtained unlawfully, and of evidence obtained as a result of that unlawfully obtained evidence. The appeals focused on s138(3)(h) of the *Evidence Act 1995* (NSW) which required the court to take into account the difficulty (if any) of obtaining evidence without impropriety or contravention of an Australian law.

The appellants, Mr Kadir and Ms Grech, were charged with acts of serious animal cruelty. At trial, the prosecution proposed to tender several video-recordings made unlawfully by a person acting on behalf of Animals Australia. As a result of those recordings, a search warrant for Mr Kadir's property was executed and material supportive of the prosecution case obtained. The same person who made the video-recordings also attended Mr Kadir's property and had conversations with him in which he allegedly made certain admissions.

The trial judge rejected all three categories of evidence. The respondent appealed to the Court of Criminal Appeal of the Supreme Court of New South Wales. That court found that the trial judge's assessment was flawed, and concluded that the first video-recording, the search warrant evidence and admissions were all admissible. The Court of Criminal Appeal assumed that proof that it would have been difficult to lawfully obtain the surveillance evidence was a factor which weighed in favour of admitting evidence obtained in deliberate defiance of the law.

The High Court said that the basis on which the parties and the courts below had approached s138(3)(h) was misconceived. Demonstration of the difficulty of obtaining evidence of animal cruelty lawfully did not weigh in favour of admitting evidence obtained in deliberate defiance of the law. The trial judge's conclusion that all of the surveillance evidence should be excluded was correct. The High Court determined the admissibility of the search warrant evidence and admissions itself, and concluded that the desirability of admitting that evidence outweighed the undesirability of admitting it.

Kiefel CJ, Bell, Keane, Nettle and Edelman JJ jointly. Appeal from the Court of Criminal Appeal of the Supreme Court of New South Wales allowed in part.

Customs and excise – customs tariff – tariff classification – whether Administrative Appeals Tribunal erred

Comptroller-General of Customs v Pharm-A-Care Laboratories Pty Ltd [2020] HCA 2 (5 February 2020) concerned the construction and application of provisions of the *Customs Tariff Act 1995* (Cth) (the Tariff Act), which imposes duties of customs on goods imported into Australia. A dispute arose between the Comptroller-General of Customs and Pharm-A-Care Laboratories Pty Ltd about the tariff classification of goods imported into Australia from Germany. The goods were referred to as "vitamin preparations" and "garcinia preparations".

At the Administrative Appeals Tribunal AAT), Pharm-A-Care contended that both preparations should be classified so as to be free of duty. The Comptroller-General contended that the preparations were to be classified so as to be dutiable at a rate of either 5%or 4%. The AAT, adopting the conventional two-staged approach to tariff classification explained in *Re Gissing and Collector of Customs* (1977) 1 ALD 144 (at 146), determined that both preparations were classifiable such that no duty was owed.

The Comptroller-General appealed to the Federal Court on numerous questions of law. The Full Court of the Federal Court dismissed the appeal. On appeal to the High Court, the Comptroller-General submitted that the AAT and the Full Court of the Federal Court had erred in their construction of the *Tariff Act*, specifically Note 1(a) to Chapter 30 of Sch 3. The High Court unanimously accepted that submission, but said that the AAT's misconstruction of Note 1(a) was immaterial to the decision which it made, which was otherwise correct in law.

Kiefel CJ, Bell, Gageler, Keane and Gordon JJ jointly. Appeal from the Full Court of the Federal Court of Australia dismissed.

Constitutional law – power of Commonwealth Parliament to make laws with respect to naturalisation and aliens

Love v Commonwealth of Australia; Thoms v Commonwealth of Australia [2020] HCA 3 (11 February 2020) were two special cases concerning s51(xix) of the Constitution, which provides that the Commonwealth Parliament has power to make laws "for the peace, order, and good government of the Commonwealth with respect to… naturalisation and aliens". The question for the High Court was whether an Aboriginal Australian, born overseas, without the statutory status of Australian citizenship and owing foreign allegiance, is an alien in Australia within the meaning of s51(xix).

The plaintiffs, Mr Love and Mr Thoms, were born overseas. They had both lived in Australia for substantial periods as holders of visas which permitted their residence but were subject to revocation. They had not sought Australian citizenship. Their visas were cancelled under s501(3A) of the *Migration Act 1958* (Cth) because they were each convicted of a criminal offence and sentenced to a term of imprisonment of 12 months or more. On cancellation of their visas they became unlawful non-citizens and liable to removal from Australia.

Detention of unlawful non-citizens and their removal from Australia was provided for in ss189 and 198 of the *Migration Act*. All parties agreed that the plaintiffs were not subject to those sections if they were outside the scope of s51(xix), pursuant to which ss189 and 198 were enacted.

By majority, the High Court said that Aboriginal Australians (understood according to the test in *Mabo [No.2]*) were not within the reach of the aliens power in s51(xix) of the Constitution. While the majority could not agree whether Mr Love was Aboriginal on the facts, this was a difference about proof, not principle.

Bell, Nettle, Gordon and Edelman JJ separately concurring. Kiefel CJ, Gageler and Keane JJ separately dissenting.

Corporations – meaning of 'officer' of corporation

Australian Securities and Investments Commission v King [2020] HCA 4 (11 March 2020) was concerned with the construction of the word 'officer' as defined in s9 of the *Corporations Act 2001* (Cth) (the Act). The first respondent, Mr King, was an executive director of MFS Ltd, a publicly listed company and the parent company of the MFS Group. He was the CEO of MFS Ltd until his resignation on 21 January 2008. Until that date, he was also, in effect, the CEO of the MFS Group. He was a director of the second respondent, MFSIM, until 27 February 2007.

On 30 November 2007, $130 million was paid by MFSIM to an entity acting as the treasury company for MFS Group. On the same day it received the $130 million, the treasury company paid $103 million to Fortress Credit Corporation (Australia) II Pty Ltd. ASIC claimed that MFSIM breached its duties under s601FC(1) of the Act, and had provided a financial benefit to a related party in contravention of the Act. ASIC contended that Mr King was liable under s601FD of the Act as an 'officer' of MFSIM.

Although he had ceased to be a director of MFSIM on 27 February 2007, ASIC's case was that Mr King nonetheless remained an 'officer' of MFSIM until 21 January 2008 as he fell within para (b)(ii) of the definition of 'officer of a corporation' in s9 of the Act, being "a person…who has the capacity to affect significantly the corporation's financial standing".

The primary judge was satisfied that Mr King was an 'officer' of MFSIM because he had the capacity to affect significantly MFSIM's financial standing. Mr King appealed. The Court of Appeal of the Supreme Court of Queensland considered that to be an officer required holding a recognised position with rights and duties attaching to it, which had not been proven.

The High Court said that para (b)(ii) of the definition of 'officer' in s9 of the Act was not limited to those who hold or occupy a named office, or a recognised position with rights and duties attached to it, and the Court of Appeal had therefore applied the wrong test.

Kiefel CJ, Gageler and Keane JJ jointly. Nettle and Gordon JJ jointly concurring. Appeal from the Court of Appeal of the Supreme Court of Queensland allowed.

David Kelsey-Sugg is a Victorian barrister, ph 03 9225 6286, email dkelseysugg@vicbar.com.au. The full version of these judgments can be found at austlii.edu.au.

Federal Court

Corporations law – conduct giving rise to contraventions re personal advice, best interests obligations, misleading or deceptive conduct, statutory unconscionable conduct and requirements to act efficiently, honestly and fairly

In *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liquidation)* (No.3) [2020] FCA 208 (26 February 2020) the court determined the liability phase of the proceeding in which ASIC alleged contraventions of the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act).

The complicated facts were summarised by Beach J at [1]: "The present proceeding concerns the activities of the first defendant (AGM), the third defendant (OT) and the fifth defendant (Ozifin) and the promotion of derivative instruments. From the latter part of 2017 until the middle of 2018, each of the three defendants operated separate businesses in Australia that offered over-the-counter (OTC) derivative products being contracts for difference (CFDs) including margin foreign exchange contracts (FX contracts) to retail investors in Australia. They provided retail investors an online platform on which to invest in those products and also provided financial product advice to them by telephone and email (the financial services). That advice was provided by account managers (AMs) who were engaged on behalf of the defendants, but who were based overseas. The AMs engaged on behalf of AGM were based in Israel. The AMs engaged on behalf of OT were based in Cyprus and later the Philippines. And the AMs engaged on behalf of Ozifin were based in Cyprus."

The court's judgment primarily focused on the alleged "investor contraventions" (at [99]-[486]) but then dealt with alleged "compliance contraventions" (at [487]-[530]). The "investor contraventions" were argued to fall within four categories:

- that the defendants, by the AMs, gave or directed personal advice to the investors within the meaning of s766B(3) of the *Corporations Act* despite not being licensed or otherwise entitled to do so (at [102]-[104]; decided in ASIC's favour at [182]-[196])
- that the AMs in making their advice statements contravened s961B of the *Corporations Act* by failing to take the steps necessary to ensure that the advice that they provided to the investors was in each investor's best interest and contravened s961G by providing advice to the investors that it was not reasonable to conclude was appropriate to those clients (at [105]-[106]; decided in ASIC's favour at [201]-[243])
- that the AMs made statements to various investors that constituted various misrepresentations constituting misleading or deceptive conduct under s1041H of the *Corporations Act* and/or s12DA of the ASIC Act and/or the making of false or misleading representations in contravention of s12DB of the ASIC Act (at [107]-[112]; decided in ASIC's favour at [257]-[356])
- that the defendants engaged in unconscionable conduct towards certain investors in contravention of s12CB of the ASIC Act (at [113]; decided in ASIC's favour at [394]-[460]).

In addressing the principles about "personal advice" (s766B of the *Corporations Act*,), Beach J analysed and discussed aspects of the judgment of the Full Federal Court in *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 373 ALR 455; [2019] FCAFC 187: see at [164]-[179]. As an aside, the writer notes that at the time of writing this summary, Westpac had sought special leave to appeal to the High Court from the Full Federal Court's decision, which application has not yet been determined.

In relation to the best interests and appropriate advice obligations (ss961B and 961G of the *Corporations Act*), the court rejected the defendants' submissions that Division 2 of Part 7.7A of the *Corporations Act* only applies in relation to the conscious or intentional provision of personal advice to a person and the relevant statutory obligations were not intended to catch situations where persons who provided general advice may have unwittingly strayed into personal advice also (at [206]-[211]). Beach J also construed s961Q to reject the defendants' arguments to restrict the contraventions to the AMs and not OT and the Ozifin (at [212]-[217]).

The court set out the principles as to unconscionable conduct applicable to ss12CB and 12CC of the ASIC Act (at [358]-[392]). This included reference to the High Court decision of *Australian Securities and Investments Commission v Kobelt* (2019) 368 ALR 1; [2019] HCA 18. Beach J discussed at [384]-[392] the concepts of "system of conduct" and "pattern of behaviour" in s12CB(4)(b) which states: "This section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour". The court held there was unconscionable conduct by the defendants towards 21 investors (at [396]-[412]). Further, the court held that the defendants also engaged in a system of conduct or pattern of behaviour that was in all the circumstances unconscionable (at [413]-[460]).

With respect to the conduct constituting the investor contraventions, the court held the conduct undertaken by OT and Ozifin was to be considered to be conduct undertaken by those defendants on behalf of AGM (at [463]-[479], with reference to s769B(1) of the *Corporations Act* and s12GH(2) of the ASIC Act). However, Beach J did not accept ASIC's case that AGM was knowingly involved in, or aided, abetted, counselled or procured, the investor contraventions by OT and Ozifin (at [480]-[486]).

Finally, in relation to the "investor contraventions", the court held that AGM failed to take the steps necessary to discharge its obligations under s912A(1)(a) of the *Corporations Act* to do all things necessary to ensure that the financial services it provided under its AFSL were provided efficiently, honestly and fairly, and under various other provisions of ss912A(1) and 961L to do those things necessary to properly supervise its representatives, which included both Ozifin and OT and the AMs engaged by AGM, Ozifin and OT (at [487]-[530]). Beach J summarised the relationship between the words "efficiently, honestly and fairly" found in s912A(1)(a).

The court is to hear from the parties on the precise form of the declaratory relief and other relief (penalties and non-party compensation orders).

Dan Star QC is a Senior Counsel at the Victorian Bar, ph (03) 9225 8757 or email danstar@vicbar.com.au. The full version of these judgments can be found at austlii.edu.au. Numbers in square brackets refer to a paragraph number in the judgment.

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Seven people you'll meet in practice

As illustrated by a tiger doco or something

BY SARAH-ELKE KRAAL

I've been Zen AF lately. You know, in between the usual episodic attacks of my multiple neuroses.

And if there's been one common thread tying those glimpses of sanity together, it's been a general lack of other people.

Because let's face it. People are weird.

Especially people who talk to themselves. *That's right, Sarah. You're so wise. You deserve a cookie.*

And all this Zen has shined down upon me a great realisation. Per capita, I've probably had more than my fair share of ~~weirdos~~ unusual interactions. Like seriously. Girlfriend has seen some *stuff*.

But then an even more sobering epiphany shone down upon my glorious flower-crown: no, I probably haven't had more than my fair share. I've probably had a typical lawyer's share.

Because when you think about it, the law covers pretty much every single aspect of existing – the good, the bad and the ugly. So it makes sense that being in practice means you'll basically see the perfect cross-section of society. And that's a fairly motley crew of individuals, to say the least.

So without further ado – and after way too many hours binging some random tiger documentary you probably haven't heard of – I give you my living-room reflections on the seven types of clients and colleagues you'll probably meet in practice (if you haven't already). And don't be put off by the apparent gender disparity; despite the names, most if not all of the players are interchangeably male/female/tiger.

JOE–

Everyone has met a Joe, probably as a colleague early on in your career. He's a loathsome, offensive brute: yet you can't look away. The immediate repulsion you feel when first meeting him is somewhat eroded by a growing sense of disarming, underlying vulnerability. Though he's still pretty repulsive. His interests include making phone calls on loudspeaker, somehow attracting a plethora of romantic interests, provocation for his own entertainment, and questionable grooming.

CAROLE–

Ahh, Carole. She's sugar and spice and everything nice, but you don't want to get on her bad side because, honey, the flower crown WILL. COME. OFF. Also, you may go missing. Her interests include maintaining a public persona of exhausting positivity, animals, and a suppressed dark side so terrifying it's like the gaping maw of hell. Also, fun accessories.

HOWARD–

We love the Howards in our life. They're steadfast, predictable, reliable and the voices of reason. They're usually the one person in the middle of a hysterical, litigation sandstorm that will actually listen to your advice; and if life was like an '80s sitcom (I wish), they'd be the one in the credits you'd smile and shrug at. But then one day, probably during disclosure, you'll stumble across a compromising picture of them in a dog collar, and you'll get that icky feeling in your stomach that makes you want to sit in the shower until you feel clean again. But you will never feel clean again. Howard's interests include following rules, classic episodes of *Star Trek*, and a few light slams every now and then.

'DOC'–

Doc is the nicest, most reasonable person you'll ever meet. He's cool, but he's also like, super enlightened too, you know? It's all just a silly misunderstanding about the (alleged) wildly illegal situation he has going on. Doc's interests include being super legitimate, going out of his way to be a really awesome nice guy, and staying one step ahead of your tricky questions.

JEFF–

If you're ever lucky to work with a Jeff (and he'll really think you are) you'll be treated to a regular schedule of increasingly uncomfortable interactions that somehow always result with his hand on your leg. Jeff's interests include talking about money, maintaining a questionable wardrobe that smells like dirty socks, and referencing the multiple entrepreneurial enterprises he's involved with that don't actually exist.

MARIO–

Mario is a very nice person and that's all I'm going to say about that. Wishing a lovely day to all you Mario types out there.

ALLEN–

Maybe you'll see him one day in court at Caboolture, in an unsecured dock, whilst you sit patiently waiting to do your innocent little work licence application. Maybe he'll be cuffed, his hands each missing an index and ring finger – though the fully tattooed remains of the ghost digits remain. Maybe he'll maniacally scan the room for threats before his eyes clap onto you; his mouth twisting up at the sides in a 'smile' that would make Pennywise pop a balloon. Maybe he'll even lunge forward when someone in the court incoherently yells something out – making you and the complete stranger sitting next to you grab on to each other for dear life. And maybe you'll walk through the carpark afterwards, white-knuckling the keys so that the pointy bits stuck out between your fingers. Or you know, something less specific.

So there you have it. The seven types of people ~~I've met~~ you'll meet in practice.

What's that Sarah? Another cookie?

Don't mind if I do.

Sarah-Elke Kraal is a Queensland Law Society Senior Legal Professional Development Executive, s.kraal@qls.com.au.

Noble Nebbiolo shines through the nebbia

WITH MATTHEW DUNN

Nebbia is the fog that hangs over the hills around the Italian town of Alba in Piedmont, where the humid subtropical climate encourages the development of white truffles and heavy red wines.

The most prized grape of the region is the Nebbiolo, its thin skins bringing a deceptive surplus of youthful tannins and high acidity, making for a robust wine of great longevity.

The flavours of Nebbiolo are classically called 'tar and roses', but this just hides the fact that great Nebbiolo is a complex mix of earthy, floral, red fruit and spice notes. As it ages in the bottle the colour turns a distinctive brick-orange and tannin gives way to structure and fruit comes to the fore.

Nebbiolo is, arguably, Italy's most noble red grape and has thrived in the hills of Piedmont since the 14th Century. Its most famous and most prized incarnation is from Barolo. Here the nebbia-cloaked hills around the town produce the deep, red wine, aged in oak and matured in bottle before release. It still needs years more waiting time to throw off its youthful jacket and for its complex fruit, floral and savoury characters to come through. Barolo is the very epicentre of fine wine from this prized grape.

If Barolo is the king of Piedmont wine, the queen is said to be nearby Barbaresco – again pure Nebbiolo, but of a slightly softer and more elegant kind requiring gentle treatment and graceful aging to bring out its complex personality.

Not too far away again are the hills of Langhe where the Nebbiolo is relatively softer and gentler still, and ready to be enjoyed without a decade in bottle. Langhe is the budgetary sweet-spot for Italian Nebbiolo wines – perhaps less known but brilliant value for money and still with those characteristic big flavours.

The more general classification of Nebbiolo D'Alba is the Cote Du Rhone of Piedmont, where the great and the good wine from the region can be labelled with the famous name. This wine may be made from grapes from Barolo not quite up to heavenly standards, such as grapes from new vineyards in the famous hills or lesser places. But, unlike the components of Cote Du Rhone, the Nebbiolo is finicky and hard to grow and not often the choice of the bulk producers, who prefer the more approachable Barbera and Dolcetto to fill their crops.

In Australia, Nebbiolo has never quite made it mainstream, despite some hearty attempts to make great wine. Just like in Italy, Nebbiolo has best come from hilly regions where fogs sometimes linger but sunshine also floods in. Victoria's King Valley has become a haven for Italian varieties and has numerous good examples, including Pizzini.

The Adelaide Hills has some excellent examples, including the otherworldly Arrivo, featured in the tasting. The Yarra Valley and Margaret River have also brought forth good offerings.

Here, at home, Boirean makes a good Nebbiolo now in its La Cima range, Symphony Hills has been feted for its Reserve, and La Petit Mort has a thoughtful example. Some tout the Granite Belt as having a big future in Nebbiolo and just perhaps this noble Italian variety can find its home high in the hills of foggy south Queensland.

The tasting

Three fine examples of the wily fox Nebbiolo were put to scrutiny

The first was the **Maretti Langhe DOC Rosso 2017**, with a deep brick-red colour only just starting to develop the characteristic orange hue around its edges. The nose was spicy rich blood plums and allspice teaser. The palate had a chewy mouthfeel of young tannins which bespoke its aging potential. It was big, young and filled with warm richness of flavour. While not showing tar flavours, there was a pleasant fulsome astringent note of black pepper hiding a ripe base of red currants grown upon earthy roadbase.

The second was the **Boschi Dei Signori Nebbiolo D'Alba DOC 2017**, with a more distinct red-orange tinge developing. The nose was a sweet mix of roses, currant and talc. The palate was more leathery and chewy than the Maretti, with dusty red ripe fruits and a tannin backbone supported by white pepper.

The last was the **Arrivo Nebbiolo 2008 Adelaide Hills**, with a deep brown-orange tone of age and grace. The nose was a haunting mix of leather, savoury fruit and floral tones still going strong after 12 years in bottle. The palate was sophisticated with rich, ripe fruit to the fore with a robe of aged and softened tannins draped across its sweet frame, the acids of youth dying down into approachable measures carrying the body of sweet damson plums and ripe raison characters.

Verdict: The most preferred was the Arrivo, showing all the sultry power and mystery that Nebbiolo can muster with age.

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

Mould's maze

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

Across

1 Common surname of District Court judge Deborah and husband Peter, a Brisbane-based barrister. (8)

4 Jurisprudential view that the law is dependent on social facts and that a legal system's existence is not constrained by morality, legal ..... (10)

8 Describing a marriage of people of unequal social rank. (10)

10 A prison (jargon); '*.... erat demonstrandum*' (Latin) or 'Q.E.D.' is used at the end of an argument to mean 'thus it has been demonstrated'. (4)

11 Defence in equity pertaining to inordinate delay. (6)

12 A lower court bailiff in Anglo-Saxon England. (Archaic.) (5)

14 Plead to a plaintiff's reply. (6)

15 Officials responsible for investigating reportable deaths. (8)

18 Abnormalities resulting from injury or disease. (8)

20 Offer a payment. (3)

22 A group of counsels' chambers or their professional associations, ... of court. (4)

23 Doctrine applicable to unexpected events that render a contract impossible to perform. (11)

25 'For this event', usually referring to lawyers practising interstate or host employers, '*pro ... vice*'. (Latin) (3)

26 A third party claiming an interest in a family law dispute. (10)

29 A ..... may apply for interpleader relief under Chapter 21 of the *UCPR* only if they claim no right to the subject property in dispute. (11)

30 Seminal Queensland Supreme Court decision regarding whether an extension of time to appeal will be warranted, *R v* ..... . (4)

31 Years of tenure of members of the Land Court. (7)

Down

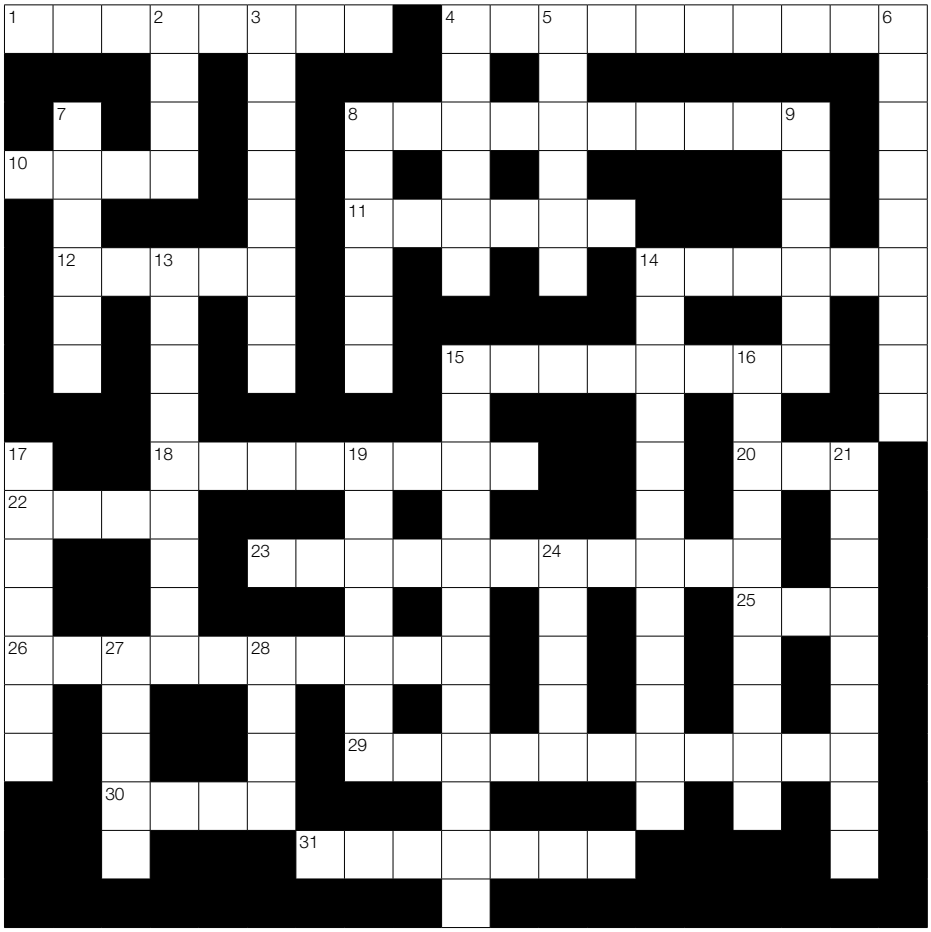
2 A term of imprisonment declared before parole is considered, ... sentence. (4)

3 Criminal record. (Jargon, two words) (8)

4 Copyright infringement; naval robbery. (6)

5 Describing a document filed with a court registry. (6)

6 All Hallows alumnus, former magistrate and Bar practice course instructor and current District Court judge. (9)



7 Minimum number of members of an organisation who must be present for valid transaction of business. (6)

8 *Wilson v* ..... damages are available for hospital visits that are reasonably necessary for the alleviation of the plaintiff's condition and not merely prompted by love and affection. (6)

9 Sir Joh Bjelke-Petersen referred to speaking to the press as "feeding the .....". (6)

13 Defendants may appeal a sentence imposed upon the ground it was manifestly ..... . (9)

14 The giving up of a legal right; abandoning participation in a crime before it is committed. (12)

15 Hire agreement for carriage of maritime freight. (12)

16 Kirby J stated in *Peters v R* that "Fear of hordes of modern ...., galloping into the court rooms of the nation, in company with anti-vivisectionists, environmentalists and other people affirming minority beliefs (so often raised as a spectre in these cases) should neither be exaggerated nor overstated." (two words) (10)

17 Sending to gaol. (Jargon) (7)

19 Saint Thomas ..... in his *Treatise on Law* distinguished four kinds of law: eternal, natural, divine and human. (7)

21 Terminate one's employment; perform one's duties; or release from legal obligation. (9)

24 Submit. (5)

27 Legally hackneyed. (5)

28 Imbue a person with an immediate fixed proprietary right. (4)

Solution on page 64

Learning in the Air tonight

Though some might say I'm insufficiently attractive

BY SHANE BUDDEN

We have all learned many things that are hard during this crisis.

We have learned that we can handle isolation, we have learned that we can deal with social distancing, and we have learned that our television news teams can devote 17 hours a day to reporting on the coronavirus and yet pass on nothing new or useful.

The hardest thing I have learned, however, is how to use a MacBook Air.

MacBook Airs, like all Apple technology, are specifically designed to be impossible for anyone not a designated and qualified computer geek to operate. It is no accident either; it is the revenge of the geek. Remember how you ran rings around them on the netball court and lapped them at the swimming carnival? Well, it's payback time.

This is why only Steve Jobs ever demonstrated iPhones and the like; he did not want you to realise that he alone on Earth could use them until all of your money – and any you might earn in the future – was safely in his pocket.

That uselessness is achieved by putting things in a place where nobody with an ounce of sanity would ever put them; if computer geeks designed houses, your toilet would be in your kitchen and the carport on the roof.

I found all this out when it transpired that I had to do a Facebook live from my own home, and that because the cameras on our work laptops – having sensed a crisis on Earth – went into geek revenge mode and became even more difficult to use.

I had to find and enable the camera on the MacBook, and of course it isn't under Settings, Photos, Videos or in fact anywhere else; I never found it. That is part of the geek revenge plan – you have to ring them to find these things, and then they make you do something stupid until they feel like fixing it – and we of course do it.

If they told us that installing a new browser involved us hopping backwards around the kitchen table singing *Star-Spangled Banner*, the air would be filed with the sounds of the US national anthem, interrupted by screams of pain as people tripped over the chairs, and geeks howling with laughter.

Thankfully I had two secret weapons – a 13-year-old daughter and a lady I work with named Lexi. My daughter has that teenage superpower of being able to make tech work, and Lexi has the incredible superpower of being able to explain it to *me*. No offence, but this is far more impressive than developing the Theory of General Relativity or turning water into wine.

In fact, I suspect that there is a long career for Lexi in explaining difficult concepts to simple creatures. There is at least five years' work for her getting Donald Trump to understand climate change, for starters.

In any event, despite the best efforts of Jobs and his band of geeks, I was able to download and install a new browser without all the hopping, make the camera work and even be seen and heard during the Facebook Live event.

All in all I was feeling pretty pleased with myself, until the comment popped up that basically said I was an unprofessional git for doing the video looking like I just got out of bed. In a way the comment represented social progress of sorts, in that a woman felt confident in shaming a man for his appearance, but I still thought that it was something of a cheap shot.

I suspect the problem was really with my hair (it could not have been my natty official QLS polo shirt, which is suitable for all occasions including weddings, dinner parties and being knighted by the Queen, and which coincidentally is for sale in the QLS shop). As regular readers know, I have been sporting the 'wolverine' hairstyle long before Hugh Jackman started doing it – Hollywood stars are constantly copying my style, as you would imagine – because my hair grows faster than some people (usually those wearing hats) drive on the highway.

I think that the problem is I am genetically meant to be about six feet tall, but for some reason – probably the effect of the powerful preservatives in the bubble gum that came with KISS cards, which I consumed in copious amounts in order to collect them all[1] – my growth was stunted.

My hair doesn't know this, and programmed by genetics it continues to grow to the point where it would be if I were six feet tall. It cannot be tamed by a mere brush at this length, and tends to do what it likes.

Back in the day, I could control it, partly because I had a flat-top haircut, and partly because I had access to my then-girlfriend's hairspray; I believe it was called Silhouette (the hairspray, not the girlfriend). This was powerful stuff – my girlfriend had a Debbie Harry hairstyle, which after the application of a can or two of spray, would have kept its shape in a cyclone; my flat-top under the influence of the same stuff could deflect bullets.

However, I very much doubt that manufacturers are still allowed to use those chemicals in hairsprays, or for that matter in bioweapons, so my hair remains unruly. Combined with my rugged, Harrison Ford-type good looks (people often mistake us for the same person; granted those people are usually on the International Space Station, but still) it is easy to think that I have just got out of bed.

That is the mistake the commenter – whose identity I will disguise, for her privacy, via the pseudonym 'Judgey Judy' – has made. I can assure her that on the day of my video I had been up early for a run, walked the dog, showered, shaved and brushed both teeth and hair; but for good or ill, this is how I look.

Judgey Judy need not worry however, because I do not blame her. It isn't her fault that I look like Harrison Ford but with more hair, and it didn't bother me one bit that after I had spent hours researching and preparing a session to hopefully help people get through a global crisis, I wasted it all by being insufficiently attractive.

I have taken her advice on board and have attempted to be more professional, and I assure her that if she does come down with chronic incurable dandruff, it certainly wasn't *me* who wished for that on a shooting star a couple of nights ago…[2]

Notes

[1] You bet I still have them.

[2] Of course, the shooting star might well have been the International Space Station looking for me and Harrison Ford, but I am sure it will be just as effective.

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Crossword solution

From page 62

Across: **1** Richards, **4** Positivism, **8** Morganatic, **10** Quod, **11** Laches, **12** Reeve, **14** Rejoin, **15** Coroners, **18** Sequalae, **20** Bid, **22** Inns, **23** Frustration, **25** Hac, **26** Intervenor, **29** Stakeholder, **30** Tait, **31** Fifteen.

Down: **2** Head, **3** Rapsheet, **4** Piracy, **5** Sealed, **6** McGinness, **7** Quorum, **8** Mcleay, **9** Chooks, **13** Excessive, **14** Renunciation, **15** Charterparty, **16** RobinHoods, **17** Binning, **19** Aquinas, **21** Discharge, **24** Argue, **27** Trite, **28** Vest.

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