



MAY 2020

CREATING YOUR NEW NORMAL

Navigating COVID-19 induced
practice challenges

TRIBUNAL MATTERS

Who is my neighbour?

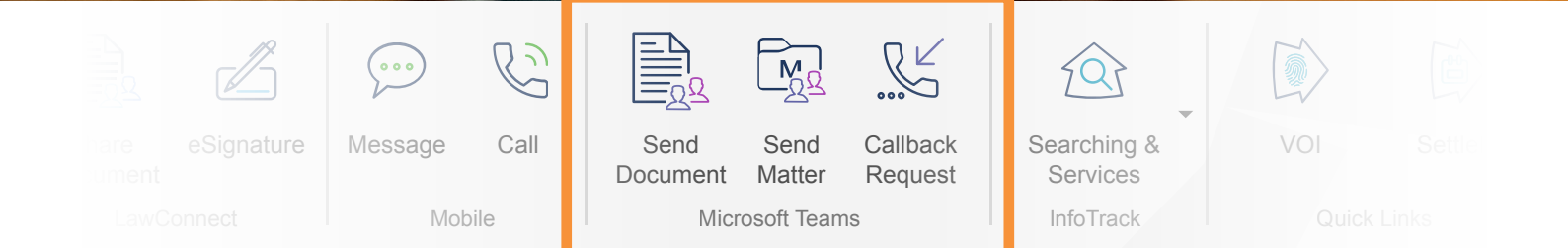
COVID-19

Keeping yourself
in good company

INSURANCE LAW

Indemnity of a
reasonable settlement

LEAP is the best system for lawyers and staff to work from home



New feature - integration with Microsoft Teams

Send a link to a document in LEAP for colleagues to edit or review.

Share a LEAP matter with a colleague or multiple staff members to discuss.

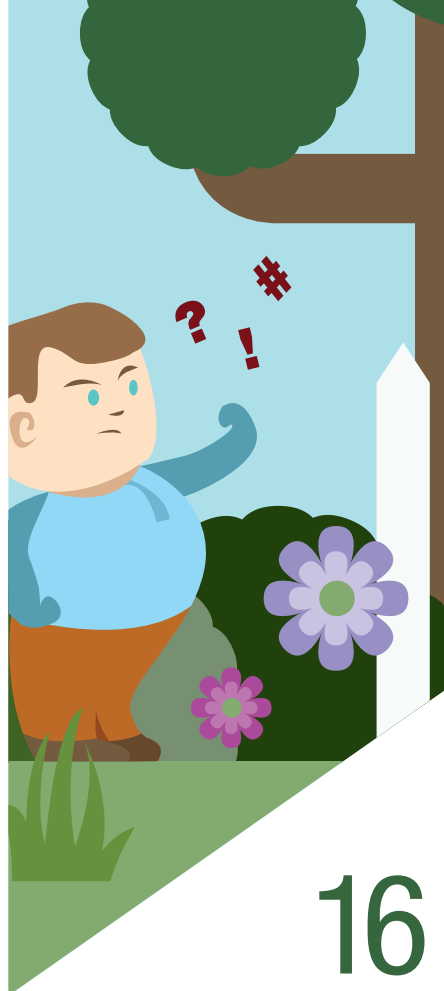
Notify other staff to call back a client or other parties in a matter.



leap.com.au/work-from-home



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COVID-19

Now, more than ever, we're here for you. We want to help practices keep their doors open and help practitioners keep their jobs.

QLS support package for Queensland's legal profession

Subsidies for members and
non-members worth \$9 million

- 26% subsidy in the annual cost of individual practising certificates
- 20% subsidy on the base professional indemnity insurance levy rates for practitioners insured through Lexon Insurance Pte Ltd
- 50% subsidy on full membership fees

For full details on subsidies,
and our other support services visit

 qls.com.au/COVID-19

Resilience to the fore

Profession rises to a pandemic challenge



In the midst of pandemic panic, it has been heartening to see the finer qualities of our legal profession come to the fore.

There have been outpourings of goodwill, and the resilience and collegiality of our practitioners have stood out.

Our profession has knuckled down to refocusing their practices, changing the way they work and adapting to a new world with significant uncertainty, except that justice for all remains an essential focus.

When I say 'profession', I am talking about it in the widest sense, including the judiciary, court staff, legal support staff and all those involved in the efficient and effective administration and implementation of our laws.

In March it was evident that the government-imposed pandemic restrictions were going to create significant obstacles for the day-to-day operations of our legal system. Any doubt about that was removed by the urgent responses by the heads of jurisdiction and government departments who immediately convened meetings to address issues of access to the courts, tribunals and commissions.

The pandemic restrictions necessitated urgent adjustments to our day-to-day operations of legal practice. It also quickly became clear that the pandemic was going to negatively impact cash flow for the vast majority of legal firms of all shapes, sizes and locations.

QLS Council knew the profession needed not only financial support but also assistance by way of enhanced support services as soon as possible. The renewals process was an obvious avenue through which part of that assistance could be provided.

The Government restrictions were announced on Sunday 15 March and work started on a support package in the week immediately following Symposium.

The first Finance and Risk Committee meeting was Monday 23 March. There was a subsequent

Finance and Risk Committee meeting on 25 March. There was a Council meeting on 26 March – which reached agreement on the fundamental principles that would underpin any assistance package and identified the areas that needed further investigation.

The investigation of how the support package was to be best structured involved an extraordinary amount of work by QLS staff and lengthy deliberation by Council. Council wanted to ensure that any financial resources accessed for financial assistance were being utilised equitably for those members of the profession who had contributed to the accumulation of the respective reserves.

Council endeavoured to determine if one demographic of the profession was being impacted more than others, such as single regional practitioners or large commercial firms. Ultimately, there was no reliable evidence. There was evidence all areas of the profession were hurting. Council decided it would be inequitable for to do anything other than treat the profession equally.

There has been an extraordinary commitment on the part of Council, Society staff and the staff and board at Lexon, who provided wonderful assistance and support to Council in its deliberations, in particular Michael Young and Glenn Ferguson AM. This assistance has been significant and much appreciated by Council.

The Law Foundation Queensland board is also keen to assist and I remind everyone that the foundation is available to consider applications for financial hardship loans as a lender of last resort.

COVID-19 has presented, and will continue to present, significant challenges for the profession both financially and administratively. However, the goodwill of all members of the profession and the willingness of the judiciary, particularly the Chief Justice, Chief Judge and Chief Magistrate, and the leaders of the court services, the various tribunals and commissions, Queensland Corrective Services, Police Prosecutions and the Office of the Director of Public Prosecutions to assist the profession and

minimise the impact of COVID-19 both on the profession and on the operations of the courts and tribunals has been extraordinary.

The Attorney-General and her department must also be thanked for their willingness to meaningfully engage with QLS and to consider any issues raised by the profession as a result of the pandemic. Working with the department has seen very positive outcomes achieved.

All of the district law associations have also willingly engaged with QLS to identify and solve local issues, and I particularly thank all association presidents. Thanks must also go to the volunteer members of our QLS policy committees – including those covering criminal law, court rules, succession law, franchising, property, accident compensation and not-for-profits/charities – for their willingness to contribute to all of the various responses QLS has been involved in as a result of COVID-19. Your contributions are very much appreciated.

It is a given that the responses that have been put in place to enable legal services to continue will certainly result in long-term changes to the way in which the profession conducts its work into the future.

These changes will create a number of opportunities for our profession. The Society looks forward to assisting the profession in identifying those opportunities and making the most of them. And whilst there is obviously significant work still to be done, the pandemic will end and the practice of law will return to some sense of normality, whatever that new normality may be.

With a profession rich in resilience and bursting with goodwill, I know we will be ready for it. Thank you all again for your support and please continue to support your colleagues and maintain communication with us at QLS. We are here to help.

Luke Murphy
Queensland Law Society President

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Contact QLS's Records & Member Services team

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Three new services to assist members

Help on hand to keep practice doors open



Our main objective during the COVID-19 pandemic is to help Queensland practices keep their doors open, and to help keep practitioners employed.

We also want to ensure that Queensland solicitors continue to be able to enjoy the many benefits of QLS membership.

For example, as part of our COVID-19 support package, we are offering full members for the 2020/21 financial year a minimum of 10 free continuing professional development (CPD) points, and very importantly, we are offering free full membership for any practitioner who is stood down or made redundant because of the COVID-19 situation.

You will find more details about all of the support we are offering on following pages in this issue of *Proctor*. What I would like to discuss specifically here is three significant new services that we have introduced to assist our members and their practices during these difficult times.

These are the Employment Law Advice Service (ELAS), the General Manager Support Service (GMSS) and the Government Funding Assistance Service (GFAS).

Each service is provided via expert advisors and is free for members who meet the eligibility criteria. They will benefit with up to two (three for GFAS) hours of advice.

Employment Law Advice Service

ELAS is designed to help individual members with employment law issues arising from the impact of COVID-19, as well as supporting eligible small practices which need advice on how they can best manage their staff during the pandemic.

QLS General Manager Support Service

GMSS is designed to help eligible members with general practice management issues arising from the impact of COVID-19, for example, how to pivot the practice, and how to manage the budget and other commitments.

The service will help a member to navigate situations such as loss of cash flow and restructuring teams/personnel. It will also provide guidance on strategies to mitigate risk and how to come out of hibernation fully activated.

QLS Government Financial Assistance Service

GFAS provides assistance to eligible members who wish to access government finance due to COVID-19.

The service will guide a member through the different government financial assistance offerings, give them an understanding of what is available to them for their situation, and guidance on how to access/lodge applications.

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

Your *Proctor*

One of the drawbacks of any print publication, from your daily newspaper to a bus timetable, is the necessary delay in assembling, proofing, printing and distributing it.

When news is evolving rapidly, as it has been during this COVID-19 situation, the time delay becomes particularly serious, and yesterday's news can be out of date very quickly.

The answer, of course, is the immediacy afforded by the online medium, which enables news and information to be distributed almost instantaneously.

With this in mind, QLS Council has considered how *Proctor* can be modernised to provide up-to-date news and information, yet retain some of the relaxed pleasure that many of us find when we browse a printed magazine.

I am pleased to announce that the Council-approved solution is now in development, and that the monthly printed edition of *Proctor* is to be replaced by *Proctor Online*, a news and legal information hub that will feature the latest daily news along with all of the regular features and columns that *Proctor* readers love.

And for those who still long to hold a printed publication in their hands, there will be a quarterly printed edition of *Proctor* which, naturally, won't be carrying time-critical information.

We have currently stopped printing hardcopy magazines, but will continue to provide electronic copies up to the official launch of *Proctor Online*, currently scheduled for 1 July. The switch to electronic copies has in part been necessitated by the fact that so many practitioners are working from home during the pandemic while the printed magazines are being delivered to their firms.

I know there are many members who feel strongly about *their* magazine and who may well wish to contribute to this evolutionary change. I invite them to contribute their thoughts on what the new hardcopy *Proctor* should contain, and, of course, to continue to contribute the submissions and articles that provide the substance of *Proctor*. Please send your thoughts to proctor@qls.com.au.

Rolf Moses
Queensland Law Society CEO

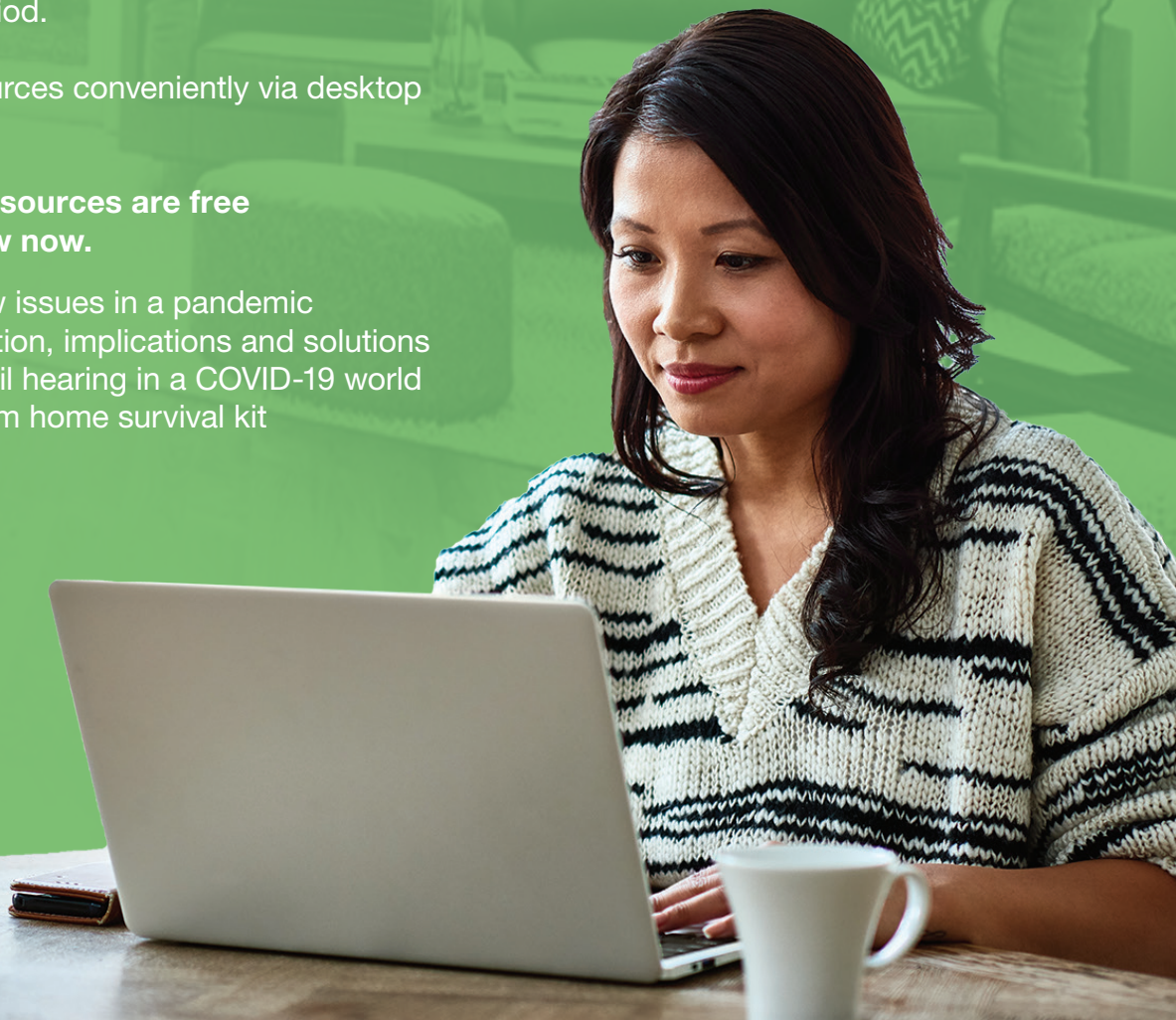
New on-demand CPD content released weekly

Now, more than ever we're here for you. QLS is working closely with legal experts to deliver new CPD content for members. Topics are relevant to your practice and designed to help you during this unprecedented period.

Access these resources conveniently via desktop or mobile device.

These four new resources are free for members! View now.

- Employment law issues in a pandemic
- Wellbeing: Isolation, implications and solutions
- How to run a bail hearing in a COVID-19 world
- The working from home survival kit



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CPD year extended. Ends 30 June.



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QLS aids profession with \$9m support package

i COVID-19

Queensland Law Society has released a \$9 million support package to help the state's 13,000 practitioners "keep the doors open and keep people in jobs" during the global coronavirus pandemic.

The assistance package, which has attracted national media attention, includes a 50% reduction in the price of full QLS membership for FY2020-21.

It also reduces the compulsory costs of practice by providing a subsidy to practising certificate fees and base professional indemnity insurance levy rates.

The benefits of the assistance package will come into effect with the Society's FY2020-21 renewals process, which will begin on Tuesday 5 May 2020.

For FY2020-21, this support package will provide Queensland practitioners with a:

- 26% subsidy in the annual cost of individual practising certificates
- 20% subsidy on the base professional indemnity insurance levy rates for practitioners insured through Lexon Insurance Pte Ltd as a result of funding QLS has released from its Law Claims Levy Fund. This has been supported by the Lexon Board and reviewed by Lexon's actuaries.
- 50% subsidy on the full membership fee for the Society's more than 11,000 members.

QLS has secured a premium funding arrangement with Westpac bank, which allows the costs of renewals to be funded by the bank at 2.95% interest and payable over 12 equal monthly instalments.

The breakdown of the subsidies are in the table below:


	Regular annual fee	COVID-19 subsidy FY2020-21 renewal year	COVID-19 fee FY2020-21 renewal year
QLS full membership	\$505	50%	\$252.50
Principal practising certificate	\$1006	26.1%	\$743.30 (saving of \$262.70)
Employee practising certificate	\$503	26.1%	\$371.65 (saving of \$131.35)

The savings are significant. For example:

- A solicitor who holds an employee practising certificate and is a QLS full member would pay \$624.15 to renew both their practising certificate and QLS full membership in FY2020-21, a saving of \$383.85
- A principal practising certificate holder who is a QLS member would pay \$995.80 to renew both their principal practising certificate and QLS membership in FY2020-21, a saving of \$515.20.

Additionally for FY2020-21, QLS will offer its full members:


- A minimum of 10 free continuing professional development points
- Free full membership of QLS for any practitioner who is stood down or made redundant between 1 March 2020 and 30 June 2020 as a result of the COVID-19 situation.

For more information about the QLS support package for practitioners, read on or check out our [FAQs](#) .

What do you need to do to access this support?

Right now, nothing. This package will be part of QLS's FY2020-21 renewals process, which will commence on Tuesday 5 May 2020.

Why you need QLS membership

QLS can help you stay connected with your colleagues and the profession during these uncertain times. We have a comprehensive **COVID-19 information hub**  which is updated daily with information from the courts, guidance for firms and practitioners, and links to information to support practitioners to continue to practise during this difficult time.

COVID-19 not grounds for early jail release

i COVID-19

The independent Queensland body tasked with assessing prisoner eligibility for return to the community on parole has sent a clear message that “vulnerability, exposure to or a confirmed diagnosis of COVID-19” is not sufficient grounds for early release from jail.

Parole Board Queensland (PBQ) President Michael Byrne QC said processes had been put in place to prioritise the consideration of parole applications by people identified to have a vulnerability to COVID-19.

However, Mr Byrne exclusively told QLS everyone should feel comfortable in the knowledge any decision to release an inmate on parole would not be based on the risks and exposure to the potentially deadly virus to the prisoner, but always in the best interests of wider community safety.

“(Queensland Government) guidelines require that the Board is to seek advice from Queensland Health or other approved medical specialist on the seriousness, and management of the prisoner’s medical condition (when considering a parole application),” Mr Byrne said.

“To be clear, vulnerability, exposure to, or a confirmed diagnosis of COVID-19 is not sufficient to be granted a parole order.

“It is just one of the many factors the Board takes into account. The highest priority for the Board is always the safety of the community.”

Mr Byrne said PBQ was an independent statutory authority and operated to ensure lawful, objective, evidence-based parole decisions were made in accordance with current legislation and Ministerial guidelines, with community safety always being the highest priority.

The board has put in place processes to prioritise the consideration of parole applications by people identified to have a vulnerability to COVID-19.

Based on current Queensland Health advice, the following prisoners may fall into the category of people vulnerable to COVID-19:

- those aged 60 or over
- Aboriginal or Torres Strait Islander inmates
- those with a chronic medical condition
- those with asthma or a respiratory condition
- those who have a weakened or compromised immune system.

Mr Byrne also said that, in a bid to increase the number of parole applications, the board had appointed an Acting Deputy President – alongside permanent appointees Peter Shields and Julie Sharpe – to increase the total matters considered by the board during the pandemic.

“From 20 April 2020, the Board has a further Acting Deputy President who will be chairing two extra Board hearings each week,” Mr Byrne said.

“These extra Board hearings will increase the number of matters considered by the Board by approximately 25%. The Board is currently utilising all available technologies to mitigate the risk of contagion to Board members, staff and prisoners.”

COVID-19 Emergency Response Act 2020 now in force

i COVID-19

Queensland now has an emergency legal response framework which alters aspects of the existing Queensland law to overcome some of the challenges posed by COVID-19.

Queensland’s emergency legal response, the COVID-19 Emergency Response Bill 2020, was introduced into Queensland Parliament and passed on Tuesday 22 April 2020. It received Royal Assent the next day.

The broad intention of the new law is “to facilitate the continuance of public administration, judicial process, small business and other activities disrupted by the COVID-19 emergency, including by easing regulatory requirements and establishing an office of small business

commissioner”, as well as providing for alterations to residential and retail tenancies laws.

The new Queensland law is very broad and different to the emergency law passed in New South Wales as it can apply to existing legal requirements in virtually any Act in any Queensland ministerial portfolio.

The new law puts in place a framework for regulations and instruments to be made under any Act to:

- change requirements for physical attendance at places or meetings
- provide alternate ways to sign, witness, certify and attest to documents and conduct verification of identity and file or lodge documents

- modify statutory time limits
- change how proceedings are conducted and decisions made.

Extraordinary regulations made under the new law generally are deemed to come to an end on 31 December 2020, with a limited power for extension.

The first set of regulations made under the new law was made on Friday 24 April in the *Residential Tenancies and Rooming Accommodation (COVID-19 Emergency Response) Regulation 2020*.

QLS expects more regulations to follow shortly as emergency measures alter other aspects of Queensland law.

No goat meditation – just free quality CPD



BY SANDRA PEPPER

We get it – it's a COVID-19 uncertain world out there.

You are swamped with invitations to free webinars offering you everything from guidance on how to reinvent your business, or a marketing strategy that would scare off a used car salesman, to a session on transcendental goat meditation that will save your sanity.

While I think the goat meditation sounds like fun (maybe with a glass of wine), QLS will not be trying to convince you to sign up for any of these things.


Instead QLS, now more than ever, wants to support you by making it easy to access the quality resources you need to continue being good lawyers practising good law.

We know CPD compliance may be a financial imposition that you are struggling to meet in the current climate, so as part of the COVID-19 QLS support package for the legal profession, we are committed to providing free on-demand CPD points for members.

We added four free CPD videos in April and will release at least one free CPD point a month from May until the end of the 20/21 CPD year. The free CPD will cover all the CPD core areas as well as substantive topics. New content will be added every Wednesday

 ON-DEMAND

Find our latest CPD offerings at qls.com.au/on-demand

on the **QLS website**  (a mixed offering of both free-to-members and paid-for content). You can access and watch them at any time from the comfort of your (home) desk or mobile devices.

The suite of videos will cover a variety of relevant topics to help you adjust and manage your practice and mental health, and stay up to date on current legal developments in this quickly evolving Coronavirus landscape.

We are working closely (although at a safe social distance!) with our expert presenters to record the CPD videos, so keep an eye out for fresh topics such as:

- employment law issues
- business contingency planning
- wellbeing in times of isolation
- bail applications
- parenting and family violence issues

- ethics in a pandemic
- document execution and witnessing
- remote advocacy
- elder law issues.

If you use social media, you will also have seen QLS is running regular Facebook Live and InstagramTV streams on Mondays and Fridays at midday. These are free and fast sessions of less than 15 minutes that keep you updated on the latest legal developments and practices, give you tips on topics such as cybersecurity and wellbeing, and point you in the direction of other reliable COVID-19 resources. In addition, we are producing some quick and easy listening Q&A podcasts, so look out for these in your social media feeds and on the QLS Facebook and Instagram pages.

I look forward to seeing many of you in person when we have the all clear to resume QLS face-to-face CPD events, but in the meantime please keep checking on our QLS website for the latest on-demand CPD offerings and updates on new online learning modules that we are preparing to roll out.

Sandra Pepper is Head of Professional Development at Queensland Law Society.

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QLS continues crucial advocacy

UPDATE PREPARED BY THE QLS LEGAL POLICY TEAM

Queensland Law Society has made submissions on increasing the age of criminal responsibility, as well as crucial written and oral submissions to the federal parliamentary inquiry into the family law system.

Age of Criminal Responsibility Working Group Review

QLS has continued its ongoing advocacy on raising the minimum age of criminal responsibility to at least 14. In February we wrote to the Law Council of Australia (LCA) to contribute to a joint submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group Review with the assistance of members of the members of the QLS First Nations Legal Policy, Children's Law, Human Rights and Public Law and Criminal Law Committees.

The Society strongly supports raising the minimum age of criminal responsibility to at least 14. We have put this position forward at several stakeholder meetings with members of the judiciary and Members of Parliament. A range of key stakeholders have similarly called for an increase in the minimum age. Their views are cogent, evidence-based and, crucially, take into account the medical, behavioural, social and rights-based approaches to dealing with children and young people in the youth justice system.

In our submission to the LCA, we noted the prevalence of young people with mental health and cognitive disabilities within the justice system. It is also well known that there is an over-representation of children from the child protection system within the youth justice system.

Early intervention and diagnosis, coupled with preventative justice reforms, are crucial, as is access to services in regional and remote communities. A whole-of-government approach across departments is needed to ensure that the diagnosis of young people can occur at the earliest opportunity to support rehabilitation and reduce recidivism.

QLS also reiterated its commitment to reducing the disproportionate rates of Aboriginal and Torres Strait Islander men, women and children in jails, and we consider that increasing of the age of criminal responsibility is an important step in this. Policy approaches must be premised and developed in accordance with the principles of self-determination. The recent release of the 'Closing the Gap Report 2020' ¹ is a significant and timely reminder that urgent change in this respect is needed.

Children occupy a very vulnerable space in our society. QLS will continue to advocate for early intervention and diversionary programs as an alternative to punitive justice, which has long-term and detrimental outcomes.

Response to family law inquiry

In December 2019, QLS provided a submission to the Joint Select Committee on Australia's Family Law System. In March 2020, QLS representatives appeared at the Joint Select Committee public hearing.

QLS expressed concern that the terms of reference imply a pre-determined outcome in relation to a number of issues, including in relation to family violence.

Importantly, QLS drew attention to the lack of empirical evidence to support the notion that false allegations of family violence are regularly made in an attempt to gain an advantage in family law proceedings. In contrast, extensive research confirms the difficulties that victims of domestic and family violence encounter when disclosing their experience to courts; including fear of not being believed and fear that disclosure will increase the risk of violence to them or their children.

QLS strongly supports the robust processes already in place which dictate how evidence is to be received in legal proceedings, including in family law proceedings, and noted that judicial officers are highly experienced in making determinations in the face of complex and often conflicting evidence.

The proper determination of family law matters requires a high level of skill and extensive knowledge of a wide range of issues and areas of substantial law.

In the experience of our members, a lack of expertise in family law can result in erroneous decisions and poorer outcomes for families. There is a significant risk that the quality and propriety of family law decisions will be compromised where determinations are made by judicial officers without family law expertise. These decisions are also more likely to be appealed, further increasing the demand on court services.

We maintain the view that the proposed court amalgamation does not represent evidence-based policy. An increased capacity to properly hear and determine family law matters, particularly complex matters, without additional funding, has not been adequately demonstrated. Improvements to efficiency cannot occur without appropriate resourcing.

At the public hearing, QLS representatives reiterated the view expressed in the submission in relation to the role of solicitors in family law proceedings. QLS noted that access to legal assistance in the early stages of a dispute can prevent or reduce the escalation of legal problems and reduce cost to the justice system overall. Private legal practitioners provide high-quality, tailored family law advice and play an important role in resolving family law matters, including by identifying relevant issues and providing relevant information to the court. Many family law matters are resolved without any court intervention and very few reach final defended hearing stage. Access to legal advice and representation is key in the resolution of matters and helps to ensure litigants are properly informed.

Copies of QLS submissions are available at qls.com.au > **For the profession > Advocacy** ¹. If you would like to learn more about how you can get involved with the legal policy work at QLS, keep an eye out for *QLS Update*, in which we regularly seek member feedback on our legal policy work.



Samantha Farrelly



Vivianne Wilson-Tonscheck



Helen Ashton



Carlu Booth



Kirstie Day



Nicole Collins



Katrina Pedersen

Career moves

Cornwalls Law + More

Cornwalls has welcomed **Samantha Farrelly** to its commercial and property law teams. Samantha has a broad commercial property background, dealing with commercial succession, property and leasing matters as well as litigation matters, including applications for the appointment of statutory trustees for sale.

Creevey Russell Lawyers

Experienced family lawyer **Vivianne Wilson-Tonscheck** has joined Creevey Russell Lawyers as a senior associate in its family law section.

Vivianne has more than 11 years' experience advising clients in family law with expertise that encompasses divorce, separation, property settlements, binding financial agreements, de facto relationships, children's matters and child support. She will be primarily based in the firm's Toowoomba office.

East Coast Injury Lawyers

East Coast Injury Lawyers has announced that **Helen Ashton** has become a partner/director of the firm.

Helen is a QLS Accredited Specialist in personal injuries with more than 15 years' experience as a PI lawyer. She is a member of the QLS Personal Injuries Specialist Accreditation Advisory Committee and the Gold Coast regional ambassador for the Women Lawyers Association of Queensland.

MBA Lawyers

MBA Lawyers has announced the appointment of **Carlu Booth** as senior associate in the family law department. Carlu has practised for more than 13 years, gaining extensive experience in advising clients on all aspects of family law including parenting disputes, property settlements, divorce, domestic violence, mediation and dispute resolution, and surrogacy and adoption.

Naughton McCarthy Family Lawyers

Kirstie Day has joined James Naughton and Kieran McCarthy as a director of Naughton McCarthy Family Lawyers. Kirstie is an 18-year family law veteran who became a QLS Accredited Specialist in family law in 2011 and is now a member of the QLS Family Law Specialist Accreditation Committee.

Rees R & Sydney Jones Solicitors

Nicole Collins has been promoted to the partnership with Rees R & Sydney Jones Solicitors. Nicole commenced with the firm in 2017 and is now the head of the commercial division. Her practice areas include leasing, business and commercial conveyancing.

Slater and Gordon

Slater and Gordon has welcomed principal lawyer **Katrina Pedersen** to its Queensland personal injuries practice, based in Toowoomba.

Katrina has taken on a regional leadership role and will support staff delivering legal services to clients in Toowoomba, Ipswich, Townsville and Brisbane. After starting her legal career 30 years ago as a legal stenographer, Katrina was admitted in 1999 and has concentrated on compensation law for more than 20 years.

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



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 **PEXA**
17 April at 15:35 · 🌐

In the latest episode of #5in5 (recorded prior to social distancing restrictions!), David Bowles, Queensland Law Society Ethics Solicitor, joins Ryan Janosevic, security expert and COO of Retrospect Labs, to discuss prominent #security threats for businesses this side of 2020 and the tools we can use to protect against #cyberfraud.



5in5 | Protect your business from cyber fraud
04:41

 **Marawah Law**
9 April at 13:58 · 🌐


Catch a snippet of Leah Cameron the owner of Marawah Law speaking about the support available for Indigenous businesses including Marawah Law's pro bono offer on NITV's The Point 🇺🇸

The program explores the impact of corona virus on Indigenous businesses and featured @Laura Berry CEO of Supply Nation

You can watch the program by clicking on the link below ❤️❤️❤️


Queensland Law Society Indigenous Business Australia Indigenous Land and Sea Corporation Office of the Registrar of Indigenous Corporations deadly stories

#indigenousbusiness #murraalumni #supportingeachother #strongertogether





The Point
58:46

LINKEDIN


 **Michelle Pennicott** · 2nd
Planning & Environment and Government Partner at MinterEllison Gold Coast
3d · 🌐

Remain nimble and patient. Wise words from the bench on what legal practitioners must do to support the courts in continuing to operate and administer justice. Well done to the [Bar Association of Queensland](#) and the [Queensland Law Society](#) on an excellent livestream to over 600 legal practitioners yesterday on how COVID-19 is changing the way hearings are being conducted. Thank you to the judges for their encouragement and support, "There is an extraordinary amount of cooperation and goodwill across the board". It requires us all to work collegially and if in doubt phone a friend. But as is being led by the bench, "it is all do-able". From wearing headsets under wigs to mastering sharp written and oral advocacy. Our responsibility to our clients and to the court is to find more solutions than problems.



 **Ena Pita** · 2nd
Client Advisor at Law Staff
3d · 🌐

Interesting read - Thanks [Queensland Law Society](#) for launching a \$9M relief package in wake of COVID-19
<https://lnkd.in/g5EwsWK>



QLS launches \$9m relief package in wake of COVID-19
lawyersweekly.com.au



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Boss Lawyers would like to say a MASSIVE thank you to the Court staff and Judiciary for working so hard to maintain the administration of justice in these challenging times.

[Brisbane Magistrates Court](#)
[Queensland Law Society](#)
[Adrian Schrinner](#)
[Department of Justice and Attorney-General QLD](#)

#coronavirus #law #lawyers #courts #justice #judiciary #judges

Lisa Stockwell • 2nd
Business success through people success
2w •

Slightly surreal experience presenting today at [Queensland Law Society](#) - to an audience of one! Feeling very blessed to have been asked by QLS to create and present straight to camera two presentations for the QLS to deliver to their members. Thank you for making it such a good experience in these crazy times.
#wellbeing #leadership #presentationskills



qutwomeninlaw
Brisbane, Queensland, Australia

Liked by [qldlawsociety](#) and others

qutwomeninlaw This April, we celebrate Kathryn Dorante who was named First Nations Student of the Year at the [@qldlawsociety](#) Awards dinner earlier this year. Kat is a proud Torres Strait Islander woman who is passionate about Aboriginal and Torres Strait Islander empowerment and celebrates diversity.

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WHO IS MY NEIGHBOUR?

QCAT'S JURISDICTION IN TREE DISPUTES



BY BEVAN HUGHES

**“Who, then, in law is my neighbour?
The answer seems to be – persons who
are so closely and directly affected by my
act that I ought reasonably to have them in
contemplation as being so affected when
I am directing my mind to the acts
or omissions which are called in question.**

**You must take reasonable care to
avoid acts or omissions which you
can reasonably foresee would be likely
to injure your neighbour.”**

*– Donoghue v Stevenson [1932]
AC 562 at 580*



Lord Atkin's seminal analysis has been the foundation of the law of negligence throughout the common law world.

But the answer to the question of 'Who is my neighbour?' is somewhat different in the context of tree disputes in Queensland.

A little history

Traditionally, parties in dispute over trees have had to have recourse to the law of negligence, nuisance and trespass. These causes of action can take considerable time and expense, and while courts can impose injunctions or award damages, remedies to prevent damage or harm can be problematic.¹ Moreover, traditional remedies do not take into account aesthetic, cultural or environmental values associated with trees.²

Unresolved tree disputes can escalate. Unlike many commercial disputes in which the parties never have to see each other again, parties to trees disputes have an ongoing relationship as 'neighbours'. Because of this, many unresolved tress disputes can quickly become matters involving trespass, criminal damage or other criminal behaviour.³ It is not unknown for parties to tree disputes to have taken out protection orders against each other.

Legislative intervention

In Queensland, the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) confers jurisdiction on the Queensland Civil and Administrative Tribunal (QCAT) to resolve tree disputes. The Act provides a framework to resolve tree disputes more quickly and cheaply, and thereby reduce unnecessary escalation.

QCAT's jurisdiction

The most common reasons for tree disputes brought in QCAT are:

- overhanging branches
- property damage
- obstruction of views or sunlight

However, before QCAT can decide the dispute, a person must first meet a number of jurisdictional thresholds, namely:

- What is a "tree"?
- Is land "affected by a tree"?
- Is the tree in an area covered by the Act?
- Who is a "neighbour"?

What is a tree?

Perhaps unsurprisingly, the Act broadly defines 'tree' to mean any woody perennial plant or any plant resembling a tree in form and size.⁴ This includes a vine,⁵ bamboo,⁶ bare trunk, roots,⁷ stump rooted in the land, and a dead tree.⁸ Importantly, the tribunal has held that it does not include an artificial plant.⁹

It is not uncommon for a tree to be identified as a noxious weed (for example, privet tree or umbrella tree). This is taken into account as a decision-making factor¹⁰ and may be balanced against other factors, for example, if there is anything special about the tree that suggests it should be retained.¹¹

Is land affected by a tree?

Land is 'affected by a tree' if branches overhang the land or the tree has caused or is likely¹² to cause within the next 12 months:

- serious injury to a person on the land
- serious damage to the land or any property on the land, or
- substantial, ongoing and unreasonable interference with a neighbour's use and enjoyment of the land.¹³

What constitutes serious injury or damage, or substantial, ongoing and unreasonable interference is beyond the scope of this article. However, the terms have generated much case law in QCAT and some useful citations are footnoted to assist practitioners.¹⁴

Is the tree in an area covered by the Act?

The Act only applies to trees that are:

- in urban areas,¹⁵ and
- on land that adjoins the neighbour's property,¹⁶ or
- on land separated by a road.¹⁷

The Act does not apply to trees:

- on rural land¹⁸
- on land of more than four hectares¹⁹
- on land owned by a local government and used as a public park²⁰
- planted or maintained for commercial purposes,²¹ or
- planted or maintained as a condition of development approval.²²

The exclusion of rural land is based on the character of the land. It is common in rural land to have large properties with many large trees with overhanging branches. However, actual use of the property is not relevant to whether land is rural.²³ Land is rural land if it is zoned rural land or the Valuer-General declares the land to be rural land.²⁴

Who is a neighbour?

A 'neighbour' may apply to the tribunal for an order in relation to a tree.²⁵ A neighbour is the registered owner of adjoining land affected by a tree and includes a body corporate if the land affected by the tree is community title.²⁶ The tribunal has held the following not to be a 'neighbour':

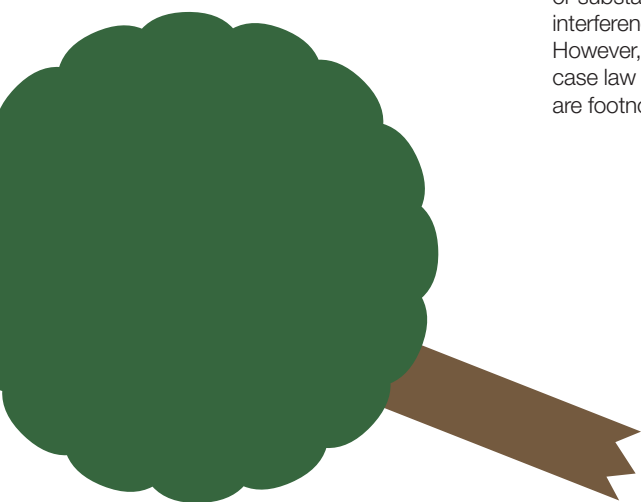
- a sub-lessee of Crown leasehold land²⁷
- a registered owner of community title when seeking orders relating to an area encompassing other unit owners and common property on the same community title.²⁸

Occupiers of land other than the registered owner can make an application about a tree, but need to establish that the registered owner has refused to act.²⁹

QCAT applies a strict interpretation of adjoining land on the basis of the Act. Adjoining land is land that 'physically adjoins'. The only exception to the requirement of continuity is the exception of a road:

- For land to 'adjoin' for the purposes of the Act it must be either physically contiguous or would, if not separated by a road, be physically contiguous.³⁰

The applicant must discharge the onus of proving that the tree is 'wholly or mainly' on the tree owner's land.³¹ Straddle trees can occur and it is not uncommon for parties to reach agreement to engage a surveyor.



Purchasers and new owners of land

Conveyancing practitioners in particular should note QCAT's jurisdiction over purchasers and new owners of land. QCAT does not have jurisdiction to make orders in relation to a previous tree owner – it can only make orders in relation to current tree owners. A joinder is not activated automatically.³² A purchaser must first be put on notice.³³ If a party cannot be joined under the Act, then they may be joined under the QCAT Act instead.³⁴

The Act provides a maximum penalty of 500 penalty units for a seller not giving a purchaser a pending application *before* they enter into a contract of sale of land.³⁵ Additionally, the purchaser may exit the sale and recoup their deposit if settlement has not yet occurred.³⁶

However, it is not uncommon for a purchaser to not know about an application filed by a neighbour *after* they have entered into a contract of sale. The Act has no penalty provisions for the failure of a tree-keeper to give a purchaser a copy of a pending

application in these circumstances. Rather, it is a contractual matter between the tree-keeper and purchaser.³⁷

If a seller of land affected by an order does not give to the purchaser a copy of the order before entering into the contract of sale and has not carried out all the work before settlement, the seller remains liable to perform the work.³⁸

The legislative intent of these provisions is to shift the burden of the tree onto the purchaser if the current tree owner is non-compliant.³⁹ However, a purchaser cannot be ordered to remedy damage caused by a tree before purchase that has been completely removed.⁴⁰

Bevan Hughes is List Manager for Neighbour and Tree Disputes and has presided in over 5000 hearings in his role as a full-time Member of the Queensland Civil and Administrative Tribunal. He is a nationally accredited mediator and has mediated over 1200 QCAT matters with a 97% settlement rate. The views expressed are those of the author only and are not made on behalf of QCAT. The author gratefully acknowledges the assistance of QCAT President, Justice Daubney AM, in preparing this article.

Notes

¹ *Neighbourhood Tree Disputes*, Victorian Law Reform Commission, report July 2019, xvi.

² Margaret Davies and Kynan Rogers, 'Tale of a Tree', (2014) 16 *Flinders Law Journal* 43, 52.

³ *Neighbourhood Tree Disputes*, Victorian Law Reform Commission, report July 2019, Chapter 2.

⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), s45(1).

⁵ *Webb v Dwyer & Clarke* [2014] QCAT 219.

⁶ *Watson-Brown v Heaton & Anor* [2014] QCAT 346; *Street v Smith & Rodgers* [2018] QCAT 193.

⁷ *Cacopardo v Woolcock* [2017] QCAT 214; *Hewitt & Hewitt v BCC & Gorman* [2018] QCAT 282.

⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), s45(1), (2).

⁹ *Dawes v Wiggins*, unreported, 17 October 2019 (Member Kent).

¹⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), s73(1)(k).

¹¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), s71(1)(c)-(g).

¹² *McDonald v Henry* [2013] QCAT 87, where the tribunal held that the plain meaning of 'likely' is probably or reasonably to be believed or expected; similar reasoning was applied in *Bunyard v McManus* [2013] QCAT 258 where an arborist's finding of 'possible' damage was not sufficient.

¹³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), s46.

¹⁴ *Hewitt & Hewitt v BCC & Gorman* [2018] QCAT 282 where a claim for \$817 was not sufficient to be 'serious damage'; *Bunyard v McManus* [2013] QCAT 258, [23]; *Belcher v Sullivan* [2013] QCAT 304, [22] to [26] (Judicial Member Dodds); *Hoy v Fox & Anor* [2013] QCAT 728; *Cacopardo v Woolcock* [2017] QCAT 214 (roots); *Belcher v Sullivan* [2013] QCAT 304 (roots); *Laing v Kokkinos (No.2)* [2013] QCAT 247 (view); *Thomsen v White* [2012] QCAT 381 (sunlight); *Body Corporate – Highlands Vista v Taylor* [2018] QCAT 244; (view re body corporate and multiple units), *Webb v Dwyer & Clarke* [2014] QCAT 219 (vine).

¹⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), s42(3)(a).

¹⁶ *Ibid*, s46(b)(i).

¹⁷ *Ibid*, s46(b)(ii).

¹⁸ *Ibid*, s42(3)(a).

¹⁹ *Ibid*, s42(3)(b).

²⁰ *Ibid*, s42(3)(c).

²¹ *Ibid*, s42(4)(a).

²² *Ibid*, s42(4)(c) and see *Werdly & Ors v Orchard* [2014] QCAT 377.

²³ *Capo Di Monte v Tolmie & Anor* [2013] QCAT 625.

²⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), s42(3)(a), Schedule definition, *Land Valuation Act 2010* (Qld), s9.

²⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), s62(1).

²⁶ *Ibid*, s49.

²⁷ *La Bella Waters Body Corporate v Northaust Leisure Pty Ltd* [2014] QCAT 372.

²⁸ *Brown & Anor v Wallace* [2014] QCAT 461; cf *Lowe v BGC Technical* [2016] QCAT 124 where the tribunal noted the "serious injustice" to the registered owner if the body corporate elected not to bring an application. However, the nature and functions of a body corporate and the rights of a majority of lot owners in community title living were not considered.

²⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), s62(2).

³⁰ *Eddes v Bourke* [2018] QCAT 69, [10].

³¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), s47(1).

³² *Ibid*, s84.

³³ *Ibid*, s83.

³⁴ *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s42.

³⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), s83.

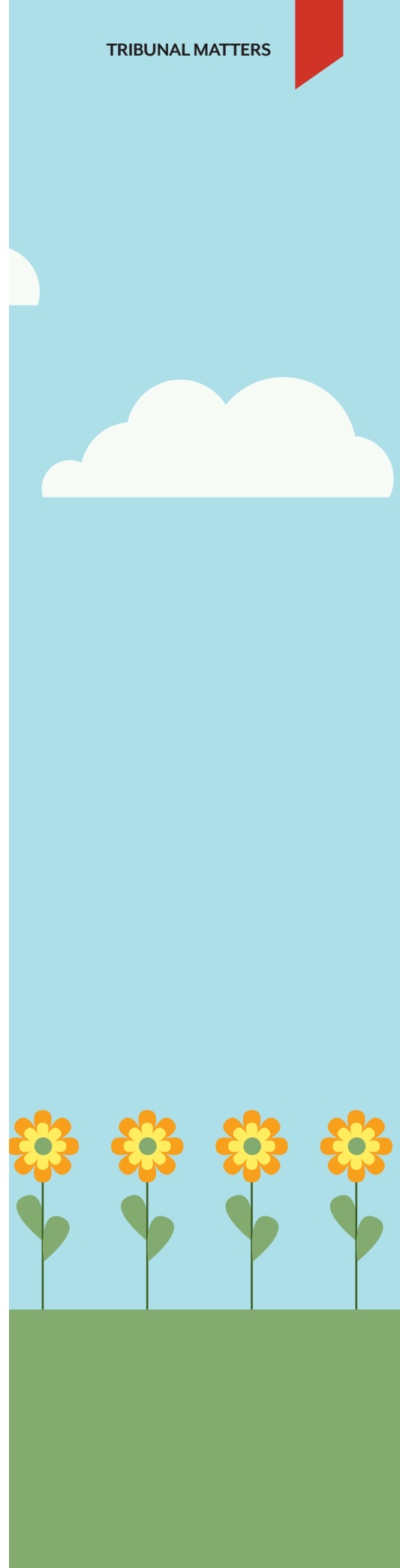
³⁶ *Ibid*, s86.

³⁷ Putting the onus on the affected neighbour to inform new tree-keepers may be problematic because the affected neighbour may not be aware of the proposed sale of adjoining land or any other details. It may be unfair for the affected neighbour to have to monitor ownership in this way.

³⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), s87.

³⁹ *Ibid*, s85.

⁴⁰ *Ibid*, s68(2).







CREATING YOUR NEW NORMAL

Just like that our world changed. And while we weren't ready for it, we do need to be ready for the new normal by refining and adapting our practice and procedures. This month *Proctor* provides some perspectives, guidance and information to assist you personally and professionally in this pandemic world we find ourselves in.

EMPLOYMENT DURING THE COVID-19 CRISIS

THE 'NEW NORMAL' FOR LAW FIRMS





BY ROB STEVENSON

The immediate crisis and panic of those last weeks in March may have passed, but the ‘new normal’ is likely to be here for some months to come.

Legal practices are still permitted to operate as they do not fall within the list of non-essential businesses prohibited from operating under the *Non-essential business, activity and undertaking Closure Direction (No.5)* given on 9 April 2020 by the Queensland Chief Health Officer.

However, the effect of the Queensland Chief Health Officer’s *Home Confinement, Movement and Gathering Direction* given on 2 April 2020 is that work should be performed from home where reasonable.

Whether work can reasonably be performed from home is a matter for each employer to determine in consultation with its employees. In doing so, both employers and employees should keep in mind that workplace health and safety obligations have not been affected by the current crisis. Employers continue to have a duty to ensure, so far as is reasonably practicable, the health and safety of their workers while at work and workers must take reasonable care for their own health and safety.

An assessment of an employee’s home working environment should be carried out (which may be a self assessment) for this purpose and there are **working from home protocols** available from Queensland Law Society.

COVID-19 and employee leave entitlements

If an employee is suffering from any of the recognised symptoms of COVID-19 or is diagnosed with COVID-19, whether or not they are asymptomatic, they are entitled to take their accrued paid personal leave to cover their absence.

Permanent employees have a statutory entitlement to 10 days a year paid personal leave comprising sick leave and carer’s leave, which is cumulative from year to year.

A medical certificate can be requested as evidence for sick leave.

If an employee takes carer’s leave to look after a sick immediate family or household member, a statutory declaration will usually be sufficient to evidence an absence for carer’s leave.

Where an employee has no paid personal leave accrual, they can ask an employer to allow them to access their annual leave and long service leave. If an employee has no leave owing, they can ask their employer to continue to pay them but there is no obligation for the employer to do so.

Employees who are subject to the *Legal Services Award 2020* (the award) have additional unpaid leave rights which operate from 8 April 2020 until 30 June 2020, subject to extension by the Fair Work Commission.

The award applies to most support staff, graduate lawyers and law clerks. Schedule X of the award provides an entitlement to unpaid “pandemic leave” and the flexibility to take twice as much annual leave at half pay. Any employee is entitled to take up to two weeks’ unpaid leave if they are required by the government or medical authorities, or acting on the advice of a medical practitioner to self isolate and are prevented from working as a result. Notice of the leave must be given as soon as practicable, along with reasonable evidence of the reason on request.

Schedule X also provides that an employer and employee can agree in writing to the employee taking twice as much annual leave on half pay. The award (clause 22.6) also allows for the payment of annual leave in advance (although an overpayment may be able to be deducted on termination).

If an employee is required to self quarantine by the authorities but is not ill, then they should be allowed to access their annual leave and long service leave. This would convert to personal leave upon request if they are subsequently diagnosed with COVID-19.

If an employer has reasonable concerns that an employee is ill with COVID-19, the employee can be directed to obtain a medical clearance before returning to work, but the employer should pay the employee for their time away as special leave if they are cleared for the period of absence.

**EMPLOYERS
CONTINUE TO
HAVE A DUTY
TO ENSURE,
SO FAR AS IS
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PRACTICABLE,
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AND SAFETY
OF THEIR
WORKERS
WHILE AT
WORK**

THE GOVERNMENT'S STATED INTENTION IS THAT EMPLOYERS MUST ENSURE THAT ALL ELIGIBLE EMPLOYEES PARTICIPATE IN THE JOBKEEPER SCHEME

How does the JobKeeper scheme assist?

If a law firm has been economically affected by the COVID-19 crisis, there are several options to allow employment to continue before considering termination of employment.

The intent of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*, *Coronavirus Economic Response Package Omnibus (Measures No.2) Act 2020* and the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (JobKeeper scheme) is to provide support for eligible employers to keep their employees in employment.

The JobKeeper scheme does this by providing financial support through the JobKeeper subsidy for financially eligible employees and employment flexibility through changes to the *Fair Work Act 2009 (Cth)* (*Fair Work Act*). The JobKeeper scheme started on 30 March 2020 and ends on 27 September 2020.

Financial support

The basis of the JobKeeper scheme is that employers will be reimbursed a fixed sum for continuing to employ people. To be eligible to participate in the JobKeeper scheme, an employer must meet the requirement of a substantial decline in turnover. For most law firms, this test will be met if there is a 30% decline in turnover:

- a. in any month from March to September 2020, compared with the same month in 2019, or
- b. in the April–September 2020 quarters compared with the same quarters in 2019.

There will be an alternative test for new businesses to be published by the Australian Taxation Office (ATO) and different tests apply for large businesses with aggregated annual turnover of more than \$1 billion and many charities.

If an employer qualifies for the JobKeeper scheme, they will be entitled to receive \$1500 per fortnight for each eligible employee on their books on 1 March 2020 for up to 13 fortnights. There is no income cap on employee eligibility. If an employee is earning less than \$1500 per fortnight, their pay will need to be made up to that rate, but an employee earning more than \$1500 per fortnight cannot have their

pay reduced on this basis. Payments will be made by the ATO to employers commencing in the first week of May 2020 with payments backdated to 30 March 2020.

Employers should be conscious of the need to elect before the end of each JobKeeper scheme fortnight to participate in the JobKeeper scheme (a different rule applies for the first two fortnights commencing on 30 March 2020) and provide information about eligible employees. Eligible employees must also agree in writing to be nominated for inclusion. Reference should be made to the JobKeeper Rules (and Explanatory Statement) as well as the ATO website for details about enrolling in the JobKeeper scheme, applying for payments and ongoing obligations.

The JobKeeper scheme Acts provide a framework, but the detail of employer and employee eligibility is contained in the JobKeeper Payment Rules made by the Treasurer. The rules' starting point is that payments will be made to cover:

- a. any permanent employee, and
- b. any casual employee with 12 months' service on a regular and systematic basis; who was employed as at 1 March 2020, over 16 years of age and either an Australian resident or holder of a Special Category migration visa.

Reference should be made to the JobKeeper Payment Rules for the detail of particular situations. Employees who have been terminated from 1 March 2020 will be covered by the JobKeeper scheme if they are re-employed, as will employees who have been stood down, as long as payments have been made to them of at least the amount of the JobKeeper payment. Self-employed people are also covered, but not employees receiving workers' compensation payments or employees receiving parental leave payments or dad/partner pay from the Australian Government.

The Government's stated intention is that employers must ensure that all eligible employees participate in the JobKeeper scheme, although at the time of writing this has not been specifically spelt out in the JobKeeper scheme. Workers who are not eligible to receive a benefit may be entitled to the JobSeeker allowance or other government benefits.

Changes to the *Fair Work Act*

The second limb to the JobKeeper scheme comprises changes to the *Fair Work Act* to facilitate ongoing valuable employment during the crisis. The temporary changes to the *Fair Work Act* enable a qualifying employer, subject to the conditions below, to direct one or more employees:

- to work fewer days or hours (but not reducing the employee's hourly rate of pay) or be stood down completely where the employee cannot be usefully employed for their normal days or hours because of business changes brought about by the COVID-19 pandemic or associated government directions
- to perform any duties within their skill and competency that are safe and reasonably within the employer's business operations
- to work at a different place to their normal place of work, including their home, as long as it is suitable, does not require unreasonable travel, is safe and reasonably within the employer's business operations.

These changes only apply to employers who qualify for the JobKeeper scheme. They effectively limit the ability of non-qualifying employers to stand down employees under the existing provisions of the *Fair Work Act* or unilaterally change the hours of work or conditions of employees. While there does not have to be a stoppage of work to stand employees down under the JobKeeper scheme (which is a condition of the general stand down provision in s524 of the *Fair Work Act*), it is necessary that employees cannot be usefully employed because of pandemic-related changes. There is no ground for stand down if an employee is still able to do work which is of benefit or value to the employer.

Arrangements where employees have agreed to take a temporary pay cut for the same hours of work can continue as long as the hourly rate paid to employees is greater than provided by an applicable award or enterprise agreement or, for award-free employees, the federal minimum wage and at least the amount of the JobKeeper subsidy is being paid.

PEOPLE REMAIN THE BIGGEST ASSET OF ANY LAW FIRM

Under the JobKeeper scheme, employers and employees can also agree in writing to an employee:

- working on different days and times to normal, while not changing the number of ordinary hours of work, and
- taking paid annual leave or twice as much annual leave at half-pay subject to the requirement to keep a balance of at least two weeks.

Any directions must be reasonable and necessary, and only given after at least three business days' notice (unless a shorter period is agreed by the employee) and after consultation with the employee. Other points to note are:

- Employee entitlements continue to accrue as normal during this period.
- An employee can ask the employer to agree to their undertaking secondary employment, training or professional development during a stand down period or reduced hours.
- The Fair Work Commission has broad powers to deal with any disputes about these matters.
- These provisions also have the effect of workplace rights under the *Fair Work Act*.

It is important that:

- Employers correctly assess scheme and employee eligibility because a failure to do so may expose employers to claims of breach of the *Fair Work Act* and claims for underpayment as well as potential liability for repayments to the ATO.
- Employers properly consult with employees and take a cooperative approach by talking to them and taking their views into account so that disputes do not escalate.
- A paper trail is kept of consultation, short-term agreements and directions in order to avoid confusion.

The JobKeeper scheme offers employers the ability to keep valuable staff in employment and substantially offset their wage costs whether it be by continued employment on their existing arrangements, by working at home under adjusted hours of work, working lesser or different hours on a short-term basis, carrying out different duties, taking leave, or ultimately being stood down and receiving at least the JobKeeper subsidy amount.

What about redundancy?

For some businesses, the JobKeeper scheme may not be enough to keep staff employed. However, caution should be exercised because redundancy is not a short-term solution and employers leave themselves open to claims of unfair dismissal and other claims. The merits of redundancy should be carefully considered because it may not be easy to employ skilled people in the future.

If considering making one or more positions redundant, the first question to ask is whether the proposed redundancy is genuine. Where the employer decides that it does not wish a job performed by the employee to be performed anymore, or proposes to redistribute the duties of the job amongst other employees, the position may be made redundant.

The important thing about redundancy is that it relates to the position itself rather than the person holding the position. An employer should be able to demonstrate financial grounds for termination and a record substantiating the selection of particular positions.

In addition, the employer should consult with the employee about the proposed redundancy by inviting their views about minimising the impact of the proposal and taking those views into account before a final decision is made (this is compulsory for award-covered employees). Lastly, an employer

is required to consider whether there are any other suitable positions open within the business for redeployment.

Once a decision to make a position redundant has been made, notice should be given to the employee or paid in lieu and payment of redundancy pay made in accordance with contractual or statutory requirements (whichever is the greater). The statutory requirement to pay redundancy pay does not apply if the employee has less than 12 months' continuous service or if the employer is a "small business employer" with less than 15 employees.

People remain the biggest asset of any law firm and care should be taken in making decisions which will have a significant impact on people's lives and livelihoods as well as the continued existence and future of businesses.

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Note

¹ *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020.*





KEEPING YOURSELF IN GOOD COMPANY

HOW TO SURVIVE SELF-ISOLATION
AND SOCIAL DISTANCING



BY
REBECCA
NIEBLER

The global pandemic has introduced us to heavy social restrictions that we never had to deal with before.

The requirements around social distancing, self-isolation and in some cases quarantine have set strong limitations on our personal freedom and other rights we have never had reason *not* to take for granted.

The associated ongoing disruption to our daily routines is painful. Change, having to give up comfortable practices and long-standing habits, always is. It forces us to confront uncertainty – the vague but powerful threat of the unknown – and to admit that all the sense of control over our lives we may have been holding on to has been a delusion.

The current pandemic also means that we are forced to slow down in many aspects of our lives, and to be with ourselves in a way we may have always been able to avoid.

Prior to COVID-19, we were used to the ready availability of 24/7 distraction, whenever we felt we needed or wanted it. For many of us, life used to revolve around the next project, task, achievement, holiday, party, networking event, physical indulgence or other immersion in external stimulation.

It's no surprise that suddenly finding ourselves at home, with not much else to do than just *be*, can be a frightening, overwhelming experience. With nothing much to *do* to quieten down our fear, anger, frustration, confusion or grief over the normal life we have been asked to let go, our thoughts and emotions may suddenly feel amplified and even uncontrollable.

As writer and actor Josh Radnor put it in his thoughtful and moving discussion¹ of this strange time: “No more running around, no more chasing the dragon of business, achievement and validation.” Our urge to immerse ourselves in external distraction keeps crashing into a wall of physical distancing and self-isolation obligations, over and over again.

Why is this so difficult for us to do? Why can we not just hold still for this moment in our lives, and use this time as a welcome pause from our usual busy-ness?

A study conducted by social psychologist Timothy Wilson and colleagues (University of Virginia, 2014) showed that many participants preferred inflicting electric shocks on themselves to just sitting in the lab with nothing else to do.²

These findings are startling and bring to mind the famous quote from French philosopher Blaise Pascal: “All of humanity’s problems stem from man’s inability to sit quietly in a room alone.” Needless to say, ‘man’ includes all of us, regardless of genetic make-up, age group or social background – there is no running away from this crisis. The virus is holding us all in this tight grip, whether we are in a specific risk group or not.

In his essay, Radnor goes on with a poignant self-observation in relation to advice about trying to meditate: “Sometimes there’s something almost frightening about closing my eyes, unhooking myself from the world of form, and confronting the dark spacious emptiness of my own psyche. Actually, strike that. ‘Emptiness’ is the wrong word. My mind is filled with myriad competing voices vying for my attention.” If you ever thought you may be the only person harbouring disquieting ideas like this, please take this as proof that you are not.

But now that we are literally backed into the corner of our living rooms, we will have to learn to face ourselves and the ‘myriad of voices’ within. Your ability to have compassion and patience with whatever you may discover inside is an essential skill needed to work through these emotions and thoughts. Trying to push them down or ignore them will only increase their power and control over you.

Showing kindness to ourselves, practising radical acceptance of who we are (which doesn’t exclude a strong commitment to lifelong personal growth!) and taking care of our emotional, mental and spiritual needs are not things that are taught to us much, if at all.

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MAYBE IT'S NOT SO HARD TO BE WITH YOURSELF FOR A LITTLE WHILE AFTER ALL

Instead, we are usually given a large variety of tools and options to distract ourselves from any uncomfortable, painful and undesirable thoughts and feelings that may reside within us – the world of easy, fast and always available distractions we have built for ourselves.

In order to learn to just be with ourselves again, the first step is to make space and time for simple yet powerful self-care and mindfulness practices that help us to slow down, connect with our body and senses, and calm down our anxious minds. Here are some ideas and suggestions:

Connect with your body and all your senses

- Tune into your breath. Follow it as it enters and leaves your body, and stay with it for at least 10 rounds. Put one hand on your chest and the other one on your belly to feel how your whole body expands and contracts with your breath.
- Gently stretch and move your whole body. Start slow, tune in to find areas of tension and stiffness. Give sore, achy parts a good rub.
- Take a bath, maybe adding some lavender, chamomile, orange or rose oil to help you relax and enjoy the comforting sensation of being immersed in warm water.
- Put an oil diffuser on and enjoy peaceful, uplifting or dreamy aromas. Experiment with fruity, herbal, earthy or floral notes and observe if they change your mood or energy in different ways.
- Go for a walk and stay in the moment. If you are at the beach, feel the sand under your feet and how you are slightly sinking in with each step. Hear the waves crashing or gently rolling ashore. If you choose a forest walk, smell the trees, listen to the soft sounds the moving leaves are making in the wind. Wherever you are, use all your senses to deepen the experience.
- Lean back, close your eyes, and listen to your favourite type of music. Try to pick out and focus in turn on individual elements of each song, for example, melody, rhythm and lyrics.

Connect with your mind


- Sit still for five minutes, doing nothing, and marvel at how surprisingly hard this is. Settle into a comfortable position and let go. Don't move until you absolutely have to. Watch the thoughts and emotions that are coming up, and how they disappear again.
- Genuinely compliment yourself. What skill have you worked hard on to master? What unique quality are you bringing to the world? What achievement are you proud of? What obstacles in your life (or that of others) have you been able to remove?

- Write a letter to your younger self. Describe the most important lessons that you have learned, the challenges you have overcome, the happiness you have found along the way, the heartbreaks and the successes. What's the most important message you would like to give to your teenage or student self?
- Listen to an inspiring or insightful podcast. Try to pay attention to the whole episode, without stopping and pausing to do something else. Avoid any simultaneous tasks – just sit back and absorb the voices and the information they are sharing with you.
- Completely unplug for half a day or longer. Switch off all mobile devices and go offline. Resist the urge to switch it back on early 'just to check' for important messages or news. It'll still be there when you finally go online again.

How do you feel now? Maybe it's not so hard to be with yourself for a little while after all – or at least it's not insurmountable. My advice is to remain open to the possibility that, intertwined with all the dreaded 'messy' feelings of fear, anger, sadness, confusion, shame and disappointment which we may encounter within, we can also find hope, love, joy, happiness and gratitude.

It's all there, all mixed together and waiting for you to discover, accept and own it, one by one.

 ON-DEMAND

Rebecca Niebler offers more wellbeing guidance in videos available from the **QLS On-demand resources page** . See, for example, *Wellbeing: Isolation, implications and solutions*.

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

Notes

¹ thriveglobal.com/stories/josh-radnor-time-of-great-love-and-great-suffering/

² sciencemag.org/news/2014/07/people-would-rather-be-electrically-shocked-left-alone-their-thoughts#

WORK REMOTELY, STAY PRODUCTIVE



BY PETRIS LAPIS

Working remotely for an extended period can present new challenges, especially for parents when schools are closed.

However, there are a number of things you can do to stay productive while working remotely.

1. Keep your routine: It will help if you can keep your regular routine as much as possible. This means things such as setting your alarm for the normal time and getting out of your pyjamas before starting work.

Getting dressed helps make the mental switch in your mind between home and work. Set up regular times for breaks and have a start and end time to your working hours. One of the traps to working remotely is keeping healthy boundaries between home and work so that you aren't doing 'just one more thing' late at night before you go to bed.

2. Plan your day: At the start of the day plan your tasks for the day and follow the same guidelines you would while working in the office. Do your highest priority tasks first during your greatest energy periods.

If you have other family members in the home, you might have to factor planning your work around their needs or setting up their learning or craft activities. It is important to have regular breaks throughout the day and set yourself time limits on how long they will be so you don't end up having a two-hour lunch break.

3. Use technology to connect: You may not be able to connect and communicate with your colleagues or clients in person, but there are a lot of ways you can use technology to check in with their wellbeing, have meetings and collaborate on projects even while working remotely. Pick up the phone rather than email them as it will help to check on their welfare and maintain the connection that relationships need.

4. Have a stop symbol for family members: Have a visual symbol for family members to tell them when you are working. It might be anything from a closed door on your home office to a red hand towel hanging over the chair near where you are working at the dining table. This lets other family members know when you are working (in a meeting or making a call, etc.), so they can practise being quiet and come back later with their questions.

5. Designate a separate comfortable workspace: You might not have the luxury of a separate home office, but if there is some way you can delineate your workspace and have a comfortable chair you will be more productive. It is best not to work in a lounge chair, for example, as it is not only bad for your posture but also for your focus.

6. Limit distractions: Although you have removed the distractions of open-plan offices when you are working remotely, it does become easier to distract yourself when you are not in an office environment. You can help yourself by removing browser shortcuts for social media, removing them from your toolbar bookmarks or signing out of all your social media accounts during working hours. You can also use technology to set timers for how long you will stay focused on tasks before you have a break. The other distraction to limit is the things that need doing around your home. The cleaner your home and your working space, the less inclined you will feel to distract yourself by doing the other tasks that need doing.

As challenging as working remotely can be, it can also be incredibly productive and rewarding. There are opportunities to create new work habits, to find new ways of doing things and to do things you enjoy in the time you would otherwise spend commuting.

Petris Lapis is director of Petris Lapis Pty Ltd, a senior trainer, presenter and facilitator.



PRACTICE MANAGEMENT FOR VIDEOCONFERENCING

TIPS FOR EFFICIENT REMOTE COMMUNICATION

BY THE QLS ETHICS AND PRACTICE CENTRE






During COVID-19 we are urged to work remotely and limit our personal interactions.

This has necessitated many practitioners to move their day-to-day meetings to the virtual landscape via telephone and videoconferencing facilities.

It might seem easy enough to simply subscribe to an online videoconferencing provider – but have you carefully considered the need for staff training to highlight security features and concerns of your chosen videoconferencing platform?

Videoconferencing security

Cybersecurity is essential. Practitioners are encouraged to refer to the following resources for assistance with cybersecurity:

- **Australian Cyber Security Centre** 
- **QLS Cyber Security** 
- **Lexon Insurance** 

Safe use policy

- Have you set boundaries around what and how videoconferencing is to be conducted within your practice?
- Is your practice only offering videoconferencing to clients who are self-isolating, in quarantine, otherwise ill and unable to attend your office (or receive visitors), or are you offering it to all clients?
- Are you offering videoconferencing to existing known clients of your practice, or also to new clients?
- What measures are you putting in place to ensure the security and privacy of your staff is respected and video conferences are conducted within the usual working hours of your practice?

Encryption

Videoconferencing facilities are generally cloud based – this means your data will be processed (and possibly stored) on a third-party server.


The level of security you require may depend on the nature of your practice, but all practitioners are subject to the duty of confidentiality (Australian Solicitors Conduct Rules 2012 (Qld) r 9).

Encryption is an absolute must for videoconferencing security. Encryption will stop hackers from accessing your system, and it secures the communications by scrambling the communication in transit.

There is generally two types of VOIP (Voice Over Internet Protocol) technology – one that uses transport encryption which prevents eavesdroppers but not the platform providers from listening in (think Google Hangouts and Skype) and the other is

end-to-end encryption which prevents all eavesdropping (GotoMeeting, WebEx, and Skype for Business').

Passwords

Ensure you have a strong, complex password. Refer to Lexon Cyber resources on password security. If you do not have a password policy in place please see QLS resource: **Template password policy for law firms** .

Scheduling and running video conferences

- If you schedule your video conference (particularly if you have scheduled a regularly recurring meeting), password protect the video meeting. Without password protection a hacker may discover your video meeting and engage in fraudulent behaviour.
- Access to the video meeting should be through password-protected access. Participants should be required to authenticate to get access to join the video meeting rather than you sharing a password with them.
- At the commencement of the meeting test audio and video and ensure that all parties can clearly see and hear each other.
- During the meeting only allow invited participants into the conference and take note if someone joins or leaves the meeting (you should document this in your file note). Some conference facilities allow you to lock the meeting once everyone has joined so no one else can join the meeting.
- Review what your camera is capturing. You do not want it inadvertently broadcasting confidential information, capturing another client's file records or perhaps family members in the background.²
- Be cautious about using screen share. Use screen sharing to only share the document or app that is required, not your whole screen.
- Mute yourself unless you are talking. This prevents background noise (and other sensitive discussions that may be going on around you) from being broadcast.
- If you are recording the video conference ensure you obtain the consent of all other parties prior to commencement. Any recording of the video conference needs to be securely saved.

For highly confidential discussions a face-to-face meeting or telephone meeting may be more suitable provided social distancing guidelines as issued by the Department of Health are complied with.

Ensure you are running regular updates and patches to your software and devices, this will protect from security vulnerabilities that can be exploited.

REVIEW WHAT YOUR CAMERA IS CAPTURING. YOU DO NOT WANT IT INADVERTENTLY BROADCASTING CONFIDENTIAL INFORMATION

COVID-19 HAS NOT ALTERED THE LAW OF CAPACITY OR A PRACTITIONER'S OBLIGATION TO ASSESS CLIENT CAPACITY.

Quality of the video/audio link

It is recommended that you abandon a video conference if you are unable to clearly see and confirm your client's identity, the documents being signed, or if you are unable to hear your client (or your client is unable to hear you clearly) due to technical difficulties.

File notes

Even if you are recording the video it is essential that you make a detailed file note of the meeting just in case the recording fails.

At times like these it can seem easy to default to other forms of electronic messaging such as text messages, WhatsApp, WeChat and the like. It is important to consider the security of all platforms you use and how you are going to record and store those client conversations.

Limitations to videoconferencing services

Videoconferencing has been touted as the answer to remote:

- witnessing signatures
- identifying clients
- verifying identification
- verifying client capacity
- providing advice.

Witnessing signatures

On 23 April the *COVID-19 Emergency Response Act 2020* was assented to. The Act provides a power for the Government to make regulations with respect to the witnessing and execution of documents including wills, enduring powers of attorney, advanced health directives and other such documents. At the time of publication it is anticipated that the regulations will be issued shortly. Please refer to the **QLS COVID-19 web page** ¹ for more information.

COVID-19

More COVID-19 practice tips and pandemic guidance notes are available at qls.com.au/COVID-19

Identifying and verifying identification of clients

Practitioners are referred to **ARNECC Client Authorisation and Verification of Identity as a result of COVID-19** ² and to Lexon's *Checklist Verification of Identity AND Right to Deal or Entitlement to Sign* to consider:

- Is VOI required?
- Has the client's identity been verified in the past two years?

You are required to take *reasonable steps* to verify your client for those matters listed in item 2 of Lexon's Checklist.

Client capacity

It is recommended that practitioners consult the **Lexon Last Check: Capacity** ³.

COVID-19 has not altered the law of capacity or a practitioner's obligation to assess client capacity.

- Can you adequately assess your client's capacity via remote means?
- Is there a risk that the client is subject to undue influence or third party duress?
- If a third party is aiding the client with use of technology, how have you satisfied yourself that this third party is not unduly influencing the client and the instructions you are receiving are your client's?

It may not be possible to assist the client without meeting in person if you have concerns about undue influence or third party duress.

If assessing capacity remotely, prepare a detailed file note regarding the process relied upon and the reasons for your conclusions as to the client's capacity.

Providing legal advice

Subject to all of the above concerns around security of use, video conferencing remains a convenient and safe way to provide legal advice to clients during COVID-19.

You may find meeting with your client by video link takes longer than if you were meeting face to face, particularly if you are explaining documents to your client. Ensure you (and your client) allow sufficient time for the client to ask questions or request further information about the documents you have (or will be) preparing for them.

Red flag warnings – remain vigilant

All staff should remain vigilant as COVID-19 is an opportunity for fraud and other illegal activities.

In each video conference consider:

- Are there any 'red flags' associated with fraud, identity theft or money laundering?
- Clients may be experiencing anxiety and increasing frustrations with our current situation, but now is not a time to be complacent.
- Document those 'red flags' and the steps you take to mitigate them. Document whether you proceeded and why or why not.
- If there are too many 'red flags' present, it is suggested that you consider whether you should proceed with the matter.

For further information see:

- Paul Hii, 'How to mitigate video conferencing security risks' *aarnet* (Blog Post, 23 May 2018) news.aarnet.edu.au/how-to-mitigate-the-security-risks-of-video-conferencing/ ⁴.
- Nicole Black, 'It's now a Trekkie world: Top videoconferencing tools for lawyers' *ABA Journal* (Web page, 30 July 2019) abajournal.com/web/article/top-video-conferencing-tools-for-lawyers ⁵.
- Legal Practitioners' Liability Committee, 'Video conferencing risks' (1 September 2018) lplc.com.au/lij-articles/video-conferencing-risks/ ⁶.

The Queensland Law Society Ethics and Practice Centre provides legal ethics and practice support guidance and education to Queensland Law Society members.

Notes

- ¹ You need to opt-in at the start of the call. See Abrar Al-Heeti, 'Skype's promised end-to-end encryption finally arrives. Here's how to use it', Cnet (Web page, 20 August 2018) <cnet.com/how-to/skypes-promised-end-to-end-encryption-finally-arrives-heres-how-to-use-it/>.
- ² @FunnyVines, (Twitter, 23 March 2020, 8.17am AEST) <twitter.com/i/status/1241851619546812418>.

ADAPT OR PERISH



BY BRENDAN NYST

Biologist, historian and futurist H.G. Wells, author of the sci-fi classic *The War of the Worlds* – a tale of alien invasion and annihilation by pathogen – once famously wrote “Adapt or perish, now as ever, is nature’s inexorable imperative.”

It could be very good advice in today’s troubled times.

As we all struggle to adapt to our new, post-COVID-19 environment, it will be interesting to see how businesses adapt and evolve to not only survive, but hopefully thrive, in this brave new world. For some, perhaps, the crisis will sadly deliver a death blow. But the very nature of the human beast suggests many others will take advantage of invaluable opportunities it will create.

Certainly, in the short term at least, business models will need to change. The evidence is there already; restaurants moving to exclusively ‘takeaway’ services is a prime example. And, as restrictions inevitably ease in the mid to long term, many if not all industries, will need to rethink the way they deliver their product.

The legal industry is no different. In the short term, many lawyers have already seen a significant decrease in the demand for some of their services, but a corresponding increase in the demand for others.

With most people spending much of their time isolated at home, and the courts taking

the unprecedented step of adjourning criminal prosecutions indefinitely, for many lawyers the practice of criminal law has all but ground to a halt, yet regrettably applications for domestic violence protection orders have reportedly surged.

Migration law practice looks to be drying up rapidly, while in the commercial sphere, although the overall appetite for non-essential court skirmishes has waned in the face of tightening purse strings, there’s been a rush of landlords, tenants and business-folk wanting advice and corresponding action on leasing and other contractual disputes, as they grapple to sort out exactly what their contractual rights and obligations will be in the face of the ongoing pandemic.

Since few could have ever foreseen the situation we’re currently in, it’s perhaps unsurprising that many commercial agreements do not specifically address a wide range of problems that are being thrown up, leaving thorny questions to be answered regarding the enforceability of a host of business relationships.

Many are hoping and expecting that the State Governments will eventually intervene with some protection measures in respect of residential and commercial tenancies, without which we would inevitably see a surge in litigation.

And of course, most uncertain of all in such times is our own physical health, so wills and estates have very recently proved an area of sharp growth for lawyers, with many clients wisely opting to get their affairs in order in a timely fashion.

So far, the once-considered dowdy and unyielding profession of law has proven surprisingly dynamic in adapting the way its services are delivered. In the matter of not much more than a fortnight, what were once everyday, face-to-face meetings with clients, courts and colleagues have become mostly a thing of the past (Well, for the time being at least).



Not only have justice administrators largely turned the courts into a ‘no go zone’, with a stern preference expressed for appearances only by audio or video link, most law firms themselves have already moved the bulk of their staff to a WFH (‘working from home’, for the uninitiated) environment. That’s no mean feat, considering the need for ongoing instant connectivity to thousands of documents, and continued seamless internal interaction within legal teams, affecting not only efficiency but culture.

It would be cavalier to think the industry doesn’t face significant challenges, but despite the unprecedented upheaval and dislocation, it’s generally business as usual for most firms.

Change is invariably hard, but there will hopefully be positives in the long run. While still struggling with inevitable teething problems associated with working remotely, lawyers have already started to see some of the benefits of allowing their staff a more flexible working environment.

To adapt our product to a more isolated and cost-effective market, we’ve begun offering everything from wills, directives and powers of attorney, to supply agreements, confidentiality deeds and work licence applications, online. Methods which once seemed a little too crass and commercial to countenance for such an honourable profession, are suddenly getting a look in... and perhaps they’re the way of the future.

As in all aspects of life, amidst all the doom and gloom, eventually a slither of light will shine through. Those businesses that spot it early – and adapt, not perish – may find themselves far better off in the long run.

This article was first published by Nyst Legal last month and is reproduced with permission. Brendan Nyst as a Director at Nyst Legal.

Indemnity of a reasonable settlement

Replace or otherwise make good

BY WILLIAM ISDALE AND SAMUEL WALPOLE



In Royal and Sun Alliance Insurance Plc v DMS Maritime Pty Ltd [2019] QCA 264, the Court of Appeal considered whether an obligation to “promptly replace or otherwise make good” the loss of a vessel required the purchase of an alternative vessel or its equivalent, or could be met through a lease of an equivalent vessel for the remainder of a contractual service period.

The court also considered whether the quantum of an indemnity under a contract of insurance could be established by proof of the amount of a settlement, provided that the sum was reasonable in the circumstances.

Background

This case involved the loss of a naval vessel, and an insurance claim made in respect of that loss. The respondent, DMS Maritime (DMS), had contracted with the Commonwealth to design, construct and maintain a fleet of Armidale-class patrol boats. In 2014, while in the respondent’s possession and undergoing repairs, one of the boats was destroyed by a fire.

Under the contract between the respondent and the Commonwealth, the respondent was required to:

- indemnify the Commonwealth for “any loss or damage” to the vessel (cl.6.8.1.1), and
- “promptly replace or otherwise make good any loss of” the vessel (cl.8.3.1) (*emphasis added*).

The respondent and the Commonwealth reached a settlement that required the respondent to pay \$31.5 million. That was the cost of replacing the lost vessel by the purchase of a new Cape-class patrol boat (which was roughly equivalent to the vessel lost).

The respondent then sought to recover the amounts paid under that settlement from its insurers. One of those insurers, Royal and Sun Alliance Insurance PLC (the appellant), initially contested its liability to indemnify.

However, the parties ultimately entered an indemnity settlement deed which, broadly speaking, conceded the insurer’s liability to pay. After a trial before Bond J, the appellant was ordered to pay the respondent \$31.5 million under the relevant insurance contract (being the amount of the settlement sum paid by the respondent to the Commonwealth).

The appellant appealed from Bond J’s judgment, contending that his Honour had made a number of errors in assessing its liability to the respondent under their insurance contract.

The Court of Appeal (per Fraser and McMurdo JJA and Boddice J) dismissed the appeal entirely. In doing so, the court considered the meaning of an obligation to “replace or otherwise make good” a loss in a contract, and provided a useful demonstration of how quantification of indemnity under a contract of insurance may be established by proof of a reasonable settlement.

The insurance contract and appeal issues

The insurance policy provided that the respondent was to be indemnified:

“...for all sums which [the respondent] shall become liable to pay by reason of the legal liability of the respondent as ship repairers for... (i) loss of or damage to any vessel or craft which is in the care, custody or control of [the respondent] for the purpose of being worked upon...”

The central issues in the appeal involved two questions:

Firstly, how was the legal liability of the respondent to the Commonwealth (under clause 8.3.1, outlined above) properly to be understood? At first instance Bond J had concluded that it required either the provision of a replacement vessel or its equivalent (for example, in money).

However, the appellant contended that this construction was too narrow. On its proper construction, it suggested, the clause required no more than payment to the Commonwealth of its *actual* loss (that is, the monetary value of the vessel immediately prior to its destruction); and, further, that the loss could be “otherwise made good” through a lease of an equivalent or better vessel for the remainder of the lost vessel’s contractual service life. Requiring an actual replacement vessel, the appellant argued, would confer a benefit on the Commonwealth that would exceed the damage or loss it had sustained.

Secondly, was the respondent entitled to establish the quantum of its indemnity, under its insurance contract, by the amount it had settled with the Commonwealth on, provided it proved that amount was reasonable in the circumstances?

Bond J had considered that such proof would establish the requisite link between the amount paid and the amount the respondent was “liable to pay” the Commonwealth, as insured.

However, the appellant argued that “a settlement is not binding on the insurer unless the insured can demonstrate that, had the matter been litigated, the amount of the settlement would not have exceeded the amount of the judgment”.¹ That was not the case here, it contended. Further, it submitted that proof of the quantum in this way had been excluded by a clause in the indemnity settlement deed.

Justice Boddice gave the lead judgment on appeal, with which Fraser and McMurdo JJA agreed. Fraser and McMurdo JJA also gave supplementary reasons for arriving at the same result.

The Court of Appeal judgment

Issue 1 – Meaning of “replace or otherwise make good”

Their Honours each upheld Bond J’s construction of clause 8.3.1, by which the respondent was required to “replace or otherwise make good” the loss to the Commonwealth.

Contrary to the appellant’s submissions, the obligation to “replace or otherwise make good” was not limited to meeting the Commonwealth’s actual loss (and was not in the nature of an award of damages). Instead, the clause required *either* the replacement of the vessel, or some other equivalent means of making good *that* loss (of the vessel).

As Boddice J observed, there was a link between the concepts of ‘replace’ and ‘make good’, which precluded the latter expression from being satisfied through the provision of an amount which reflected the actual pecuniary loss alone.²

Although this had the result that the Commonwealth may be placed in a better position – that is, by having a new boat in place of the old (or its monetary equivalent) – their Honours considered that the contract clearly contemplated that result. It would have been apparent to the parties at the time of contracting that replacement with an equivalent vessel of the same age and condition would not be possible.

Further, the alternative means suggested for making good the loss – that is, through provision of a leased vessel for the remainder of the contracted service period – would not provide an equivalent making good of the loss. That was because the Commonwealth would not retain ownership of a vessel after the end of the leasing period.

Issue 2 – Proof of loss and reasonableness of settlement

The court unanimously concluded that the indemnity settlement deed had not excluded proof of a reasonable settlement as a means of establishing the quantum of the insured amount.

While the deed had indicated that the settlement amount was not *determinative* of the indemnity, it did not displace the insurance policy, which was subject to the recognised principle that an obligation to indemnify a legal liability may encompass the reasonable compromise of a legal proceeding.³

McMurdo JA, in particular, noted the divergent authorities concerning this principle. For example, the appellant argued that the respondent was required to prove that the amount of the settlement was less than what would have been obtained had the matter been litigated. However, McMurdo JA considered that the primary judge's approach was supported by Queensland appellate authority (with the only requirement being proof that the settlement amount was *reasonable*).⁴

In any event, it was not necessary to consider the correctness of this approach because the settlement sum was less than the amount that would have been awarded after a trial. This was because the settlement sum was

only the "bare replacement" cost of a *roughly* equivalent vessel. To make the replacement functionally equivalent to the lost vessel would have required an award "well above \$31.5 million".

Implications and takeaways

This decision is a useful reminder of how parties may be led astray if they understand the indemnity recoverable under a contract of insurance independently of the particular obligation of the insured which is indemnified.

In this case, the insured obligation of the respondent was to provide a replacement, or otherwise (equivalently) make good the loss of the vessel. The insurer had agreed to indemnify the respondent for that legal liability.

That resulted in an outcome that may confer some betterment on the Commonwealth, but that was simply a matter of giving effect to the obligation agreed at the time of contracting. Accordingly, the insurer's obligation was not satisfied by an amount that would reflect only the actual loss, or what might be arrived at for an award of damages.

Further, the decision provides an illustration of how proof of a reasonable settlement may establish the quantum of indemnity under a contract of insurance. The reasons

of McMurdo JA (in particular) and Boddice J (less obviously),⁵ seem to support the continued authority of the earlier decision in *Hurlock*,⁶ to the effect that all that is required is proof that the settlement is *reasonable* (and not the stricter test that the amount settled on is less than what would have been achieved through a trial).

William Isdale is a lawyer at MinterEllison. Samuel Walpole is a legal officer at the Australian Law Reform Commission and a sessional lecturer at the University of Queensland. The views expressed in this article represent solely the personal views of the authors.

Notes

- 1 Relying on *Colinvaux's Law of Insurance* (11th ed.) at 21-107.
- 2 Thus, the fact that the market value of the vessel was nil was irrelevant, as was the fact that the Navy obtained the use of an Australian Border Force vessel for two years and a leased vessel for three years after that.
- 3 See, for example, *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603 at 626.
- 4 *Hurlock v Council of the Shire of Johnstone* [2002] QCA 256.
- 5 Fraser JA did not expressly address this second issue, but agreed with the reasons of both McMurdo JA and Boddice J.
- 6 See note 4, above.

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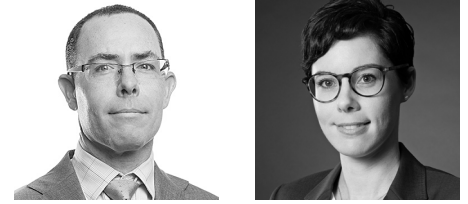
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Disability and the justice barrier

The issues that impede access

BY LUKE GEARY AND NAOMI BRODIE



The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability was formally established in April 2019 and began public hearings and consultations across the country.

Prior to all public hearings being suspended from March, one of the most significant issues that was repeatedly raised concerned the barriers and challenges experienced by people with disability in accessing the criminal justice system and the justice system generally.

The commission has heard that people with disability who have experienced or witnessed violence, abuse, neglect or exploitation face significant barriers in seeking justice.

A public workshop held on 2 September 2019 specifically focused on people with disability in the criminal justice system and explored issues relating to policing practices, arrest, charge, prosecution and legal and court processes.

In its issues paper¹ on the criminal justice system, published on 14 January 2020, the commission acknowledged that people with disability may come into contact with the criminal justice system either as victims, accused persons, or as witnesses.

People with disability are overrepresented across the criminal justice system in Australia, with disproportionately high rates of arrest, charge, prosecution and incarceration, with significant negative flow-on effects in other areas of their life. They are at a heightened risk of violence, abuse, neglect and exploitation in criminal justice settings.

The criminal justice system is often used to 'manage' people with disability who experience multiple hardships rather than being supported in the community. There is also evidence of systemic criminalisation of disability which is often related to undiagnosed disability.

A range of systemic and structural problems prevent people with disability from accessing justice and fairly participating in the criminal justice system on an equal basis with others. The barriers are complex and various, and may arise as a result of:

- systemic criminalisation of disability and intersectional discrimination (including due to race and sex, linguistically diverse backgrounds, First Nations people, or the nature of a person's particular disability such as a cognitive or psychosocial impairment)
- physical barriers to accessing services
- communication barriers
- the attitudes, values and assumptions of legal professionals and others, such as a lack of understanding of the rights of people with disability by those who work in the criminal justice system
- the absence of appropriate supports to address the above factors when navigating the criminal justice system.

For example, a person with disability may:

- be reliant on the perpetrator of abuse or other crime for their ongoing support, or even to make a report or complaint, in the context of both private and institutional support settings
- not be believed, or have difficulties in making people understand the level of threat they are facing, especially when the perpetrator of abuse or other crime is the primary support giver or a justice agency
- be denied access to information needed to understand and enforce their legal rights
- not have their experiences considered worthy of investigation by authorities
- have their legal capacity called into question, or
- not be aware that they are in fact experiencing abuse or other crime.

These access to justice issues, particularly in the context of the criminal justice system, were scheduled to be addressed in a public hearing this year.

We expect that the commission will also focus in future issues papers and hearings on the experiences of people with disability in relation to other specific justice system issues, including with respect to legal capacity issues, unequal access to justice, and ineffective complaint processes.

Note: The terms of reference² broadly direct the Royal Commission to inquire into all forms of violence, abuse, neglect and exploitation of people with disability in all settings and contexts. The commission's progress made to date is outlined in the first progress report³ published in December 2019. The commission's interim report was due to be delivered in October 2020, although it is expected that this will be delayed due to the impact of COVID-19 on the commission's activities and the postponement of the previously announced hearing schedule for 2020. Further updates are available at disability.royalcommission.gov.au/news-and-media/coronavirus-covid-19-update.

This article appears courtesy of the Queensland Law Society Access to Justice and Pro Bono Committee. Luke Geary is a partner and Naomi Brodie is an associate at Mill Oakley. If you have an interest in this topic, or other access to justice topics, and want to share your views, please email e.shearer@qls.com.au. Elizabeth Shearer is Deputy President of QLS, chair of the committee and Legal Practitioner Director at Shearer Doyle Law.

Note

- ¹ disability.royalcommission.gov.au/system/files/2020-02/Issues-paper-Criminal-justice-system.pdf.
- ² disability.royalcommission.gov.au/about-royal-commission/our-terms-reference.
- ³ disability.royalcommission.gov.au/sites/default/files/2020-01/first-progress-report.pdf.

Preparing an affidavit (part 2)



BY KYLIE DOWNES QC

An affidavit is one means by which your client might seek to adduce evidence in its case.

In most jurisdictions the rules of evidence apply, which means that the affidavit must comply with those rules before it can be admitted into evidence. This article addresses some of the common issues which arise with the admissibility and presentation of affidavits.

Rule 1: Every statement in the affidavit must be relevant.

To comply with this rule, you must understand the relevance of the deponent's evidence to the case.

For example, if the affidavit is to be used in an interlocutory hearing, the evidence in the affidavit should be relevant to the relief which is sought. For example, a letter from your firm complaining about inadequate particulars is unlikely to be relevant to a disclosure application.

If the affidavit is to be used in a trial, you will need to identify the issues on the pleadings to which the witness' evidence relates. To successfully resolve this, you must:

- have read the pleadings or relevant parts
- have identified the facts in issue (that is, the facts which are in dispute between the parties based on the pleadings or which are relevant to the relief being sought)
- have answered this question in the affirmative – does the evidence I propose to put in this affidavit tend to prove or disprove a fact in issue? If yes, it is likely to be relevant evidence.

Practical tip – Always have the pleadings on your desk and open at the relevant section when drawing the affidavit. Constantly double-check the relevance of what you are drafting against the pleadings.

Rule 2: Every statement in the affidavit must be admissible evidence.

To comply, you must be familiar with the rules of evidence, including relevant legislation, which operate in the jurisdiction in which the affidavit will be filed.

As a general rule, the deponent can only swear to what they perceived. When drafting the affidavit, ask: is the witness deposing to what they (personally) saw or heard (for example)? Or are they (in truth) speculating about what happened or deposing to what someone else told them about what happened?

What the witness saw – if relevant, this evidence will be admissible.

What the witness thinks or believes – Generally, a witness cannot express an opinion or depose as to what they thought or believed at an earlier time or what they think or believe now.

In particular, a witness cannot depose as to their view as to why a party is making a claim or why a witness has given certain evidence.

Common exceptions include:

- a case in which a party must prove they believed certain things as a result of representations made by another person and that they relied on the representations
- opinion evidence given by an expert or (in limited circumstances) a lay witness.

What the witness said – In general, there are two exclusionary rules of evidence which operate in connection with a witness who wishes to depose to what they said on another occasion. These are:

Rule against previous consistent statements: A witness cannot, as a general rule, give evidence of what they said on a previous occasion for the purpose of showing that their present evidence is consistent with their earlier statement and they therefore ought to be believed.

For example, if the dispute concerns what parties said during contractual negotiations, Gordon can state in his affidavit, "I said 'I agree to your terms provided you pay me by next week,' and Liz said, 'OK, no problem'."

As a general rule, Gordon cannot state the following in his affidavit if the purpose is to show that his evidence about what occurred at the meeting is credible:

"After the meeting with Liz, I spoke to John at the pub and told him, 'I spoke to Liz today and she agreed to pay me by next week. Isn't that great!'"

The reasoning for excluding such evidence includes:

- Liars, especially accomplished ones, could easily perpetrate and perpetuate a false account from an early stage.
- The earlier consistent statement will have been made in uncontrolled conditions as the maker of the statement was not under oath, not liable to be cross-examined on the truth or accuracy of the statement, and the judge had no opportunity to assess the witness' demeanour.
- The avoidance of multiplicity of issues – were such evidence to be admitted, other evidence could theoretically be called to rebut the evidence that the earlier consistent statement was made.

Rule against hearsay: As a general rule, a witness cannot give evidence of their own statement which was made out of court (the present proceedings) and which is being tendered to prove the truth of the contents of the statement.

There is a common misconception that, to be hearsay, the witness must be repeating what they heard someone else say. However, if a witness seeks to depose to their own earlier statement and the purpose of tendering the evidence of that earlier statement is to prove the truth of any part of that statement (as a matter of fact), then the evidence of the earlier statement is inadmissible hearsay.

For example, assume a fact in issue in a case is whether or not Sylvia sent a certain letter to James on February 12. You are asked to draw Sylvia's affidavit. Her statement reads:

"I posted the letter to James at the registered office of his company on the afternoon of February 12. *In the week after I posted the letter to James, I sent a letter to my solicitors which said: 'Please be advised that on 12 February, I sent a letter to James c/o his company and am now awaiting his response'.*"

The letter by Sylvia to her solicitors appears to be an out-of-court statement which is being tendered to prove a certain letter was sent to James on a certain date – that is, it is being tendered to prove the truth of the content of the statement. What else is its purpose?

What the witness heard – Again, the rule against hearsay needs to be considered if the witness is deposing as to what they heard someone else say.

Questions to ask: Was the statement made outside the present proceedings? If yes, then:

- What are the facts contained in the statement?
Example: proposed evidence of John: "Gordon told me that he and Liz had a meeting at the building site at 1pm on Thursday." Facts within the statement: Gordon and Liz had a meeting. Where: at the building site. When: at 1pm on Thursday.
- Am I seeking to tender this evidence to prove any of the facts in the statement (directly or indirectly)? If so, it is hearsay. Example above: John cannot depose to what Gordon told him if your client is seeking to prove by this evidence that: a meeting was held between Liz and Gordon; that it was held at the building site or that it was held at 1 pm on Thursday.

All of these examples render John's evidence inadmissible hearsay. Remember: it is not the fact that the witness is deposing to what someone else has said that makes it hearsay. It is the reason that you are seeking to tender the evidence which makes it hearsay.

It is important to note that:

- There are numerous exceptions to the hearsay rule, including those which may be provided by legislation which applies to the court in which you are appearing. If you wish to rely on an exception provided by legislation, ensure that the statutory requirements are able to be satisfied.
- Civil courts are more relaxed than criminal courts about adherence to the rules of evidence.
- Even if the evidence is allowed, courts tend to give less weight to hearsay evidence.

Rule 3: Put all statements in direct language and avoid conclusions.

For example, if the witness' evidence is that they made an oral promise, the affidavit should read: "I then said to Andrew, 'I agree to pay you tomorrow'," rather than "I then agreed to pay Andrew tomorrow" or "I then agreed to Andrew's terms" or "We then reached an oral agreement".

Rule 4: Be concise, not verbose.

State the evidence concisely, then stop or you may include irrelevant or self-contradictory evidence.

Rule 5: Have only one idea per paragraph.

To put it another way, avoid paragraphs in an affidavit which span several pages and have numerous sub-paragraphs.

Rule 6: Use sub-headings throughout to denote different topics within the witness' evidence.

Doing this in an affidavit assists the court and your client's counsel.

Rule 7: Put each statement into context.

For example, include information about the date, place, other people present.

If it is not obvious how a witness knows a fact, include an explanation of this.

Rule 8: Relate events chronologically.

Subject to Rule 14.

Rule 9: Do not include argumentative statements or submissions.

The judge will pay no attention to them and will probably regard the witness as being partial and less credible as a consequence.

Rule 10: Exhibits must be properly proved.

The deponent must be the appropriate person to prove the document which is exhibited to their affidavit.

To answer this, ask: if the deponent was giving oral evidence, would I be able to tender the document through the witness? If the answer is 'no', then find the correct person to swear an affidavit and exhibit the document to their affidavit.

Rule 11: Avoid big bundles of disparate documents marked as one exhibit.

Rule 12: Properly brief your witness about their evidence before the affidavit is executed and tendered.

This includes a discussion with your witness about:

- the fact that the witness is swearing to facts on oath or affirmation, what this means and the consequences of false testimony
- the likelihood the witness will be cross-examined about the content of the affidavit and what this will entail. This is your opportunity to test the witness and understand how they are able to give the evidence which they wish to give, and
- whether the witness agrees with the content of the draft affidavit or what changes they wish to make.

Rule 13: Comply with the rules of court as to format.

Rule 14: Present the information with the greatest impact first, leaving minor issues to the end.

Rule 15: Use the witness' own words.

Do not alter the manner or style by which the witness communicates information.

The affidavit will be virtually worthless if it reads likely every other affidavit tendered as part of your case (because it is your voice in all of them and not each witness); or it is revealed during cross-examination that the witness does not know the meaning of a word in their own affidavit.

Conclusion

An affidavit provides an opportunity to present a witness' evidence in a manner which is, in its highest form, cogent and persuasive. Preparing such an affidavit involves more than copying the witness' statement into an affidavit template. It requires consideration of and adherence to the rules of evidence and a thorough understanding of the relevance of the evidence in the affidavit to the case.

In conversation with Catherine Chiang



BY SHEETAL DEO

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

As the peak professional membership body for the legal profession, Queensland Law Society aims to be your partner from law school to lawyer – and beyond.

This includes non-practising members, those in academia and counsel at the Bar. Catherine Chiang is one such member.

Catherine has a long-standing relationship with QLS. She began her QLS journey as a student member, then opted for full membership once she was admitted to Queensland legal practice. Now, as a barrister at Wilberforce Chambers, she enjoys her associate membership.*

Over her 12 years' of experience in the legal industry, Catherine has become an increasingly active member of the legal profession. She not only helped establish the Queensland Branch of the Asian Australian Lawyers Association (AALA(Q)) in 2016 to better support lawyers with diverse backgrounds, but in recent years has worked with QLS and other organisation to improve inclusion and celebration of diversity in the legal profession.

I had the opportunity to hear Catherine deliver a lecture on 'Lessons in Diversity' at the Banco Court last year and am convinced that not only will she be a leader for the next generation of legal professionals, but alongside the AALA(Q) will be pivotal in leading the profession into a more inclusive future. I asked Catherine to share her aspirations for the future of the legal profession and how we can work towards achieving same.

SD: Hi Catherine. Thank you for your time today. You've been a member of the QLS for the entirety of your legal career. What role has QLS played in your legal career?

CC: Thank you Sheetal. I became a student member of QLS in 2008 while working as a paralegal, then a full member once I joined the solicitors' ranks in 2013. I now practise as a barrister in commercial and civil litigation and remain an associate member of QLS.



In 2016, I co-founded the Queensland branch of the Asian Australian Lawyers Association (AALA), a national non-profit association with the Honourable Michael Kirby as our patron. With active branches in Queensland, New South Wales, Victoria and Western Australia, we work closely with industry regulators like QLS, the judiciary, law firms and universities to spread the message of diversity and inclusion. QLS has increasingly facilitated our work in this space.

After I went to the Bar in 2018, I remained an associate member of QLS because of the wonderful advocacy that QLS has been doing for diversity and mental wellbeing, especially through partnering with organisations like AALA and Minds Count to bring their work to a wider audience.

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

CC: The recent trend of increased awareness of diversity issues is a positive one. I hope this momentum continues until, one day, it is commonplace for judges from non-Anglo-Saxon backgrounds to be appointed, and for a large portion of equity partners of law firms to be working mums.

In this age of disruption and global instability, the profession is also long overdue for a sharp correction in its business models. The scarcity of graduate employment, workplace harassment and bullying, archaic modes of billing, and underfunding of legal aid etc. are all critical issues that I hope the profession will band together to resolve in coming years.

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

CC: Rather than rest on our laurels, the profession needs to keep its foot on the gas when it comes to efforts to break down barriers and promote wellbeing. Each practitioner can do their part by recognising and overcoming unconscious biases, fearlessly calling out unacceptable workplace behaviours, and elevating team players who do the right thing. I certainly don't profess to have all the answers, but a seismic shift towards better access to justice and away from relentless profit-generation would be a good starting point.

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

CC: In a speech to pupils at the end of my Bar Practice Course in 2018, Justice Bradley advised us to "make friends and ask for help" when we go the Bar. I think this advice applies to junior solicitors too. I believe most people in the profession are willing to help, but sometimes it's not the right time. Just keep asking politely and be ready to work hard when opportunities come your way. Joining AALA also gives you access to a network of friends who are trying to make the profession more welcoming for all.

"Each practitioner can do their part by recognising and overcoming unconscious biases, fearlessly calling out unacceptable workplace behaviours, and elevating team players who do the right thing."

Catherine Chiang

Catherine and the AALA(Q) have worked together with organisations across the Queensland legal profession to support the future of the legal profession – not only through its nation-wide University Outreach project and National Mentoring Program for students and early career lawyers, but through initiatives such as the William Ah Ket Scholarship essay competition, cultural awareness training modules/sessions and the annual Judicial Diversity Panel event, which shares inspirational personal stories of our judicial officers with the public.

With Catherine Chiang and the AALA(Q) fiercely advocating and championing diversity and inclusion in the legal profession, it's only a matter of time before diversity and inclusion become less of an initiative and more standard practice.

*Associate membership is open to Australian lawyers who are not legal practitioners, former solicitors, barristers, law practice employees, law lecturers and to people with other appropriate qualifications or experience. See qls.com.au/membership ↔

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

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- our weekly newsletter, *Queensland Legal Updater*, to keep you up to date with legal news and developments (sclqld.org.au/information-services/qld-legal-updater)

Please don't hesitate to contact us if you have any questions or need assistance. All of us at the library wish you well during these highly unusual and challenging times.

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Quotes to build a career on



BY ROCHELLE RYAN

As an early career lawyer you will question yourself and what you are doing, feel overwhelmed, experience ups and downs, highs and lows and grow phenomenally.

There are two quotes that have helped me early in my career and I hope they will assist you to navigate your way towards a healthy, happy and balanced career.

“Focus your time on building meaningful relationships. You can be the smartest person in the room, but if nobody wants to work with you, that doesn’t matter.”

Canadian fintech firm Mogo

To be successful in law, you need to build and maintain good relationships. In the beginning, it will be hard, you probably won't know many people. To list a few essentials, I would encourage you to establish a relationship with:

Other early career lawyers: There will be ups and downs and you can reassure and support each other.

At least one experienced mentor in your practice area: Whether this is a more senior practitioner or a barrister, it is always helpful to bounce ideas off peers with a lot of experience who can point you in the right direction.

“Remember that a job, even a great job or a fantastic career, doesn’t give your life meaning, at least not by itself. Life is about what you learn, who you are or can become, who you love and are loved by.”

Author and psychotherapist Fran Dorf

Other practitioners who you will work with: This might come as a surprise to some, however, I have found that, the better the relationship you have with your colleagues in your practice area, the more likely you are able to discuss and resolve issues to the satisfaction of all clients.

Support staff: A law practice is a team. The team works best if all members feel valued and respected. Be kind to those who assist you in your work and take time to get to know everyone in the office.

I have found that the better our relationships are with every person who we need to work with, the more success we will have and the more enjoyable our work will become. When we have success for our clients, our own success will follow.

Take the time to actually get to know the people in your team in the office. Be courteous to other solicitors that you know you need to work with. Don't be afraid to put yourself out there, attend events, reach out to people, pick up the phone, get involved in a committee or volunteer in your community.

Lawyers consume a lot of energy during the day and working week. We are often so focused on taking care of our clients and fixing their problems that we forget to take care of ourselves. Early career lawyers are particularly susceptible to burnout. It is important to find a balance in your life. My tips are to:

Plan leave in advance: This will give you something to look forward to and ensure you have time to recharge your batteries.

Prioritise you at least once a day: Try to do at least one thing each day that makes you happy. Try not to compromise on your happy time. For me, I start each day with a gym session, which is my favourite part of the day. Everybody is different, but I encourage you to find that one thing you appreciate in a day and that is for you.

Nurture your personal relationships: Often when I arrive home from work I am completely exhausted and flat. I usually just want to relax and wind down. I encourage you to take five minutes when you first arrive home to acknowledge the loved ones in your life, ask them how their day was, give your pet some attention, engage with them.

We should be putting in just as much effort into greeting our loved ones at the end of a long day as we would greeting our first client appointment for the day. These are, after all, our most important relationships, but also the ones that are easiest to take for granted. This in turn will make you feel more connected and loved by those around you.

A career in the law can be difficult but resilience and persistence, along with surrounding ourselves with the right people and relationships, can help us stay on the path we have chosen. My hope is that these encouraging quotes can be a reminder to those starting out in the law to continue.

This article appears courtesy of the Queensland Law Society Early Career Lawyers Committee Proctor working group, chaired by Adam Moschella (amoschella@pottslawyers.com.au). Rochelle Ryan is an associate at Miller Harris Lawyers.

COVID conundrums

Consideration needed on the question of ‘presence’

WITH CHRISTINE SMYTH



It seems that no matter how fast I type, I can't match the speed with which things are changing as a result of COVID-19.

At the time of writing, succession lawyers are grappling with how we might address the issues thrown up where there is a legislative requirement for witnessing and for it to occur ‘in the presence of’, particularly with respect to affidavits, wills, powers of attorney, advance health directives and superannuation binding death benefit nominations.

In the COVID-19 crisis, the limitations to executing these documents in accordance with the current legal requirements has created a substantial, if not insurmountable, barrier to solicitors carrying out client instructions. The situation is exacerbated by the fact that our clients typically fall into the high-risk category, and by the withdrawal of Justice of the Peace services from the community, and self-isolation and sanitisation restrictions.

As a result, ordinary citizens are being denied some of their most basic legal rights to make decisions in advance on their medical care and thereby safeguard their affairs. Why is this happening?

In *Legal Services Commissioner v Bentley* [2016] QCAT 185 (*Bentley*), the parties accepted that the term ‘present’ meant physical presence, with minimal discourse on the term. The practitioner, Mr Bentley, took an affidavit via telephone while his client was overseas, and that affidavit was filed with the court.

The commissioner's position was that “Rule 432 of the *Uniform Civil Procedure Rules 1999* (Qld), makes it clear that an affidavit must be signed by the person making it ‘in the presence of’ the person authorised to take the affidavit”¹ and that presence required physical presence.²

Accordingly, the taking of the affidavit over the telephone did not meet that requirement for presence.³ While the tribunal found the submissions of both parties were not dissimilar,⁴ Mr Bentley did submit that, in a modern environment, there is scope for a broader interpretation of ‘presence’.⁵ Unfortunately, that submission was not explored in the judgment.

One might posit that the missing element in Bentley's case was that he could not see the client or the document which was being executed. So, what if he could see the execution? That therefore raises the question of whether remote or videoconference witnessing would fall within the term ‘presence’.

Witnessing is a separate act to other acts typically associated with documents, such as the taking of an oath, the giving of evidence in a court, or the assessment of capacity.⁶ These important legal tasks can be undertaken through the use of technology, typically via video-link facilities.⁷

Some might argue that these tasks are of higher orders of importance than the verification of a signature. The object of witnessing is to minimise fraud on the document by ensuring that the person signing is who they say they are and to safeguard the integrity of the document. Yet, the integrity of a document and the identity of the person both can now be readily secured and validated by technology at an exceptionally high level of certainty, in most cases more so than by the currently accepted norms of witnessing a signature.

In *Bentley* the tribunal indicated there may be scope for a more modern approach by observing “that the requirements arising from the words used in the jurat have not been judicially considered and involve the type of concept which may change over time depending upon the way in which technology and communications develop”.⁸

Since then, technology, much like COVID-19, has rapidly and exponentially evolved. Australian legislators have recognised this through the enactment of the *Electronic Transactions Act 1999* (Cth) and its state and territory counterparts (ETAs).⁹ Critically however, court documents

and witnessing of documents are specifically excluded¹⁰ from this forward-thinking legislation. This means that the ETAs cannot presently be used to permit remote signing and witnessing of wills, powers of attorney or affidavits for filing in court.¹¹

Nevertheless, in some instances, the courts are trying their best to work around the limitations. For example, at the time of writing the Supreme Court of Queensland undertook an informal will s18 *Succession Act* application entirely by telephone in which my firm, Robbins Watson, was a party.¹²

Conversely, the Supreme Court of the ACT in the matter of *Talent v Official Trustee in Bankruptcy & Anor* (No.5) [2020] ACTSC 64 (*Talent*) determined to vacate the final hearing date on an application for a family provision and maintenance application as a result of COVID-19 related concerns, yet citing as its primary reason the perceived limitations of a hearing by video.

A number of the parties in the matter, on both sides, were in the high-risk category for COVID-19, including one counsel who resided in Queensland and could not travel. As a result, an application was brought to adjourn the final hearing.

The respondent submitted that the hearing could proceed “with the use of video link and telephone connections”.¹³ The court rejected that proposition on the basis that “litigants have a right to appear in court to not only give evidence but also to observe the running of their case. This will involve providing instructions, sometimes very promptly. There is no doubt that many procedures within a litigated case can be effectively conducted through remote forms of communication. However, I think there can be an important distinction with a final hearing.”¹⁴

While the court determined that other significant factors of serious consequence formed part of the decision to vacate the final hearing date,¹⁵ it is difficult to reconcile that court's reasoning as to the conduct a hearing through the use of technological means when other courts are more readily embracing technology.

By way of further example, in the matter of *JKC Australia LNG PTY LTD v CH2M Hill Companies LTD* [2020] WASCA 38,¹⁶ the Court of Appeal dismissed an application to adjourn the appeal hearing. Again, the matter involved COVID-19-related concerns, however the primary submission was prejudice to the parties in conducting an appeal hearing by telephone.

Similar concerns were raised by senior counsel in this matter that were referenced in *Talent*. In denying the application to adjourn the appeal hearing, the court rejected the submission that the parties “were ‘entitled’ to have a normal hearing”,¹⁷ rather “[p]rocedural fairness requires that a party be provided with an adequate opportunity to properly present its case. The court’s experience is that, having regard to the other practices and procedures in the Court of Appeal, the conduct of an appeal hearing by telephone provides for comprehensive and considered dialogue and debate between bar and bench as to the issues raised by the appeal. It is not the case that an appeal hearing by telephone is manifestly inadequate or that an appeal hearing by videolink is inadequate.”¹⁸

The exclusion of court documents and witnessing from the *Electronic Transactions (Queensland) Act 2001* (Qld), coupled with the divergence in approaches by the courts to the use of technology and the current jurisprudence around the term ‘presence’ demonstrates there is currently no universal legally valid way to solve the problem.

Our legal system is grinding to a halt with the necessary restrictions in place to address the current health crisis, with that we ought not lose sight of the maxim that “justice delayed is justice denied”. Now more than ever we need a response that takes into account how things are, the available technology, including the emergency and uncertainty caused by COVID-19.

The task of our legislators is to make our legal system work, and work in the environment in which we live, to ensure we can pursue our legal rights in a timely and efficient manner. The technology exists for us to be able to action our legal rights in this crisis and it is incumbent on our legislators to address this immediately.

Technology currently exists to ensure protections sought, including ensuring the integrity of a document, the identity of a person, the giving of evidence and so on. It is clear, however, that legislative intervention is required to recognise those technological solutions and allow them to be used to address modern-day problems.

Immediately this crisis occurred, numerous jurisdictions were quick to recognise the issue and take real and effective steps to rectify the unnecessary limitations.

On 25 March, New South Wales passed its legislative power to create regulations.¹⁹ On 7 April, the Canadian province of Ontario passed an Order in Council permitting virtual witnessing of wills and powers of attorney.²⁰

On 16 April, New Zealand similarly did so²¹ and, then on 22 April, New South Wales passed its regulations.²² Granted, late in the evening of 22 April 2020, the Queensland Parliament finally passed the COVID-19 Emergency Response Bill 2020, enabling regulations to be made.²³ However, Parliament did not pass any regulations and, at the time of writing, none exist.

No clear solutions have been identified. We remain in legal limbo, with piecemeal work-arounds. For example, the Supreme Court, responsive to our concerns and quick to act, published on 22 April 2020, Practice Direction Number 10 of 2020 to provide some relief for informal wills. But that does not address the myriad of other important estate planning documents, especially enduring documents.

In ordinary times, the average number of deaths in Queensland is around 33,000 a year.²⁴ In 2017, the Attorney-General announced at the March QLS Symposium that amendments to the 1973 *Trusts Act* would be tabled. We are still waiting for that, three years after that announcement and some seven years after the Queensland Law Reform Commission recommended the enactment of new trusts legislation to replace the current Act.²⁵

For every one of those 33,000 Queensland deaths, a trust is created. Surely that sobering figure of itself is sufficient to prioritise these estate planning issues, without the impetus of a global pandemic?

Notes

¹ *Legal Services Commissioner v Bentley* [2016] QCAT 185, at [19].

² At [20].

³ At [16].

⁴ At [33].

⁵ At [29].

⁶ Medical appointments and diagnosis are frequently undertaken by video and through the use of other technologies; see [medicalboard.gov.au/Codes-Guidelines-Policies/Technology-based-consultation-guidelines.aspx](https://www.medicalboard.gov.au/Codes-Guidelines-Policies/Technology-based-consultation-guidelines.aspx).

⁷ Supreme Court of Queensland Practice Direction No. 1 of 2008, Taking evidence by telephone and video link; Supreme Court of Queensland Practice Direction No. 4 of 2014, Criminal Jurisdiction: Supreme Court. See also ‘Practice Note for Queensland practitioners taking Will and Enduring Power of Attorney Instructions during COVID-19’ at qls.com.au/Knowledge_centre/Ethics/Resources/Client_instructions_and_capacity.

⁸ At [38].

⁹ See ‘Electronic Contracts and Signatures’ presented by Andrew Smyth on behalf of QLS, the August 2019; ‘Signatures in a digital age’, by Andrew Smyth Proctor, December 2012.

¹⁰ See *Electronic Transactions (Queensland) Act 2001*, Schedule 1.

¹¹ Contrast with New South Wales which recently passed *NSW COVID-19 Legislation Amendment (Emergency Measures) Act 2020 No. 1*, which amends the NSW ETA to allow for wide-ranging extensions to the acceptable uses of electronic signatures.

¹² As are many firms nationwide undertaking court appearances, civil and criminal applications and trials through the use of technology, including video link.

¹³ At [11].

¹⁴ At [14].

¹⁵ The court postulated that the likely outcome would be the house in which the applicant was living would have to be sold and in the current environment that posed a risk to the applicant. See [15-17].

¹⁶ My thanks to QLS Ethics Solicitor Shane Budden for bringing this case to my attention.

¹⁷ At [7].

¹⁸ *Ibid*.

¹⁹ *Electronic Transactions Act 2000* No 8

²⁰ Ontario Regulation Made Under The (Bilingual) Reg2020.0240.E 5 Emergency Management And Civil Protection Act Order Under Subsection 7.0.2 (4) Of The Act- Signatures In Wills And Powers Of Attorney

²¹ Epidemic Preparedness (Wills Act 2007—Signing and Witnessing of Wills) Immediate Modification Order 2020

²² *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* under the *Electronic Transactions Act 2000*

²³ See section 9

²⁴ <https://www.qld.gov.au/law/births-deaths-marriages-and-divorces/data/life-event-statistics>

²⁵ https://www.qld.gov.au/_data/assets/pdf_file/0011/372854/r71.pdf

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High Court and Federal Court casenotes

WITH DAVID KELSEY-SUGG AND DAN STAR QC



High Court

Criminal practice – directions to jury – *Liberato* direction

De Silva v The Queen [2019] HCA 48 (13 December 2019) concerned the adequacy of directions given to the jury in a criminal trial. The trial judge had not been asked to give, and did not give, a direction along the lines of the direction proposed by Brennan J in *Liberato v The Queen* (1985) 159 CLR 507 at 515 (a '*Liberato* direction'). Such a direction serves to clarify and reinforce directions on the onus and standard of proof in a case in which there is a risk that the jury may be left with the impression that the evidence on which the accused relies will only give rise to a reasonable doubt if they believe it to be truthful, or that a preference for the evidence of the complainant suffices to establish guilt.

The appellant, Mr De Silva, had been arraigned in the District Court of Queensland on an indictment that charged him with two counts of rape. The prosecution case on each count was dependent on acceptance of the complainant's evidence. Mr De Silva did not give, or call, evidence. A recorded interview between him and the police, in which he provided exculpatory answers, was in evidence in the prosecution case. The jury ultimately returned verdicts of not guilty on the first count and guilty on the second count.

Mr De Silva's case in the High Court was that it is prudent to give a *Liberato* direction in most, if not all, cases in which there is evidence of the conflicting defence account of material events. He complained that the instructions given to the jury at his trial by the trial judge were flawed in several respects, including that the instructions: were generic and not adapted to the circumstances of the case; did not ensure that the jury understood that a preference for the evidence of the complainant did not preclude a verdict of not guilty; and did not make clear that disbelieving the appellant's version of events was no bar to a verdict of not guilty.

The High Court said that while it may, in some cases, be appropriate to give a *Liberato* direction notwithstanding that the accused's conflicting version of events is not before the

jury on oath, this was not such a case. The trial judge's summing-up made clear the necessity that the jury be satisfied beyond reasonable doubt of the complainant's reliability and credibility. The Court of Appeal had not erred in concluding that, when the summing-up is read as a whole, the trial did not miscarry by reason of the omission of a *Liberato* direction.

Kiefel CJ, Bell, Gageler and Gordon JJ jointly. Nettle J dissenting. Appeal from the Supreme Court of Queensland dismissed.

Immigration – representative proceedings – application for remitter

DBE17 (by his litigation guardian Marie Theresa Arthur) v Commonwealth of Australia [2019] HCA 47 (6 December 2019) was an application for an order, by consent, that a representative proceeding instituted in the original jurisdiction of the High Court be remitted to the Federal Court of Australia pursuant to s44(2A) of the *Judiciary Act 1903* (Cth). The claim in the representative proceeding was for damages for false imprisonment arising from the allegedly unlawful detention of the plaintiff and each other group member. The plaintiff claimed that he and each other group member were purportedly detained under ss189 and 196 of the *Migration Act 1958* (Cth) in circumstances which did not conform to the requirements of those provisions.

The application for remitter was listed for hearing in the High Court because, at first sight, it appeared that s476B of the *Migration Act* might have precluded the High Court from remitting the proceeding to the Federal Court or that s486B(4) of that Act might render the proceeding incompetent in its present form. Ultimately, the High Court did not consider that s476B of the *Migration Act* prohibited it from remitting the matter to the Federal Court or that s486B rendered the proceeding incompetent in its present form.

Nettle J. Matter remitted to the Federal Court of Australia.

Bankruptcy – vesting of property held by a bankrupt on trust for another

Boensch v Pascoe [2019] HCA 49 (13 December 2019) was an appeal from a judgment of the Full Court of the Federal

Court of Australia dismissing an appeal from the decision of the Supreme Court of New South Wales that the respondent, Mr Pascoe, did not act without "reasonable cause" within the meaning of s74P(1) of the *Real Property Act 1900* (NSW) in lodging and not withdrawing a caveat against dealings over land in respect of which the appellant, Mr Boensch, was the registered proprietor of an estate in fee simple (the Rydalmere property).

Mr Boensch was granted special leave to appeal to the High Court because the appeal raised a question of principle of general importance as to whether property held by a bankrupt on trust for another vests in the bankrupt's trustee in bankruptcy pursuant to s58 of the *Bankruptcy Act 1996* (Cth).

The High Court's answer to that question was that, provided the bankrupt had a valid beneficial interest in the trust property, the trust property will vest in the trustee in bankruptcy subject to the equities to which it is subject in the hands of the bankrupt. For those purposes, a valid beneficial interest meant a vested or (subject to applicable laws as to remoteness of vesting) contingent right or power to obtain some personal benefit from the trust property.

There was no reason to doubt that, on the making of a sequestration order, the Rydalmere property vested in equity in Mr Pascoe by reason of Mr Boensch's right of indemnity and, therefore, that Mr Pascoe had a caveatable interest in the property. Nor was there any reason to doubt that Mr Pascoe honestly believed on reasonable grounds that the property so vested, either on the basis that the trust was void or on the basis of Mr Boensch's right of indemnity. On the facts as found, Mr Pascoe did not lodge or refuse to withdraw the caveat without reasonable cause.

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

Immigration – Immigration Assessment Authority – apprehended bias

CNY17 v Minister for Immigration and Border Protection [2019] HCA 50 (13 December 2019) was an appeal from a decision of the

Full Court of the Federal Court concerning a problem that had arisen in the administration of Pt 7AA of the *Migration Act 1958* (Cth).

A delegate of the first respondent refused the appellant's application for a protection visa. That decision was referred to the Immigration Assessment Authority (IAA) for review under Pt 7AA of the Act. The secretary of the department was required to give the IAA certain material in the secretary's possession or control. The IAA had to review the decision "by considering the review material provided to [it]" by the secretary, without accepting or requesting new information, and without interviewing the appellant.

Unbeknown to the appellant, the secretary gave the IAA material which was not only irrelevant but prejudicial to him. The question for the High Court was whether a hypothetical fair-minded lay observer with knowledge of the material objective facts might reasonably apprehend that the IAA might not bring an impartial mind to the decision before it as a result of that information being given to it.

The High Court by majority answered that question in the affirmative. A fair-minded lay observer might have apprehended that the IAA might not have brought an impartial mind to the review, by reason of the irrelevant and prejudicial material which the IAA was mandated to consider. The material might have led the decision-maker to make a decision otherwise than on the legal and factual merits of the case because it might have led the decision-maker to the view that the appellant was not the sort of person who should be granted a visa or that he was not a person who should be believed. A fair-minded lay observer might have apprehended that this might have had an effect on the decision-maker, even if that effect was subconscious.

Nettle and Gordon JJ jointly. Edelman J separately concurring. Kiefel CJ and Gageler J jointly dissenting. Appeal from the Full Court of the Federal Court of Australia allowed.

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Federal Court

Corporations law – 'best interests obligations' in *Corporations Act*, ss961B, 961G and 961J – lack of culture of compliance – penalties

In *Australian Securities & Investments Commission v AMP Financial Planning Pty Ltd (No.2)* [2020] FCA 69 (5 February 2020) the court gave its reasons for judgment concerning contraventions by AMP Financial

Planning Pty Ltd (AMPFP) of the best interests obligations and related duties in ss961B, 961G and 961J of the *Corporations Act 2001* (Cth) (the Act).

The court's judgment is highly critical of AMPFP. Lee J states at [2]: "A 'culture of compliance' is an amorphous concept. But whatever it actually means, it must transcend simply putting in place expensive 'systems'; or it must be more than persons, whose titles include terms such as 'governance' and 'compliance', declaiming platitudes. One might question the point of such structures and roles in a company, if the corporate will to do the right thing is absent. For generations, many successful financial institutions did not need 'values statements' setting out bromides; nor was it thought necessary to have an array of compliance executives with highfalutin' titles; those responsible simply ensured their employees or representatives dealt with customers in a manner reflecting an instinctive institutional commitment to playing with a straight bat. At bottom, as I will explain, this penalty proceeding reflects a lamentable failure of corporate will to take the necessary steps to prevent greedy and unlawful conduct taking place, and a further failure to adopt a swift and proper remedial response."

An adviser of AMPFP (Panganiban) was repeatedly engaging in a form of 'churning' by, rather than advising his clients to transfer their existing cover, arranging for his clients to sign cancellation letters and then, some days later, arranging for an application for new insurance to be submitted to AMP (at [4]). The motivation for this conduct, which exposed the clients to risks and other disadvantages, was that Panganiban was entitled to a substantially higher commission (at [5]). In its defence filed in September 2018, AMPFP admitted contraventions of ss961B, 961G and 961J of the Act by Panganiban but not by other authorised representatives of AMPFP (at [32]). In May 2019, AMPFP also admitted contraventions of ss961B, 961G and 961J of the Act by another five authorised representatives of AMPFP (at [34]).

The court's judgment addresses:

1. Certain factual matters, and most importantly the question of whether, as at 1 July 2013, AMPFP had reason to believe that the conduct was common (at [68]-[88]).
2. The proper construction of s961L and the number of contraventions that arose (at [89]-[141]). Section 961L provides: "A financial services licensee must take reasonable steps to ensure that representatives of the licensee comply with sections 961B, 961G, 961H and 961J". The court found that AMPFP engaged in six contraventions of s961L of the Act (at [140]).

3. The appropriate pecuniary penalty (at [154]-[235]). The court held that the appropriate penalties in total were \$5.175m (at [234]).
4. The appropriateness of aspects of the remediation plan and compliance plan under s1101B of the Act (at [236]-[262]).

Human rights and anti-discrimination law – sexual harassment – whether employer took all reasonable steps to prevent sexual harassment – whether judgment unsafe because of six-year delay between trial and judgment

In *Von Schoeler v Allen Taylor and Company Ltd Trading as Boral Timber (No.2)* [2020] FCAFC 13 (20 February 2020) the Full Court allowed the appeal. The Federal Circuit Court judge upheld an allegation of sexual harassment against one employee (Mr Urquhart) of the employer (Boral), but dismissed the claims against Boral for vicarious liability and the claims against a second employee of Boral. The Full Court's judgment commenced noting that a "startling feature" of the appeal was that the judgment was delivered more than six years after the trial and delivery of final submissions (at [1]).

The Full Court held that the primary judge erred in finding that Boral was not vicariously liable for the sexual harassment by Mr Urquhart which was proven (at [50]-[89]).

Section 106 of the *Sex Discrimination Act 1984* (Cth) (SDA) provides for vicarious liability. The effect of s106(2) of the SDA is that an employer or principal to whom s106(1) applies will not be liable for the act of unlawful discrimination or sexual harassment if the employer or principal establishes that it took "all reasonable steps" to prevent its employee or agent from doing the relevant act (at [60]). The court noted that it is common for employers to seek to establish that they took all reasonable steps to prevent an employee from doing the unlawful act by relying on policies published and training provided in the workplace (at [65]) and that is what Boral sought to do in this case (at [67]).

After reviewing the evidence of the policies and training, Flick, Robertson and Rangiah JJ stated at [81]: "The paucity of evidence as to the steps actually taken to convey the seriousness and consequences of sexual harassment to employees, including Mr Urquhart, leads to the conclusion that Boral failed to establish that it took all reasonable steps to prevent Mr Urquhart from engaging in the sexual harassment". Accordingly, the defence under s106(2) of the SDA failed and Boral was liable under s106(1) for the sexual harassment perpetrated by Mr Urquhart (at [88]).

The Full Court also set aside the orders of the Federal Circuit Court dismissing the appellant's other claims under the

SDA. The six-year delay in the delivery of judgment was described by the Full Court as “extraordinary and deplorable” as well as being “explained” (at [92]). Having said that, the judges discussed the authorities showing that the circumstances in which delay of itself vitiates a judgment are rare (at [93]-[96]). However, the appeal succeeded in the present circumstances. Flick, Robertson and Rangiah JJ explained at [113]: “The primary judge’s delay created requirements in respect of the reasons that would not ordinarily apply. It was incumbent upon his Honour to inform the parties of the reasons why the evidence of particular witnesses had been accepted or rejected and to say why the evidence of one witness had been preferred over the evidence of other witnesses. The primary judge was also required to explain how, despite the delay, he was able to recollect the oral testimony and demeanour of witnesses in order to demonstrate that delay did not affect his decision. The reasons do not meet these requirements. In addition, the reasons expose examples of the primary judge appearing to skirt more difficult issues and driving toward simple conclusions. Further, some aspects of his Honour’s reasoning reveal a lack of clarity which suggest that the delay has affected the decision. In addition, his Honour overlooked issues that had been squarely raised in the

case. The reasons demonstrate that the primary judge was unable to satisfactorily determine the case six years after hearing the evidence. It must be concluded that the judgment is unsafe”. The matter was remitted to be heard and determined by a different judge (at [118]).

Representative proceedings – approval of settlement under s33V of the *Federal Court of Australia Act 1976* (Cth) and Division 9.2 and Rule 9.70 of the *Federal Court Rules 2011* (Cth) – dispensing with requirement to fix an opt out date

In *Sister Marie Brigid Arthur (Litigation Representative) v Northern Territory of Australia (No.2)* [2020] FCA 215 (26 February 2020) the court approved the settlement of a representative proceeding for children in detention in the Don Dale Youth Detention Centre and the Alice Springs Youth Detention Centre. The stated objective of the proceeding was the improvement of conditions in youth detention in the Northern Territory. Only public law relief (declarations, injunctions, a writ of mandamus and other orders) was sought and the case did not include claims for damages or compensation (at [3]). The settlement involved terms of the Northern Territory’s Statement of Commitments (annexed to the judgment)

being negotiated between the parties and the applicant sought and obtained improvements in the proposed government initiatives (at [7]; also [63]-[68]).

To the extent it was a proceeding instituted under Part IVA of the *Federal Court of Australia Act 1976* (Cth) (FCA Act), settlement approval was given under s33V of the FCA Act. The proceeding was also an ‘old-style’ representative proceeding under Division 9.2 of the *Federal Court Rules 2011* (Cth) and the court approached settlement of the Division 9.2 proceeding on the same basis as the Part IVA case (at [71]-[79]).

The court’s judgment also included reasons why it was appropriate to dispense with the requirement for the court to fix a date for opt out (at [42]-[62]). Murphy J said at [58]: “In my view, in cases where no damages claim is made I consider s33ZF provides a source of power to dispense with the requirement to fix an opt out date”.

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A case for reform

Misuse of confidential information by public sector agencies

BY ELEANOR DICKENS AND SAM WESTON



The misuse of confidential information by public sector agencies has always been a known corruption risk.

However, as the volume and scope of the confidential and personal information held by public sector agencies continues to expand and community expectations rise, agencies must now respond to this risk with an increased focus and range of mechanisms to avoid the legal and reputational risks arising from the potential misuse of confidential information.

This article considers how agencies can best respond to these risks, by reference to recent reports released by state-based corruption regulators, including Victoria's Independent Broad-based Anti-corruption Commission, with a focus on a report released by Queensland's Crime and Corruption Commission (CCC).

Operation Impala

On 21 February 2020, the CCC released its 'Operation Impala – Report on Misuse of Confidential Information in the Queensland Public Sector' (the report).¹

The report examines the practices of a cross-section of Queensland's public sector, with a particular focus on the misuse of confidential information of a personal nature by Queensland public sector agencies – an issue that has been in the CCC's crosshairs since 2016, as a "key enabler of other types of corrupt conduct".

After a spike in allegations from 2015 to 2019, the CCC commissioned Operation Impala to examine how and why confidential information can be misused, as well as the impacts of unauthorised access and disclosure on both agencies and victims of misuse. In November 2019, a public hearing for the operation heard evidence from 31 witnesses, including agency chief executives.

The CCC made 18 separate recommendations, which provide a blueprint for how public sector agencies across all jurisdictions can better manage this increasing corruption risk.

Misuse: How and why?

Agencies were reported to be at "varying levels of maturity" in confidential information

management practices, which were influenced by the types of information collected and managed, as well as the strength of organisational culture in reinforcing the importance of protecting that information.

Consistent risk areas contributing to misuse of confidential information were said to stem from agency pressures to:

- manage vast and diverse volumes of information
- ensure consistent approaches to information security across devolved entities
- keep up with technological advances that can impact on information security, access control systems and or database usability.

The CCC found the key motivations for improperly accessing confidential information from public sector databases include personal interest (curiosity), material benefit (such as a financial incentive), relationships (organised crime groups or calling on favours, threats) and personal circumstances (drug-related issues, anxiety, broken relationships).

18 recommendations: What's next?

Broadly, the CCC's recommendations for dealing with this corruption risk can be grouped into five categories:

- **Recommendations 1-9 and 18:** Introducing several technical and organisational enhancements to strengthen information management systems to create a more "privacy-aware culture".
- **Recommendation 10:** Creating a new offence in the *Criminal Code* better suited to offending related to misuse of confidential information, punishable by five years' imprisonment (increasing to 10 years in aggravated circumstances). The CCC found that section 408E of the *Criminal Code* (Computer hacking and misuse), currently used to prosecute public sector employees who improperly access or disclose confidential information, is inadequate.
- **Recommendations 13 and 17:** Improving remedies available for victims of misuse of confidential personal information, notably including a recommendation that the State Government consider introducing a statutory tort for misuse of private information.

- **Recommendations 11, 12, 14 and 15:** Extending and clarifying the Office of the Information Commissioner's powers and practices, notably including the implementation of a mandatory data breach notification scheme in Queensland.
- **Recommendation 16:** Revising and consolidating the Information Privacy Principles and National Privacy Principles into a single set of principles consistent with the *Human Rights Act 2019* (Qld).

How can public sector agencies respond?

Agencies should now move to enhance their information management and associated practices in line with the CCC's recommendations. That means taking measures like:

- Improving information management systems and access control mechanisms, including updating ICT policies and introducing comprehensive auditing programs enabling routine auditing to proactively identify access to sensitive personal information and training to alert employees to this privacy and corruption risk.
- Undertaking regular information privacy awareness campaigns and promoting 'privacy by design', to ensure privacy is considered at the outset and becomes a relevant consideration in agency decision-making processes.
- Reviewing the agency's code of conduct and related employment procedures, such that a clear avenue for decisive action is outlined in instances of misuse of sensitive confidential information, including automatic referral of such cases to the Queensland Police Service.
- Allocating responsibility for risks associated with data management and sharing, including embedding 'privacy champions' at the senior officer level.

Eleanor Dickens is a partner in the Clayton Utz Brisbane office and a member of the QLS Privacy and Data Committee. Sam Weston is a lawyer at Clayton Utz.

Note

¹ Available at ccc.qld.gov.au/publications/operation-impala-report-misuse-confidential-information-queensland-public-sector.

'Abuse of process' leaves solicitor with indemnity costs

WITH ROBERT GLADE-WRIGHT



Costs – indemnity costs against solicitor – client's application had no chance of success

In *Benard & Eames and Anor* [2020] FamCAFC 47 (5 March 2020) the Full Court (Alstergren CJ, Strickland & Kent JJ) dismissed with costs of \$18,000 an appeal by a solicitor ordered to pay indemnity costs. The solicitor acted for the father in an application for a credit of third-party payments made for the parties' children under s123 of the *Child Support (Assessment) Act 1989* and an order under s66M of the *Family Law Act 1975* that he had a lawful duty to maintain his stepchildren (the children of his new partner).

At first instance Judge Bender summarily dismissed the application for having no reasonable chance of being granted. The father's appeal of that dismissal was dismissed. Costs were subsequently awarded to the mother and the father's solicitor was ordered to pay them. He appealed.

The Full Court said (from [35]):

"...[I]t is clear that the application was brought on the advice of the appellant... where [he] would have well known that the application had no chance of success. Indeed, that was not only a finding by her Honour, but was also a finding by the Full Court...[which] also found that the application was brought for a collateral purpose and was, thus, an abuse of process.

[36] (...) As was said by the Full Court of the Federal Court of Australia in *Levick v Deputy Commissioner of Taxation* [2000] FCA 674 at [44]:

'...[I]t is...important to uphold the right of a court to order a solicitor to pay costs wasted by the solicitor's unreasonable conduct of a case. What constitutes unreasonable conduct must depend upon the circumstances of a case...In the context of instituting or maintaining a proceeding...we agree with Goldberg J that unreasonable conduct must be more than acting [for] a client who has little or no prospect of success. There must be something akin to abuse of process...using the proceeding for an ulterior purpose or without any, or any proper, consideration of the prospects of success.'

Property – adjustment under s75(2) set aside where children were 16 and 13 and husband was paying child support

In *Chan & Chih* [2020] FamCAFC 31 (14 February 2020) the Full Court (Strickland, Ryan and Tree JJ) allowed the husband's appeal of property orders. The husband was 50 and the wife 45. The parties married in 1999, moved from South Korea to Australia in 2000 and separated in 2013 with assets totalling \$4 million. Their children (16 and 13) lived with the wife.

At first instance Watts J held that there should be two pools, being the wife's Korean assets and all other assets (including the husband's Korean property). The wife's Korean assets comprised a 5/14th share in her late father's commercial property, her interest being worth \$2.2 million which also provided the wife with an income stream. The wife had also received financial support from her mother. Watts J made a 5% adjustment under s75(2)(d)-(g) for the wife calculated on the value of both pools.

The husband appealed, arguing that no adjustment should have been made. The Full Court agreed. The court ([42]) said that his Honour gave insufficient reasons for that adjustment, continuing (at [43]-[44]):

"It is also argued that the particular factors identified...cannot justify a 5 per cent adjustment. Certainly, the financial responsibilities for the children are a highly relevant factor, but the children were aged 16 and 13 years...and the husband was paying child support as well as providing additional funds. In relation to the 'real nature' of the wife's interest in the J property... his Honour made no findings as to the restrictions on the wife's enjoyment of her interest in that property being significant enough to justify an adjustment of 5 per cent.

Further, it is significant that his Honour only referred in percentage terms to the extent of the adjustment. There is no dollar figure discussed, and no analysis by his Honour of the real effect in money terms of the adjustment. The adjustment of 5 per cent represented \$203,568, and created a differential of approximately \$407,000. To not take that into account flies in the face of authorities such as...*Clauson* [1995] FamCA 10."

Children – father's interim application to vary parenting order so as to commence equal time before trial dismissed

In *Findlay & Reis* [2020] FCCA 425 (28 February 2020) Judge Hughes dismissed an interim application by the father to vary parenting orders which had been in force for six years, by which the children (now 13 and 11) spent four nights per fortnight with him. His application sought equal time. The mother's application for dismissal was listed as a preliminary hearing.

The father's case was that the children had repeatedly asked to spend week about time with him ([45]), that they were sufficiently mature to have more weight given to their views and that he was in a stable new relationship ([68]).

After citing *Rice & Asplund* [1978] FamCA 84 and *SPS & PLS* [2008] FamCAFC 16 her Honour said (from [65]):

"Their Honours [in *Marsden & Winch* [2009] FamCAFC 152] set out a two-step process to be followed in which there was a requirement:

- (1) for a *prima facie* case of changed circumstances to have been established; and
- (2) for a consideration as to whether that case is a sufficient change of circumstances to justify embarking on a hearing.

[66] (...) The mother said the only occasion on which...[equal time] was raised with her was...the result of the father's influence and a desire by the children to meet his need to have an arrangement which is 'fair' as between the parents. The veracity of the competing evidence about the children's views is not something I am able to determine on the strength of the untested affidavit material... (...)

[79] Based on the limited untested evidence before me, I am not persuaded further litigation will likely result in a substantial change in the children's arrangements given the high level of acrimony and resentment between the three significant adults. ...[T]he potential benefit to be derived by the children from [any] change is, in my view, outweighed by the negative aspects the children will be required to endure for a period of more than 12 months until a trial can occur."

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).

Performance appraisals

An opportunity frequently missed

BY GRAEME MCFADYEN



Handled well, performance appraisals can be an effective tool which can lead to higher performance, increased productivity and a more culturally attuned employee.

Handled poorly, appraisals can be a negative and uncomfortable experience. Rather than allowing billing targets and CLE programs to dominate the conversation, appraisals represent a real opportunity to expand the solicitor's commercial and cultural awareness and to identify opportunities for how they may better contribute to both firm culture and the firm's strategic plan.

It is incumbent on the principals and senior staff to recognise that their leadership is also a factor in the equation and the ideal environment is one which encourages and inspires rather than simply providing a black or white conversation.

Rather than being an overtly formal occasion which may cause discomfort, the appraisal should take the form of a regular informal conversation every three to six months.

The appraisal should focus on four principal areas:

1. Quality of work

There is no avoiding the fact that the rate of recovery of WIP and ultimately the profitability of the firm is largely determined by the quality of the work performed by the firm. The principals need to have quality staff upon whom they can rely for the majority of the work performed in the firm. However, technical competence in its own right is not enough. Staff contribution to productivity, office culture and client relationships are also critically important. But quality is also a function of mindful supervision.

2. Productivity and profitability

The solicitor's contribution to the profitability of the firm is critical to the success of the firm. However, principals need to understand both the outcome and how this is achieved.

You do not want solicitors (or anyone else for that matter) maximising their chargeable time by gaming the system by, for example, charging large numbers of single six-minute units or charging time for activities that do not advance the client matter.

Regardless of the billing methodology it is important to continue to time record as it is the only way to truly measure productivity. And if you cannot measure productivity you cannot measure profitability, which is critical in managing the performance of multi-disciplinary practices.

The most common financial performance metrics required are:

- between 5.0 and 6.0 chargeable hours per day (although recent FMRC surveys have found that, across the board, principals and solicitors both are struggling to recover more than 4.0 hours per day.)
- employed solicitors to recover a minimum of three times their salary package.

3. Strong client focus

In an increasingly competitive legal market client service and support are critical to client retention. Responsiveness to client queries and prioritising client deadlines are essential characteristics of a strong client focus.

Clients may be prepared to reconcile themselves to paying higher fees if they are satisfied that they are getting a commensurate level of service. For this reason it is important that every client is asked after the conclusion of each matter to identify how the firm could have improved its service. If possible, this conversation should be with a principal not responsible for the conduct of the matter.

4. Positive attitude and contribution to culture

The Corporate Leadership Council, a global research platform for HR professionals, discovered that "emotional commitment is *four times more influential* (author's emphasis) than rational commitment".¹

If the firm's principals are able to develop a positive firm culture then it is far more likely that their employed staff will make a greater

effort to contribute to the firm's success. Their contribution to the culture, their respectful collaboration with other staff, their enthusiasm to participate in firm activities and their preparedness generally to assist the firm are all important and observable indicators of their commitment to the firm.

Culturally energised staff will be keen to learn how the firm is performing and how they can best contribute to the firm's success. Revealing the firm's budget and progressive performance through the year can do much to boost an employee's understanding of their personal contribution to the business and lead to greater enthusiasm and commitment.

Important strategies to adopt to maximise the value of performance appraisals:

- Appraisals should be a regular part of the firm culture.
- Don't wait for a formal appraisal if somebody's conduct warrants intervention.
- The employee should complete the appraisal form first to minimise the chance of surprises at the appraisal.
- Encourage the employee to do most of the talking to take responsibility for their own performance and growth.
- Look for opportunities to commend positive performance as well as identify areas for improvement.
- If you set specific objectives during the appraisal session ensure that you follow up within a reasonable period of time.
- Consider disclosing the firm's budget and progressive performance against budget to enable the staff member to better appreciate their role and purpose.

| Graeme McFadyen is the CEO of Kemp Law.

Note

¹ Michael Henderson, Dougal Thompson, Shar Henderson, *Leading through Values*, Harper Collins 2006, p51.

Legal Services Award 2020 – award coverage



BY ROB STEVENSON

The *Legal Services Award 2020* (the award) covers employers engaged in the business of providing legal and legal support services, and accordingly covers most private legal practices.

That does not mean that all employees are subject to the award's requirements. It is necessary to consider the employee classifications falling under the award, which are set out in Schedule A, and it is important that employers are familiar with the detail of these classifications.

There are five levels of 'Legal clerical and administrative employee' as well as classifications for 'Law graduate' and 'Law clerk'.

Admitted solicitors are not covered by the award. Employees performing duties which fall outside the scope of the listed classification descriptions are not covered by the award, for example, information technology employees, accountants (as opposed to bookkeepers) and senior managerial staff.

Each classification level for legal clerical and administrative employees sets out the characteristics, generic skills and core skills of jobs at that level, starting from an introductory level and progressing through levels requiring increasing skills and experience.

The characteristics section of each level covers things such as the required level of supervision, competency and indicative training. A statement of generic duties and skills is provided for each level covering problem-solving, literacy and numeracy skills.

The statement of core skills starts with skills in information handling, communication, enterprise/industry, technology, organisation, team and business/financial and progresses to more complex skills at each level. Skills in the legal area are included in the upper levels including, for example, a working knowledge of relevant legal systems and skills in routine legal procedures and documentation.

There are also classifications for the jobs of 'Law graduate' and 'Law clerk'. The definitions clause (clause 2) of the award defines a law graduate as an employee who has completed a legal qualification and is undertaking a period of training in a law firm in satisfaction of the requirements prescribed for admission to practice. This does not include lawyers admitted to practice in a foreign jurisdiction. The law graduate classification requires completion of a relevant degree, a formal offer by the employer and registration and approval of documentation required by relevant governing bodies.

The definitions clause (clause 2) of the award defines a law clerk as a clerk who spends most of their time interviewing clients, preparing documents and general work assisting a barrister or solicitor in their office. The term does not include account clerks, law graduates, titles office clerks, receptionists and employees principally engaged in clerical or routine duties.

The law clerk classification requires an indicative education level of associate diploma at TAFE or tertiary level (or equivalent) with the ability to display a practical understanding and application of the structures, methods and procedures of the relevant legal system. Work occurs under limited guidance involving the use of significant judgment related to products, services, operations or processes of the firm.

The definitions clause (clause 2) of the award also contains a definition of 'work experience clerk' as a person who is employed for no more than two months in a consecutive 12-month period for the purpose of gaining experience. The term does not include law students or persons performing a formal work experience program. It is not reflected in any award classification, nor is the term used anywhere else in the award. The implication is that someone who is employed for more than two months in a consecutive 12-month period may be subject to award classifications.

It is necessary to compare the requirements of a job position description with the award classification levels to determine which level best suits the actual job being performed. A Level 1 legal clerical and administrative employee role is, for example, an entry-level role usually working under a degree of direct supervision and comprising basic clerical and administrative tasks, including some financial tasks.

Each succeeding level includes the skills of previous levels but with escalating expertise and independence. So, legal, clerical and administrative employees at the highest level (Level 5) work under broad guidance with self directed application of knowledge and skills used independently. The law clerk classification does not require specific clerical and administrative competencies and sits above the highest legal, clerical and administrative classification.

Assessment of the appropriate award classification does not involve application of a precise formula but rather a practical judgment of the level that best fits the particular skills required for the job in question.

It is always wise to err on the side of caution in this assessment because each classification level is associated with a minimum pay rate under the award. Ongoing assessment is also necessary as an employee moves through each applicable level as their skills and responsibilities increase.

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Dr Jekyll and Mama Hyde

A horror story

BY SARAH-ELKE KRAAL



Day 28

Don't get me wrong. I'm very grateful. But I'm not sure I can bear it much longer.

My suits haven't left the closet – alright, the laundry basket; what are you, the Marie Kondo police?! – in nearly a month; and the shiny, happy, new heels I bought on that blissfully ignorant eve prior to our orders to work from home, remain innocently ensconced in their box.

They call to me with the long, plaintive cry of the unworn; beckoning me like a siren's song.

I hear you, my pretties. I hear you. *And what are you complaining about?! I wore you yesterday in my PJs around the living room... We danced to Right Said Fred! Did that mean nothing to you?!*

Stupid shoes.

Day 29

I think I may be going slightly mad.

I find myself singing "Baby Shark, doo, doo, doo, doo, doo!"...even when the Toddler is not around. Also, the toaster's been laughing at me.

I fear my descent from sophisticated Mummy-about-Town to reclusive, deranged shut-in is imminent. A fear that inches ever closer with every leftover peanut butter and honey sandwich I scoff from the Toddler's plate. And hand.

My usual beauty appointments have all been cancelled, and I have no idea whether or not I'm allowed to step into my hairdresser or if a SWAT team will swarm and tackle me as I run for the basin. I heard whispers of an underground beauty service, but our lines of communication were cut. I can only hope the Government appreciates the value of a good eyebrow wax before it's too late. Ideally, before we all start looking like Frida Kahlo.

Until then I'll have to satisfy myself with YouTube tutorials and old episodes of *Drag Race*.

Day 30

It's been nearly a week since I've washed my hair and it's beginning to matt at the crown. But I hide it well, I think.



My top tip for slaying in isolation? A half-updo hides a multitude of sins, it's practical, flattering; and all those frazzled knots clump together nicely for a rather chic confinement coiffure. Plus no need to tease it to Jesus, girlfriend! Also I find a cute hairclip from Sportsgirl tarts it up nicely in the event of any unexpected visitors I receive behind the safety of my locked screen door.

Don't come any closer or I'll get the supersoaker. I MEAN IT.

Or at least, that's what my new custom "unwelcome" mat from Etsy says. You can get the cutest things online these days.

Lucky.

Day 31

Today the Toddler pointed at Ursula from *the Little Mermaid* and said "Mummy".

When I laughed and said "no darling, that's not Mummy – here's Mummy" whilst showing her a wedding picture from the shelf, she shook her head and pointed back at the TV.

Don't know if I'll ever laugh again.

Day 32

Braved the shops for the essentials like sav blanc, cab sav, rosé, and potatoes (in case

we need to make vodka). Managed to sweep the leg of someone going for the last bar of soap. Knew this pram would come in handy. Panicked at the checkout when told I had to choose only two canned items. Chose a can of sauerkraut and a can of diced capsicum. What the hell am I going to do with either of those?! Clearly not good in a crisis.

I look forward to finding them both at the back of the cupboard in three years' time, when we next clean it out.

Day 33

All this working hunched over a laptop is giving me a mighty hump. I caught my reflection in the bathroom mirror today and nearly had a heart attack. It was basically Quasimodo in a hairclip.

Mama's gotta get back into the office, ASAP.

Now, the effort of writing has made me lightheaded – so I close by saying: SAVE ME! SAVE ME NOW!

*Sincerely,
Mama Hyde.*

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

Air battle in the bottle

WITH MATTHEW DUNN



Wine has a difficult love-hate relationship with oxygen. Without a little oxygen there is no aging and development to wine, and with too much there is total failure.

As Sweet sang to us, walking that line can be tricky.

With a new world order of social distancing, public health-induced isolation and the awkward calculus of whether another trip to the bottle shop can be considered *essential*, there is a renewed focus on how best to get an open and unfinished bottle to last a bit longer.

Oxygen is a reactive substance. It can release volatile flavour elements to increase the flavour of a wine, it can assist in the development of primary fruit characters in young wine and promote secondary and more complex flavours to develop with time. It can trigger the change of precious ethanol into the much less appetising aldehyde and carboxylic acid.

It is this last action which is the challenge in storing open wine. Given the rate of reaction is heat sensitive, one easy way to slow oxidation is to simply refrigerate the leftover wine.

Most modern wine storage mechanisms, such as bottles, cans, tetrapacks and silver bladders are designed to limit the amount of

**Love is like oxygen
You get too much
you get too high
Not enough and
you're gonna die**

Sweet, Love is Like Oxygen, 1978

oxygen entering the wine while in storage. Each packing method has a small volume of air in the top of the sealed container which does work upon the wine and, in the case of bottles sealed with corks, small amounts of oxygen seep into the enclosure through the porous wood bark, promoting ongoing development of the wine.

Upon opening the container, new oxygen rushes into the vessel and starts to work on the chemicals of the wine (only the much maligned silver bladder is designed to be effective at limiting the ingress of additional oxygen for as long as the plastic tap holds firm).

Among the many fancy methods to elongate the life of wine in open bottles, the simplest is to transfer the leftover wine to a smaller

container with a sealed lid closely matching the volume left. A collection of half bottles and quarter-sized bottles with screw-cap lids can be a very effective and inexpensive solution to storage if coupled with refrigeration.

The much honoured vacuum pump is a standard for your wine writer, but is only about 70% effective in reducing the oxygen in a bottle and is subject to leaking from the stopper. This is a gambit which may just buy a few days, but is better than just replacing the cork.

Enthusiasts have invented greater gizmos to de-oxygenate a bottle, including the species of neutral gas cylinders. Often this method requires a layer of neutral argon gas to be blown into the bottle to sit on top of the wine and keep out the evils of the oxygen. While costly, it does make for good theatre for dinner parties.

A final variant is the shield which is inserted into the bottle to float on top of the wine and form a physical version of the argon gas method. This can be an effective solution in stopping oxygen reaching the wine below and is less cumbersome than dealing with canisters of noble gases. Often shields are single use as extraction can be tricky, so this method may be better suited to the rare occasions when a serious wine is left unfinished.

Wine needs oxygen to be pleasurable, but the challenge of holding over for the next day, is all about not getting too much of a good thing.

The tasting A tasting from Italy, with love.



The first was the La Gioiosa Valdobbiadene Prosecco Superiore D.O.C.G. NV, which was pale gold in colour. It had a first run of enthusiastic bead which burnt down to large languorous bubbles. The nose was demure but the palate was crisp and lively. It was grapefruit and lime citrus lifting with floral sweet undertones. Lovely.



The second was the Ciu Ciu Falerio D.O.P. Oris 2018, which was the colour of straw gold. While the nose was demure again, the palate of this special wine from the Marche was acid and fine mineral structure. It was crisp with lime and refreshing with fine food wine notes.



The third was the Poderi del Paradiso 2018 Chianti Colli Senesi D.O.C.G., which was the colour of blood plums and had a nose of cherry, white pepper and currants. The palate was very special, with pepper, leather, oak and dark chocolate. A smooth operator from Tuscan hills with a real sense of depth of flavour. Delicious.

Verdict: It seems inappropriate to pick anything from Italy as being a winner at present, but the most preferred was the Chianti, as a seriously good red to start exploring decent Chianti.

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

Mould's maze



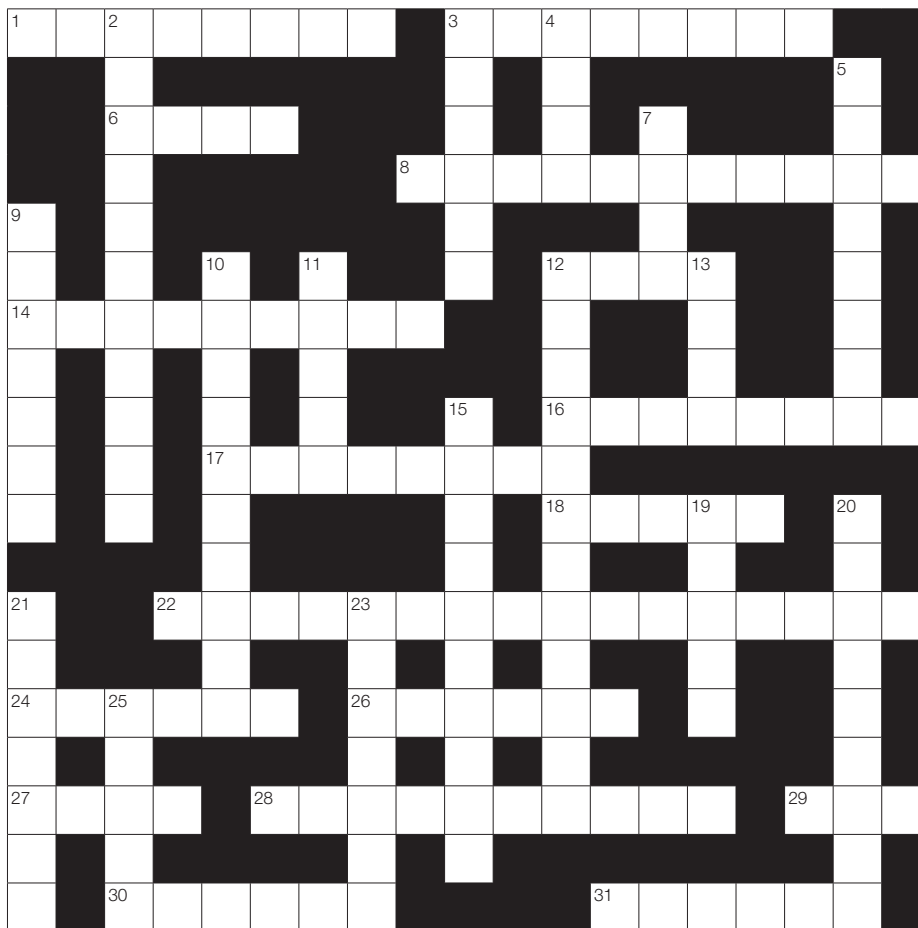
BY JOHN-PAUL MOULD, BARRISTER AND CIVIL MARRIAGE CELEBRANT | JPMOULD.COM.AU

Across

- 1 The Act provides for penalties for contempt for insulting or interrupting magistrates. (8)
- 3 A small textbook summarising an area of law. (8)
- 6 Knowing receipt and knowing assistance are the two limbs of *Barnes v ...* governing the liability of third parties for breach of trust. (4)
- 8 Censorship of literature and performances because of especially broad definitions of immorality. (11)
- 12 An offer is distinguished from a "mere". (4)
- 14 Discontinued a session of Parliament without dissolving it. (9)
- 16 A person who flouts the law, especially a law that is difficult to enforce effectively. (8)
- 17 The art of persuasive speaking or writing. (8)
- 18 Hear a case anew. (5)
- 22 A person who gives advice outside the area of their expertise. (16)
- 24 In order to a contract, the aggrieved party must have knowledge of the facts giving rise to terminate and act in a way that is unequivocally consistent with the choice to continue it. (6)
- 26 Take into police custody, typically for questioning. (6)
- 27 Made a defendant. (4)
- 28 Payment made to a creditor by an insolvent company which causes that creditor to be in a more favourable position than other unsecured creditors in a liquidation, unfair (10)
- 29 Formal notice of pending legal proceedings, ... *pendens*. (Latin) (3)
- 30 Common surname of an American legal realist and the Chief Justice of the Queensland Supreme Court. (6)
- 31 Criminal allegation; form of security for a debt taken by a creditor over company assets. (6)

Down

- 2 Member of a company. (11)
- 3 Motto of the Queensland Police Service, 'With We Serve'. (6)
- 4 Police informers. (Jargon) (4)
- 5 The law upholds bargains in accordance with the principle *pacta sunt* (Latin) (8)
- 7 White skull-cap worn by a serjeant-at-law. (Archaic, English) (4)



- 9 Gave evidence under oath. (7)
- 10 A person appointed by a secured creditor to deal with assets the subject of a charge. (10)
- 11 A set of 24 (or 25) uniform sheets of paper. (5)
- 12 Fiduciary duties are held in Australia to be, not prescriptive. (12)
- 13 An estate of land. (Archaic) (4)
- 15 The order set down by the *Corporations Act* for the payment of unsecured creditors of an insolvent company by an external administrator. (10)
- 19 High Court case dealing with the constitutional validity of legislation that prohibited prisoners from voting, v *Electoral Commissioner*. (5)
- 20 Type of licence a party acquires to allow them access to a business's intellectual property. (9)
- 21 International law term used to mention a sea or ocean under the jurisdiction of a state that is not accessible to other states, *Mare* (Latin) (7)
- 23 Common surname of a former District Court judge and a former Supreme Court justice. (7)
- 25 '..... evidence' did not exist at trial or could not with reasonable diligence have been discovered. (5)

Solution on page 60

Walking the non-virtual dog

Inappropriate observations on a serious issue

BY SHANE BUDDEN



As I write this, I am finding it a little difficult to be amusing (*What else is new?* – Ed.) because the ongoing issue of the Coronavirus – perhaps you have heard of it? – has forced the closure of many important institutions (like gyms) and some absolutely essential ones (such as pubs).

The fact that these are closing just as the school term is coming to an end – thus forcing parents to deal with their children without ‘fortification’ – will, I predict (by the time you read this) have forced us into a *Mad Max*-style world. The only difference that I can see is that apparently we will be fighting over rolls of toilet paper and not gasoline.

(Max: “Two days ago I saw a rig that could haul that Sorbent – you wanna get out of here, ya talk to me!”)

Indeed this virus has created some very strange experiences – who would have thought that we would find ourselves singing *Happy Birthday* to ourselves in public toilets? Which I suppose is at least better than singing it to someone else in a public toilet...

My point is that we are in weird times, not helped by the fact that the media – who, as we all know, respond to public crises with the same overall calm and rational approach that Pauline Hanson brings to the immigration debate – cannot seem to report about anything else. Half of the daily newspaper, at least, is devoted to a tense and doom-laden discussion of COVID-19, none of which has any new information and will only be of any use if the toilet paper shortage becomes a reality.

Like many of us, I have been working from home during this crisis, and this has been a revelatory experience. For example, I have discovered that, if you want to get technical about it, I do not need to be wearing pants to do my job. I have also discovered that this is not the case if you are skyping with people.

Indeed modern technology has come into its own during this crisis. Without the power of the internet, mobile devices and wi-fi, there is no way I could have received 1500 memes about toilet paper within minutes of people beginning to kill one another over six rolls of Quilton. This is of course a very typical response to a crisis (creating memes, I mean, not toilet roll-inspired homicide) and it is anybody’s guess how much of the ensuing economic chaos was in fact due to the massive drop in productivity caused by office workers dropping everything to download images from apocalyptic films and Photoshop rolls of toilet paper into them.

That response is not new, of course. Long before the invention of the internet, the desperate need office workers have to transmit, in any way possible including smoke signals, anything they find even remotely amusing has been destroying economic performance for decades. Top sociologists now agree that the first fax ever sent was a photocopy of a US postal worker’s backside back in the ’70s; they doubt, however, that there is any truth to the rumour that this worker was Donald Trump, as it is regarded as unlikely that he would have known how.

Working from home has its advantages, of course, and I don’t just mean being able to drink wine on the job, not that I would, honest. This is especially true for so-called ‘digital natives’ (translation: anyone younger than you) who in my experience will go to extreme lengths to avoid having anything like normal social interaction, to the extent that they text the person sitting next to them rather than risk a conversation which they were unable to accentuate with emojis, creative font and pictures of Boromir from *Lord of the Rings* emphasising that one does not simply...do a whole bunch of things.

For digital natives, this is paradise; nobody can sit within four metres of anyone else, shaking hands and all physical forms of expressing affection – what we humans call ‘feelings’ – are banned. It is as if everyone turned, overnight, into a barrister. All those robots people keep assuming are just waiting for their AI to develop enough that they can rise up and take over the world will be disappointed, because they have been beaten to it.

Thankfully, not everyone has reacted this way. At the park down the road from my place, parents who would once have been strapped in for their daily commute are kicking footies with their kids, going for bike rides or walking the dog.

Oh, I am sure somewhere there are millennials with Oculus devices strapped to their faces kicking virtual footies and walking virtual dogs (although probably not cleaning up the dogs’ virtual business) but sooner or later they will fall down some not-so-virtual stairs and no longer be an issue. The rest of us are taking the chance to re-connect with real life, and that isn’t so bad.

OK, so I realise I have been making jokes about a deadly serious issue, but that is the way we generally get through these things; I know people are hurting – and I have no idea how bad things will be by the time you read this. I am sure we will get through it though, so take care and stay safe out there.

Now, our extremely non-virtual dog is going virtually insane, so I’d better take him for a non-virtual walk...

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Crossword solution

From page 58

Across: 1 Justices, 3 Hornbook, 6 Addy, 8 Comstockery, 12 Puff, 14 Prorogued, 16 Scofflaw, 17 Rhetoric, 18 Retry, 22 Ultracrepidarian, 24 Affirm, 26 Detain, 27 Sued, 28 Preference, 29 Lis, 30 Holmes, 31 Charge.

Down: 2 Shareholder, 3 Honour, 4 Rats, 5 Servanda, 7 Coif, 9 Deposed, 10 Controller, 11 Quire, 12 Proscriptive, 13 Fief, 15 Priorities, 19 Roach, 20 Franchise, 21 Clausum, 23 Andrews, 25 Fresh.

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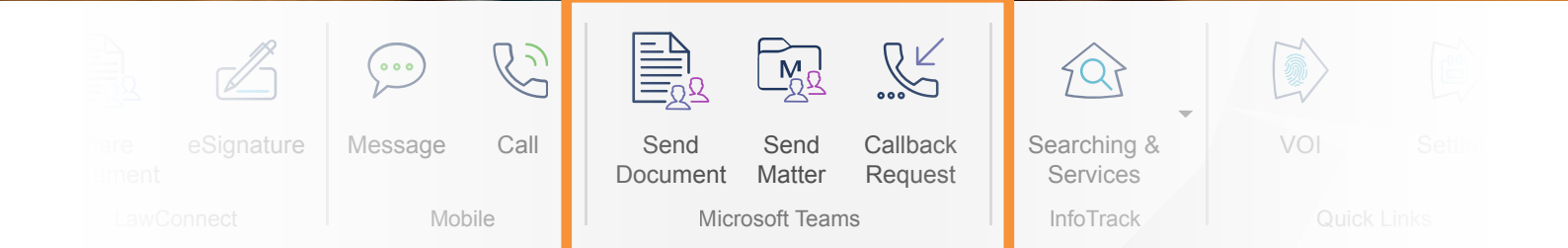
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