The Australian Capital Territory Bar Association

Bar Bulletin

ISSUE JUNE 2016

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A Ceremonial Sitting of the ACT Supreme Court to mark the swearing in of the Honourable Justice Michael Elkaim will be held in Courtroom 1, Supreme Court on Monday 4 July 2016 at 9:30am.

The Supreme Court Library and Sheriff's Office will be closed for business on that day until 11:30am. All court proceedings that day will be heard not before 11:30am.

Monitors will be set up in Courtroom 2 to enable practitioners to view the proceedings should no seats be available in Courtroom 1.

Farewell to Mr Shane Gill and welcome to The Hon Justice Shane Leslie Gill to the Family Court of Australia

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NOTE FROM **EDITOR**

The Hon Jeffrey Miles' Milestone

Former Chief Justice Jeffrey Miles has been remembered in stone by a plaque in Canberra's Walk of Honour near the Canberra Times Fountain in Civic. This honour recognises the former Chief Justice Miles' leadership of the Supreme Court, his dedication to law reform and his impartial dispensing of justice for the Canberra community. The ceremony was conducted by Chief Minister Andrew Barr on 28 April 2016. Sir Richard Blackburn is also among the many people who have been acknowledged for his contribution to Canberra's Story. Jeff was immortalised together with other persons whom Refshauge J calls "Populists", such as the manager of Manuka Pool, the Jennings "Germans" and Canberra's former "Kellermeister" Michael Hoffman.

Farewell to the Three Amigos

On 27 April 2016, a dinner at The Boathouse farewelled The Hon Justice Mary Finn, The Hon Deputy Chief Justice John Faulks and Judge Brewster from the Family Court of Australia. The dinner was very well attended by members of the profession. It was a joyous and nostalgic night. David Harper recalled his memory and history with all three. Faulks DCJ replied on behalf of everyone. Di Simpon of DDCS Lawyers stole the show with a poignant but hillarious speech - particularly she read out part of Judge Brewster's judgment wherein he criticised the High Court, praised feminism and discovered a dead cat.

Farewell Peter Dingwall

Long Serving Magistrate Peter Dingwall has reached the statutory age of senility and retires in the next few weeks. Peter has made an enormous contribution to the legal profession in Canberra, as a prosecutor, a solicitor, as the Registrar in Bankruptcy and lastly as a Magistrate. Everyone who appeared in Peter's Court was treated politely and patiently. His judgments were wise, thoughtful, considered and almost always correct. He will be sorely missed by the profession and the Canberra community. We wish Peter a long and happy retirement.

Congrats Shane-O

Our immediate past president of the ACT Bar Association Shane Gill has been appointed to the Family Court of Australia, replacing John Faulks. We congratulate the Federal Attorney on making an appropriate and welcome appointment. The people of Canberra will benefit by this appointment. Justice Gill will bring to the bench compassion, understan-

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FJ Purnell SC

MAGAZINE

Editorial

FJ Purnell SC **Editor -** The views contained in the Editor's column are the views expressed by the Editor and are not necessarily the views of the Bar Council or individual members of the ACT Bar Association.

Svetlana Todoroski - **Associate editor**

Contribution

Have an idea? We would like to publish articles from a broad pool of expert members and we're eager to hear your ideas regarding topics of interest to the profession. If you are interested in writing an article, email your article to ceo@actbar.com.au. Contributions may be subject to editing prior to publication, at the discretion of the editor.

Advertising

For advertising opportunities, contact Svetlana Todoroski, CEO at ceo@actbar.com.au

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ding, common sense, learning and fairness. His Honour has long fought for the underdog and the opressed. He has been a champion for Aboriginal and Torres Strait Islander issues. He has spoken out with a strong voice personally and on behalf of the Bar on issues of law reform, rights of the accused and matters generally that concern the profession. The Bar will lose a champion, but the Family Court and the people of Canberra will gain a hardworking and just Judge.

"Let them Eat Cake"

No! It was not Marie Antoinette who said this in the run up to the French Revolution, but our new Supreme Court Judge, The Hon Justice Michael Elkaim - that is according to his friend and confidant Paresh Khandhar. Paresh made the speech at the '15 Bobber' for the then newly sworn-in District Court Judge Elkaim and told the story that apparently when Elkaim J was called for interview in relation to his application to join the District Court, he took a chocolate babka cake. This unusual approach was apparently very successful. It is not known whether he took the a cake to his interview for the spot on the ACT Supreme Court.

David Peacock is currently Canberra's most famous 'ex Zambian' but Michael Elkaim will now mount a challenge as he also initially came from Zambia. At the Bar, the much beloved Dennis Wheelahan QC took Michael on as his pupil. No doubt Wheelahan QC would have taught Michael not only of the highest standards of advocacy, but also the importance of a wicked sense of humour and a dose of irreverence.

We look forward to appearing in front of The Hon Justice Elkaim and wish him fulilment and enjoyment in his new challenge on the ACT Supreme Court.

Magistrate Glenn Theakston

On 23 May 2016 the Attorney General Simon Corbell announced the appointment of Glenn Theakston as a Magistrate of the ACT Magistrates Court. Mr Theakston joined the Bar Association in 2012 and developed a criminal and family law practice as a barrister and reguarly appeared as counsel for the Australian Defence Force. We congratulate Mr Theakston on his appointment as a Magistrate. In an environment when legal decision making and particularly sentencing is being undertaken in an increasingly complex environment, Mr Theakston's balance and compassion will serve the Canberra community well.

Seldon's Corner

Many years ago Purnell SC acted for a young female plaintiff who suffered injuries after a MVA. Her main problem was a severely comprised bad back. Elkaim SC acted for the Dark Side (NRMA). Master Harper presided. The case was adjourned part heard in the middle of a cold Canberra winter. Unbeknown to the Plaintiff's legal team, the Plaintiff repaired to the warm waters and temperate climate of Surfers Paradise. There she had a tempestuous affair for a week, which ended with her male partner (certainly not a gentleman) being so upset, he informed the NRMA of the details of her physical feats during the brief affair. On resumption of the case after initial denial and thorough skillful cross-examination, the plaintiff tearfully and reluctantly admitted her ability to perform the alleged physical feats. Master Harper, who knows about affairs of the heart and how passion can overcome pain, punished the plaintiff ever so slightly. The NRMA appealed about qantum. When the case was called on in the Court of Appeal the then President, Crispin J, informed the parties that the Court would not hear the appeal and adjourned the matter to 2pm so that the parties could settle. The case was settled.

"Thems were the days"

CEREMONIAL SITTING – 11 JULY 2016

A Ceremonial Sitting of the ACT Magistrates Court to mark the swearing in of Magistrate Glenn Theakston will be held on Monday, 11 July 2016 at 9:30am.

President's message

"The ACT Bar Association and the Judiciary in the ACT is going through a process of change and renewal"

The appointment of our President, Shane Gill to the Family Court is a welcome development. He is a very worthy appointment and those who attended His Honour's swearing in ceremony heard the high regard in which he is held within the profession for his legal knowledge and commitment to fairness within our legal system.

The Bar has been advocating for the appointment of a 5th Supreme Court judge for some years. It was satisfying to hear that the Government has acted to appoint His Honour Justice Michael Elkhaim from the NSW District Court to be our newest judge. Many of you will know Justice Elkhaim from his days at the Bar. He appeared regularly in Courts in the Territory and was known for his good legal mind, his fairness and good humour. When appointed to the District Court in NSW those very same traits made him an outstanding judge on the District Court. The Bar welcomes his appointment.

Magistrate Dingwall is leaving the Magistrates Court in August after 25 years service. He has brought not only a good legal mind to his role but a level compassion and decency that made him such a respected Magistrate. Magistrate Dingwall is not gone yet but those at the Bar congratulate him and thanks him for the contribution he has made to the delivery of justice in the ACT. He will be sorely missed.

The Attorney General has announced that Mr Glenn Theakston will be appointed as a Magistrate to replace Mr Peter Dingwall. Mr Theakston was a respected member of the Bar and known for being a thorough and balanced advocate. He will bring skills derived from a varied background in the law to the office of Magistrate. Significantly in these times, that experience includes a long period of time learning the craft of a solicitor at the ACT Legal Aid Office. The Bar welcomes his appointment.

Svetlana Todoroski and Shane Gill

Change has also been the order of the day in the ACT Civil and Administrative Tribunal with the recent appointments of Ms Heidi Robinson and Mr Geoff McCarthy to positions on the Tribunal. Both are very good lawyers and both will enhance the capacity of ACAT to deliver expeditious and legally correct outcomes in an informal but respectful environment. Their appointments are well merited. Both will be very much missed at the Bar.

Within the Bar Association it is also a time of significant change. It is a challenging time and the appointments I have referred to have taken talented people from our ranks.

The appointment of Justice Gill has given me the opportunity to assume the position of President before the September elections. I hope to write in a future Bar News about some of the issues I am keen to pursue in whatever time I have as the Bar's President. Richard Arthur has taken on the position of Vice President and Rebecca Curran has joined Council as the Association's Secretary.

Ms Svetlana Todoroski has told the Bar Council that she intends to resign from her position as Chief Executive of the Bar Association and go into practice. Svet has been a rock of our Association for many years and her skills, intelligence and good humour will be greatly missed.

It has not been all about departures. Alicia Irving , Greg Stagg, Karl Pattenden and Brodie Buckland joined our ranks during 2015. Prue Bindon and Katrina Musgrove have recently completed the NSW Bar Readers course and will continue their reading program at Blackburn chambers. Welcome to the Bar!

Our Bar will be hosting a number of events to celebrate these comings and goings. We will keep you informed through our Current Awareness Broadcasts.

"Proportionality analysis as a constitutional criterion in political communication cases and its consequences"

On Thursday 19 May Canberra academics and practitioners had the privilege of attending a lecture presented by Sir Anthony Mason AC KBE GBM on an important development in our understanding of implied rights in Australia's constitutional law. The Centre of International and Public Law, ANU College of Law, hosted Sir Anthony Mason's lecture on "Proportionality analysis as a constitutional criterion in political communication cases and its consequences".

Sir Anthony Mason spoke about the new formulation of the proportionality test in assessing the implied freedom of political communication in the 2015 High Court decision of *McCloy v New South Wales* [2015] HCA 34. The implied freedom was first identified in the High Court decision of *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; [1992] HCA 45.

As former High Court judge from 1972 to 1987 and then as Chief Justice from 1987 to 1995, Sir Anthony Mason was, of course, very well placed to address this subject ,with personal insights into the development of this relatively newly propounded implied freedom. *Australian Capital Television* arose from a challenge to the *Political Broadcasts and Political Disclosures Act 1991* (Cth). This law imposed restrictions on the use of radio and television during election periods for political campaigning and some dissemination of political information and comment. Sir Anthony Mason was the Chief Justice of the 1992 Court in that decision and was part of the majority that found there was such an implied freedom of political communication.

He said that this implied freedom arose as a necessary part of representative government by the Ministers chosen by the people and who exercise their powers as representatives of the people. "[I]n the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act. Freedom of communication as an indispensable element in representative government" and indispensable to that accountability is "freedom of communication, at least in relation to public affairs and political discussion" (at [1992] HCA 45; [37]-[38]).

After referring to the development of the concept of 'proportionality' more generally in Australian constitutional law (e.g. in s51(vi) defence and s 92 freedom on interstate trade) Sir Anthony turned to the cases dealing with the implied freedom of communications after *Australian Capital Television Pty Ltd v The Commonwealth.* He discussed the test for establishing the 'qualified limitation on legislative power' propounded and refined in the seminal decisions in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; [1997] HCA 25 and *Coleman v Power* (2004) 220 CLR1; [2004] HCA 39.

JUNE 2016

- **Practising Certificates issued (you should receive you PC between 1 June and 10 June 2016 provided you have finalised your PII).**

JULY 2016

- **1 July - Commencement of the new Practising Year.**
- **4 July - Swearing-in Ceremony for The Hon Justice Michael Elkaim, (9.30am Court 1, Supreme Court of the ACT).**
- **11 July - Ceremonial Sitting for Magistrate Glenn Theakston, (9.30am, Magistrates Court of the ACT).**

SEPTEMBER 2016

- **ACT Bench and Bar Dinner, Friday, 2 September 2016 - the Boathouse by the Lake (see invitation on page 8)**

Guest Speaker:
The Hon Chief Justice Tom Bathurst AO (Supreme Court of NSW)

Ms Junior:
Ms Kristy Katavic, Barrister, Blackburn Chambers

- **Annual General Meeting, 15 September 2016.**

continued from p6.....

The *Lange* tests are, firstly, does the law effectively burden the freedom in its terms, operation or effect and if so, secondly (as adapted by *Coleman)* is the law that operates to restrict the freedom reasonably appropriate and adapted to serve a legitimate purpose compatible with representative government. This has two components. First, what is the object or purpose and is it compatible with representative government (the compatibility test). Then, the Court needs to consider whether the law is reasonably appropriate and adapted to achieving that purpose (the proportionality test).

McCloy involved the second High Court challenge to the *Election Funding, Expenditure and Disclosures Act 1981 (*NSW*).* The Court found that the provisions did not impose an impermissible burden on the implied constitutional freedom. The majority judgement by French CJ, Kiefel, Bell and Keane JJ redefined how to measure proportionality by identifying three criteria that have to be met in the balancing necessary to determine proportionality , i.e. (i) suitable, (ii) necessary and (iii) adequate in its balance. Sir Anthony described this as 'structured proportionality'. He found with the majority on the decision but did 'not reach the result through the template of standardised proportionality analysis' [98]. He expressed two reservations; firstly he was not convinced that 'one size fits all' and questioned whether this analysis was suitable for all restrictions, no matter how large or small [142]. Second, an equation between strict proportionality and specific or ad hoc balancing has always been controversial [146].

Sir Anthony advocated that the High Court should have a margin of appreciation for the legislative judgment, which will depend on the margin of the political case. Perhaps future High Court judges considering the majority judgment in *McCloy* will be concerned with its narrow concept of judicial power.

Canberra lawyers and students who attended the lecture enjoyed his erudite analysis of this complex topic and along the way, received a master class in advocacy. Sir Anthony's use of clear language combined with a complete mastery of his subject rendered a complex subject teased out of a number of cases and individual judgments digestible, even by this listener.

On a personal note, I was very pleased to hear Sir Anthony's acknowledgement of the late Professor Leslie Zines. Many heads were nodding in agreement as Sir Anthony spoke of how he missed enlivening conversation with the Professor.

BY: John Harris SC

AUSTRALIAN BAR ASSOCIATION URGES NORTHERN TERRITORY TO RECONSIDER PROPOSED BAIL LEGISLATION

The Australian Bar Association says the Northern Territory's proposed bail legislation to remove the presumption in favour of bail for repeat property offenders will only further exacerbate Australia's disgraceful Indigenous incarceration rates.

ABA President Patrick O'Sullivan QC said, "This proposed legislation will disproportionately target young Indigenous Australians in the Northern Territory, where the rate of indigenous people in prison is close to 90 percent. Indigenous incarceration is a national crisis and we need to be looking at solutions that divert indigenous people from the criminal justice system, not the other way around."

"It is a shocking fact that an Indigenous young person who has served a prison sentence is more likely to return to prison than finish school. On the other hand, we've seen that early intervention, prevention and diversion programs used in the ACT, have seen rates of young people in detention decrease by 35 per cent and arrests of young people down by 20 per cent over two years."

The Australian Bar Association recently proposed that mandatory sentencing laws, that have the biggest impact with minimum effect on Indigenous people, be amended or removed, and funds saved from housing prisoners redirected into programs that rehabilitate and reduce recidivism.

"Oregon in the US experienced a 72% drop in juvenile incarceration after the state reinvested $241 million from prison spending to treatment programs and improved probation and parole services. The evidence into the value and efficacy of Justice Reinvestment strategies exists. It's time we put these programs into practice and start seeing some real changes to the Indigenous incarceration rate and break the cycle of crime."

The Australian Bar Association is urging the Northern Territory to urgently reconsider this proposal before it becomes another hurdle to overcome in the struggle to reduce Indigenous incarceration rates in Australia.

The President of the ACT Bar Association,

Mr Ken Archer

cordially invites you
to the Annual ACT Bar Association's

2016 Bench and Bar Dinner

to be held at
The Boat House by The Lake
at Grevillea Park, Menindee Drive, Barton ACT

On Friday 2 September 2016
at 7pm for 7:30pm

Guest Speaker: The Hon Chief Justice Tom Bathurst AO, Supreme Court of NSW

Ms Junior - Kristy Katavic, Barrister, Blackburn Chambers

Cost: $165.00 (incl GST)
Dress Code: Black Tie/Formal **RSVP: 19 August 2016**

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RSVP - 19 August 2016

Please accept my registration for the Bench and Bar Dinner on 2 September 2016. Return the completed form to ACT Bar Association, GPO Box 789, CANBERRA, ACT 2601 (DX 5654 CANBERRA)

Registration Details — Bench and Bar DINNER			Payment	
☐ Please reserve	ticket/s @ $165 each	$	☐ Cash/EFTPOS	☐ Cheque (to ACT Bar Association)
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Dietary requirements:			Signature:	

2.2% Merchant Fee Charge applies to all credit card payments. Please note: Cancellations will only be accepted up to COB Friday 19 August 2016. After this time refunds will not be made, but substitutions will be accepted. If a registered attendee does not attend without notice, there will be no credit/refund offered and 100% of the total cost will be retained by the Association. The Association has the right to cancel or alter events at its discretion. In such circumstances, attendees will be notified via email.

High Court to Reconsider Application of Advocate's Immunity to Negligently advised settlements

Attwells v Jackson Lalic Lawyers Pty Ltd

The High Court has allowed an appeal against a decision of the New South Wales Court of Appeal on advocates immunity from negligence actions in the context of out of court settlements.

Facts in *Attwells*

ANZ Bank sought to enforce a guarantee of approximately $1.75 million on a loan taken out by the appellants. An employee of the respondent law firm allegedly negligently advised the appellants to settle the claim and also accept liability for a larger amount (approximately $3.4 million) because it 'would not make any difference' whether they defaulted for $3.4 million or the lesser sum.

The proceedings came on for trial before Rein J in the Supreme Court of NSW, but were settled on the first day. Orders by consent were made, which provided for a judgment against the plaintiffs for the full amount of the company's indebtedness to the bank (that is, $3.4 million), subject to an agreement that the bank would not enforce judgment if the plaintiffs paid a lesser sum by a nominated date.

The plaintiffs failed to make the payment within the time, and the bank enforced judgment for the higher amount of $3.4 million. In this instance, had it not been for the entry of the consent orders, the plaintiffs would have only been liable for a maximum of $1.75 million, plus interest and costs.

First Instance decision

The plaintiffs sued their former solicitors alleging that they negligently structured the settlement. They did not sue the barrister as he was not involved in documenting the settlement.

The solicitors pleaded that the defence of advocate's immunity provided a complete defence to the plaintiff's claim. They contended that work done by them was done either in court, or alternatively out of court byt in circumstances that then led to a decision affecting the conduct of the proceedings, or was intimately connected with work in court.

Following application to the Supreme Court of NSW, Schmidt ordered that the issue of whether the defence of advocate's immunity provided a complete defence to the plaintiff's claim, be determined as a separate question.[1]

The separate question was referred to Harrison J to determine, based on facts agreed between the parties.

Harrison J declined to make any order on the separate question on the basis that it was not clear whether the case would require the Court to revisit the issues previously determined, and thus offend the principle of finality. His Honour stated:

...it is not possible to form a concluded view about whether or not an examination of the plaintiff's liability to the bank over and above their certified liability as guarantors of the company's obligations will or may "identify issues which do not involve re-agitation" of the judgment entered by consent by Rein J. I have been provided with expansive statement of agreed facts for my purposes, but the allegations of negligence against the defendants cannot be usefully assessed or determined without considerably more material. Without being exhaustive I can well imagine that such extra material would necessarily include evidence from the plaintiffs with respect to their discussions with and instructions to the defendants, as well as the advice that they received, leading up to and concluding with the settlement...[2]

Court of Appeal decision

The Court of Appeal held that the trial judge should not have refused the appellants' application to first determine whether that advice would attract advocates' immunity, but also held that the defence of advocate's immunity applied and acted as a complete defence to the plaintiff's claim because it led directly to the settlement of the matter, and was thus 'intimately connected' with the proceedings.[3]

Bathurst CJ (agreed by Meagher JA and Ward JA) stated:

In the present case, in my opinion, the work fell within the categories of work done out of court affecting the conduct of that case in court. The alleged breach occured in advising on settlement of the guaranteed proceedings during the luncheon adjournment on the first day of the hearing and more importantly on the evening of that day. The Agreed Facts also state that the consent order the first respondent and Ms Lord [the second respondent] were advised to sign were signed on that evening and submitted to the Court on the following day.

The advice thus led to the case being settled. Put another way it was intimately connected with the conduct of the guarantee proceedings.[4]

Special Leave Application

A majority of the Court allowed the appeal. The majority (French CJ, Kiefel, Bell, Gageler and Keane JJ) accepted the appellant's arguments that scope of the immunity should not be extended to cover negligent advice on the settlement of cases, but rejected the appellant's arguments that advocate's immunity should be abolished in its entirety. Abolishing the immunity would require overturning the decisions in *D'Orta-Ekenaike v Victoria Legal Aid*[5] and *Giannarelli v Wraith*[6], which the majority declined to do for a range of reasons (at [27]–[30], Gordon J agreeing: at [131]): because

1 *Attwells v Jackson Lalic Lawyers Pty Ltd* [2013] NSWSC 925.
2 *Attwells v Jackson Lalic Lawyers Pty Ltd* [2013] NSWSC 1510.
3 *Jackson Lalic Lawyers Pty Ltd v Attwells* [2014] NSWCA 335.
4 Ibid at [37] and [38].
5 [2005] HCA 12
6 [1988] HCA 52

it would generate a legitimate sense of injustice in potential litigants who did not pursue or lost cases on the basis of the law settled by these authorities, that such a change is best left to the legislature, that the questions of the rationale for the scope of the immunity were fully argued in those cases, that no argument of principle or public policy raised in this matter was not addressed in those cases, and that '[m]ore importantly', *D'Orta* 'states a rule which is consistent with, and limited by, a rationale which reflects the strong value attached to the certainty and finality of the resolution of disputes by the judicial organ of the State' (at [30], and see the explanation for this conclusion at [31]–[37]).

The respondent's counsel submitted that:

- the facts of *Attwells* concern a settlement which occurred mid-trial which resulted in a judgment and in those circumstances the immunity was attracted.
- *D'Orta* was a recent decision of the High Court. The High Court rightly has a *'very real concern'* in re-opening recent decisions.
- the High Court had recently disposed of two special leave applications concerning the applicationof the defence of advocates' immunity in the context of settlements, one being *Young v Hones & Ors* [7] and the other being *Nikolidis & Anor v Satouris & Ors.*[8] (Bell J stated that special leave had been refused in those matters because they were not 'suitable vehicles' for reconsidering *D'Orta*.)

In response to the respondent's argument, majority rejected the submissions, saying that it would be anomalous for the Court to hold that the immunity did not extend to advice leading to disadvantageous compromise but did extend to advice not to compromise which led to a judicial decision less benefitial than the rejected compromise offer.

The majority also rejected the respondent's argument that a compromise by consent effectively merged the parties' rights with the consent judgment and thus went towards a judicial determination that would attract the immunity, because here the substantive content of the rights and obligations under the settlement were determined by the parties without any determination by the court.[9]

The majority set aside the orders of the NSWCA and NSWSC, and ordered that the separate question of whether the plaintiffs' claim was defeated because the defendant was immune from suit be answered 'no'.

Gordon J (Nettle J agreeing) would have dismissed the appeal. Gordon J focused on whether the settlement involved a 'final quelling' of the controversy between the parties by the order of the court, concluding that the advocate's immunity extended to settlements for two reasons. First, the immunity revolves around finality, which can only be challenged in limited circumstances and stems from the judgment of the court: 'the pre-existing rights and liabilities of the parties were determined and the controversy was quelled ... not only because the advocate advised the client to consent to the controversy being resolved in that manner but because the controversy was quelled by an exercise of judicial power by the court, which made a conclusive, binding and enforceable judgment or order'.[10]

[The hearing of the appeal is scheduled for November.]

7 [2015] HCASL 73 (6 May) 2015)
8 [2015] HCASL 117 (4 August 2015)

9 at [54]–[59])
10 at [110]

Process and Substance of Law Reform Based on International Indigenous Rights

Key principles of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) include self-autonomy, engagement and the importance of the ongoing connection with culture, traditions, lands, territories and resources. These principles were put into action by the ACT Aboriginal and Torres Strait Islander Elected Body ('ATSIEB'), ACT Government and ACT Human Rights Commission in their joint efforts to enact the key aspects of the UNDRIP into the *Human Rights Act 2004* ('HR Act').

The new s27(2) provision of the ACT HR Act, which passed earlier this year, is based on Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and s19(2) of the Victorian *Charter of Rights and Responsibilities 2006*. Both the earlier Victorian provision and newer ACT amendment recognise Aboriginal cultural heritage, distinctive spiritual practices, languages, knowledge and kinship ties. The new ACT provision adds Torres Strait Islander Peoples cultural rights and a note explicitly cites UNDRIP, in particular articles 25 and 31.

These rights recognise Aboriginal and Torres Strait Islander Peoples' material and economic relationships with the land and waters and other resources. The enjoyment of these cultural rights may include, for example, a way of life associated with territory, and the use of resources. This might include traditional activities such as hunting and fishing, or the right to live in reserves protected under law.

The HR Act obliges public authorities, including government agencies and those performing outsourced government functions, to act and make decisions consistently with human rights. These rights may also be used by courts and tribunals in interpreting laws, and where legislation is incompatible with s27(2) and a consistent interpretation cannot be adopted, the ACT Supreme Court may issue a 'declaration of incompatibility'.

International experience suggests these new rights can be used in a number of ways. Cases have explored how the rights of indigenous peoples to culture have been unreasonable denied through removal from ancestral lands, [1] taxes,[2] and lack of consultation around new development.[3] In contrast, the United Nations Human Rights Committee found no breach of the right to culture arising from recognition of Maori culture through fishing industry regulation, because the New Zealand Government provided the Maori population sufficient opportunity for contribution to the decision-making process.[4]

In its submission to the ACT Legislative Assembly Standing Committee's Inquiry into the amending legislation, the Victorian Equal Opportunity and Human Rights Commission also noted substantial outcomes from the cultural rights in that state included the passage of the *Traditional Owners Settlement Act 2010*. This legislation provides an out of court settlement of native title matters in Victoria.

A challenge of realising the full potential of the ACT HR Act remains enforcement, with barriers including the cost and logistical challenges of mounting direct challenges in the Supreme Court, coupled with damages not being a possible remedy for a breach. The recent recommendations of the Eight Year Review of the Victorian Charter that conciliation be used as a complaint resolution tool would appear to particularly suit discussions between Aboriginal and Torres Strait Islander Peoples and the ACT Government on how best to respect and promote these new cultural rights.

Nonetheless, the Victorian Government has demonstrated recently the power of legislating such rights. The Aboriginal Affairs Minister, Natalie Hutchins, has announced that the Government will commence talks with First Nations representatives on a treaty to cover services and address past injustices. This would be an historic step in Australia's history, and already the agreement is being modelled on treaties in New Zealand, Canada and the United States.

It remains to be seen how the new rights will be applied in the ACT. Based on the experience of the Human Rights Act to date, such application is important not only through courts and tribunals, but also behind the scenes as the government bureaucracy considers these new obligations in the provision of services and the making of decisions. In particular, the right has the potential to further fulfil and realise the principles of self-autonomy and engagement.

BY: Sean Costello
Principal Legal Adviser,
ACT Human Rights Commission

1 The Endorois communities' right to culture was denied when their pastoralist way of life was deprived by the state of Kenya in removing the community from their ancestral lands (*Ctr. For Minority Rights Dev. V Kenya*, Comm. 276/2003, 27th ACHPR AAR Annex [Jun 2009-Nov 2009])

2 The Mohawk right to culture was not unreasonably denied. Taxes, tariffs and other restrictions were 'reasonable limits' and not 'particularly discriminatory to a particular group' (*Mitchell v Canada*, Case 12.435, inter-Am, C.H.R, Report No. 61/08, OEA/Ser.L/V/II.134, doc. 5 rev. 1 [2008])

3 The traditional Aymara way of life was threatened by government waterway diversions. The lack of consultation, as well as the communities means of survival completely collapsing was a violation of the right to enjoy culture (*Poma v Peru*, CCPR/C/95/D/1457/2006)

4 *Apriana Mahuika et al. V. New Zealand*, CCPR/C/70/D/547/1993/2000)

NOTICE

ACT Human Rights Commission is moving to Level 2, 11 Moore Street, Canberra City ACT 2601 from 20 June 2016

LEGALAIDMATTERS

Thursday, 02 June 2016

Eight out of ten believe legal aid should be there in times of need

Australians are overwhelmingly in favour of universal legal aid availability, according to an independent national poll commissioned by the *Legal Aid Matters* campaign.

1019 Australians, demographically weighted to reflect the national population, were asked:

> *How much do you agree or disagree with the following proposition? 'In Australia, anyone who encounters a serious legal issue, but cannot afford a lawyer, should be able to rely on legal representation being provided through legal aid.'*

81.4 per cent of respondents of the *I-view* poll said they either strongly agreed (47.6 per cent) or agreed (33.8 per cent) with only 3.1 per cent disagreeing. 11.7 per cent neither agreed nor disagreed, and 3.8 per cent did not know.

Legal Aid Matters campaign spokesperson, Law Council of Australia President Stuart Clark AM, said the result should cause both major parties to drastically reassess their priorities.

"This election, we need all political parties to support the eight of ten Australia's who rightly believe that legal aid should be there for them if they need it," Mr Clark said.

"Unfortunately, the overwhelmingly majority of Australians believe they have a right to something they simply cannot access in the vast majority of cases.

"Due to the cuts, only eight per cent qualify for legal aid under the current means test. Can you imagine if Medicare only covered eight per cent of the population?

"It's well known that Australians believe passionately in the right to a Medicare safety net. This data clearly shows that we strongly believe in a legal safety net as well.

"Unfortunately, legal aid funding is so scarce that even if you're living below the poverty line, you're unlikely to qualify. People are being forced to represent themselves in court and it's destroying lives."

Mr Clark said that every way you look at it; there is a compelling reason to end the legal aid crisis.

"The legal profession has made the access to justice case. The Productivity Commission has made the economic case. And now the public has made the popular case," Mr Clark said.

"Access to justice is a basic human right and it is one that Australians rightly feel entitled to. Legal representation should not be exclusively for those wealthy enough to afford it. We know that due to the cuts, around 10,000 people per year are being forced to front the courts alone."

The Legal Aid Matters campaign is calling on the next Federal Government to inject $350 million into legal aid to end the current funding crisis.

"As the Productivity Commission has clearly outlined, investing in legal aid will lead to major savings in the court system, the welfare system, and the health system. Properly funding legal aid isn't a cost, it's an investment." Mr Clark said.

Australians can get involved in the campaign by visiting legalaidmatters.org.au – where they learn more about the crisis, sign a petition, and even directly contact their local MP.

The polling data (conducted 18-22 May 2016) can be accessed here. Margin of error: 3.2 per cent.

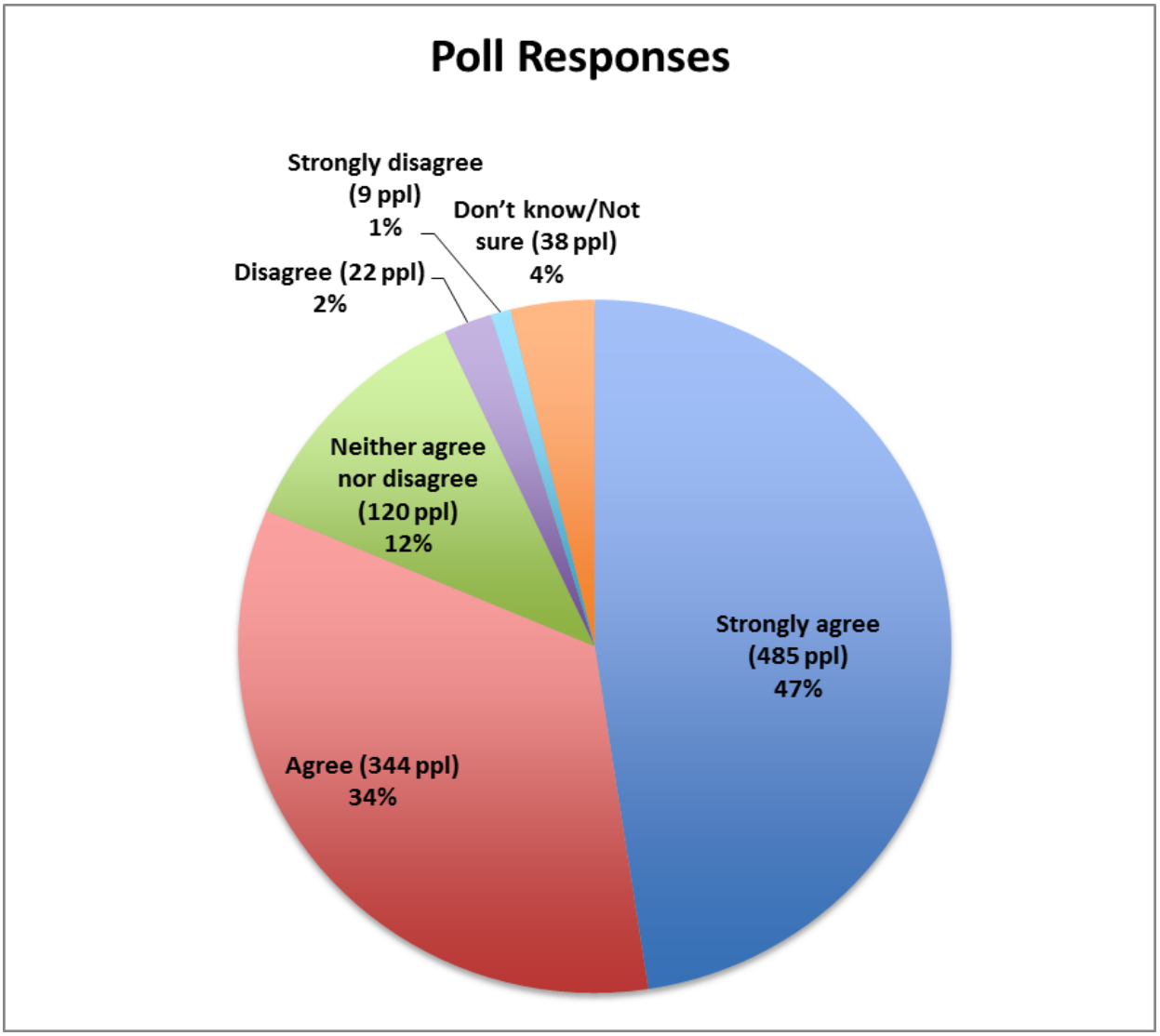
Patrick Pantano: Public Affairs
P. 02 6246 3715
E. Patrick.Pantano@lawcouncil.asn.au

Anil Lambert: Media
P. 0416 426 722
E. anil@hortonadvisory.com.au

LEGALAIDMATTERS

I-view

Q. How much do you agree or disagree with the following proposition? 'In Australia, anyone who encounters a serious legal issue, but cannot afford a lawyer, should be able to rely on legal representation being provided through legal aid.'



Based from **1019 responses**, the results above outline that 485 people (47.6%) strongly agree with the above proposition, while 344 people (33.8%) Agree, 120 people (11.7%) neither agree nor disagree, 22 people (2.2%) disagree, 9 people (0.9%) strongly disagree and 38 people (3.8%) don't know/ not sure.

Responses were provided between 18 - 22 May 2016.

Margin of error for the I-view poll is within 3.2 per cent.

THE AUSTRALIAN CAPITAL TERRITORY BAR ASSOCIATION INCORPORATED IN 1970

BarCare

Health care for ACT Practising Barristers

There is a higher than average level of stress within the legal profession. This may take the form of anxiety, depression, alcohol and drug misuse, family issues, work pressures and related problems.

What perpetuates the problem is the reluctance of people to seek help for the fear of showing signs of weakness. But we need to educate and assure ourselves that its OKAY to ask for help and that its not a weakness but a strength that could save your or someone else's life.

The ACT Bar Association has recognised the seriousness of these issues and has established BarCare to assist members in dealing with such pressures.

BarCare is a confidential service to assist barristers that acts independently from the ACT Bar Association.

The Panel

The panel members hold the following attributes:

- Formal qualifications in counselling or clinical psychology, or organizational psychology;
- Seniority and experience in their professional field;
- Experience in working with lawyers;
- Completely independent practitioners in private practice settings;

How BarCare works

The providers are listed below with profiles, photos and contact details.

Members are encouraged to make separate contact with any panel member and organize a consultation. The Bar Association meets the cost of the first consultation for *all barristers holding an ACT Practising Certificate*. The members will be responsible for payment of any additional consultations. (Medicare and/or insurance rebates may be available.)

Confidentiality

The process is completely confidential.

There is no need to inform the Bar Association in relation to any session arranged. The sessions are strictly confidential and the panel will not be reporting to the ACT Bar Association on an individual case.

Payment of Consultations

Accounts are forwarded to the CEO and are signed off and the identity removed. This ensures that barristers dealing with BarCare have strict confidentiality from the Association. Any personal information is only disclosed to the Bar Association with the express permission of the barrister.

Source of referral

The nature of the scheme is aimed at a proactive approach. To overcome the reluctance of barristers to seek help, there is a proactive aspect that has been instituted with the cooperation of the ACT Magistrates Court and the Supreme Court of the ACT. Judicial officers of these Courts will, in any case where the facts or circumstances are considered horrific or of a particular confronting nature, advise the CEO of the name of the case and counsel involved. The CEO will then contact one of the panel members who will in turn make contact with the barrister involved to offer the services of BarCare.

Family members or colleagues who may have concerns about a barrister may also seek guidance about how they should approach the barrister who is experiencing difficulties.

If preferred, the CEO can also make a call to the barrister and offer the services of BarCare. In this situation the name of the reporting person is not disclosed to the barrister.

Key Message

We all from time to time struggle with various issues. Sometimes they go away and other times you can's stop thinking about them. Please allow yourself to talk to someone or if you see someone showing these signs – ask them if they are okay!

There are ways that you can reduce your risk of depression and anxiety – by exercising and spending quality time with family and friends, listening to music, laughing out loud and loving those close to you.