BAR BULLETIN
THE AUSTRALIAN CAPITAL TERRITORY BAR ASSOCIATION

Bar Bulletin March 2014

Restorative Justice

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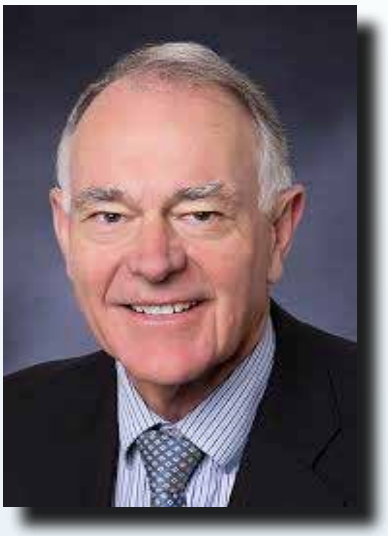

President's Report

Central Criminal Listing Callover

Mr. White, the Director of Public Prosecutions, has indicated (at page 11) that the pilot listing of trials is shaping as "an outstanding success". His contribution to the body of information about how the pilot listing exercise is operating in practice is most welcome. I do, however, suggest we need to exercise some caution in labeling the pilot listing exercise "an outstanding success". The jury is out on that issue.

As part of the review of the pilot listing of trials, members of the Bar who practice in the criminal jurisdiction will be asked for their views as to how the pilot has operated. A formal questionnaire will be circulated shortly.

From discussions I have had with my members I anticipate that members of the Bar will have no "in principle" objection to doing what is sensible and reasonable to assist the Court in clearing its backlog of cases. The reputation of the Court has been damaged by delays in hearing criminal matters and the interests of justice require cases to be heard within time frames that are reasonable.

However, I also anticipate that the view of criminal barristers will be that this should not be done in a way that compromises the integrity of the relationship between an accused person and their legal counsel and which does not demand that the pilot process be effectively paid for by individual accused persons, the Legal Aid Office and individual members of the Bar. The Bar is also concerned that the outcomes of the pilot program be properly analysed so that in future sensible decisions can be made about where resources are most effectively deployed. Analyzing court outcomes in terms of guilty pleas and results at trial should only be a starting point and can tend to be misleading or at least gloss over the equally important considerations as to why particular outcomes are achieved and why they are achieved when they are.

Dates for trials included in the pilot program have been allocated at a call over of matters that have been identified as matters to be heard during the pilot period. In deciding when a matter is to be listed the experience of the Bar has been that whilst the availability of counsel is taken into account it could not be said that this consideration was an overriding concern of the Court. Where a conflict of commitments arises in those circumstances the barrister involved has been required to return the brief. The consequences of that are very significant. Usually that barrister will have been briefed for a considerable period of time. The barrister has been retained to prepare and make strategic decisions about how the case is to be run. In sexual cases the barrister has effectively commenced the trial process by appearing at a pre-trial hearing and if he has done so, in many cases, will have effectively run the trial. However, the Court provides no guarantee that in such cases the barrister will be accommodated in a way that will enable her/him to retain that brief.

Further, the preparation that has been done will have been lost. If the client is a private paying client the barrister that is retained to do the trial on short notice will also have to be compensated for that preparation. In respect of a Legal Aid case, the new barrister (like his/her colleague before them) will probably have to prepare the matter without being paid other than a token amount to do so. The bonds

of trust between the client and a lawyer will be lost. The compressed timeframes for preparation will compromise the quality of that preparation. Losing a brief may have significant financial consequences for the barrister involved unless a retainer of a like kind is acquired in place of the lost brief. The Legal Aid Office (where applicable) will be required to pay the second counsel fees that have already become payable to the first barrister.

I also anticipate that the over listing of cases will be a matter of concern to my members. The process that has been adopted has seen trials allocated to particular dates but without the expectation that the matter will be heard on that date. In practice that has seen the hearing of matters "slide" so that counsel and solicitors have had to divest themselves of other commitments to accommodate the hearing of the relevant date. This is not just a matter of a day here of there. In some cases matters have been deferred for up to a week. No doubt that delay would cause distress to witnesses on both sides of the litigation. It also impacts unfairly on the ability of counsel, and no doubt solicitors, to run other cases to which they are committed. The impact on counsels' ability to earn a living is obvious and can, and has had, a huge impact on the ability of members of the Bar, particularly junior members of the Bar.

The limited jury court facilities of the Supreme Court have caused cases to be shuffled between courts and have caused delays in the starting of other cases. Not only has this caused the loss and inconvenience I have referred to, but it will, sooner or later, cause cases to be aborted if jury panels are exposed to things that my impact upon their capacity to deal with the case impartially. The Sheriff's staff have been exemplary during the pilot listing period. However, their ability to discharge their oath in respect of juries is put to daily challenge in assembling and shepherding juries in and between courts.

I anticipate that the Bar will suggest that a proper analysis of the outcomes of the pilot be undertaken. For example, in relation to the pleas of guilty that have been entered, analysis needs to be done of what the accused pleaded guilty to. In particular the Bar is concerned to establish whether the counts to which pleas were entered were all of the counts on which the accused was originally arraigned. If they were not (and we anticipate that in the overwhelming majority of cases they were not) when was the decision made to change the indictment or accept pleas to a lesser number of counts?

Analysis also needs to be done of the nature of the counts to which pleas have been entered. The view that has been put to me by members of the Bar is that in this pilot listing exercise a significant number of sex trials were listed. The overwhelming majority of those cases ran to hearing. Those that ran to hearing ran at least to the original estimate of time if not for longer. That category of trials probably contributed significantly to the delays that were observed in matters that had been listed actually being heard. It may be that one suggestion the Bar will make is that cases be actively streamed. For example, given the high probability of sex trials running, they should be in the class of trials that are given a listing on a specific date and not be included in the undifferentiated mass of other trials that are listed. That would allow the list to otherwise operate more smoothly.

The Bar would also welcome a public indication of what benchmark (in respect of time between committal and trial) the Court would regard as the goal of Supreme Court listing. That might include whether the Court will give priority on a routine basis to trials of a particular type (sexual assault trials and crimes of violence may be examples). Some information on what the extent of the backlog is and information about statistical trends in respect of time between committal and trial would be most welcome.

The Bar would also welcome considered cost benefit analysis of whether the actual cost of this pilot listing would be better spent in another way. A fifth judge (permanent or on secondment from other jurisdictions) may be a more effective and efficient way of spending the resources used in this pilot listing exercise. It would provide a means of achieving a reduction in the backlog by way of a more orderly and methodical way, rather than

have listing processes governed by the reality or perception of a crisis in the state of the criminal lists of the Supreme Court. Whilst everyone is contributing to getting cases through the Supreme Court, processes built on crisis management may not be sustainable in the longer term and place unfair burdens on all involved in criminal litigation. Indications given privately are that the unease with certain aspects of the pilot listing expressed here are shared concerns amongst the legal profession engaged in the conduct of criminal litigation and are not the unique pre-occupation of members of the Bar. Whilst the community is looking at the listing pilot with interest, the demands of justice require a considered reflection upon its achievements.

Efficiency should always come second to the interest of justice, and the former should never be considered in isolation of the latter.

In the last publication of the Bar Bulletin I reported on the raid on the offices of a solicitor, Mr Bernard Collaery.

I said, assuming the truth of the allegations, "it is appalling and worthy of the strongest condemnation"

On 5 March 2014, the Canberra Times reported that the International Court of Justice had ordered that Australian intelligence agencies stop spying on East Timor and seal documents seized in an ASIO raid last year. The court did not accept undertakings by Senator Brandis that documents seized in the raid could be safeguarded by being kept from Australian officials involved in the dispute with East Timor and only accessed by those charged with ensuring "national security".

According to the same newspaper report, Attorney General Brandis is quoted as saying he is pleased with the order of the International Court of Justice.

It is astounding, to say the least, that an Attorney General, whose undertakings have not been accepted, could express pleasure at the decision of the International Court of Justice. It is even more astounding that the comments of the Attorney General, assuming they have been correctly reported, have not sparked outrage in the community. Instead, it appears that members of the public have simply heard the Attorney's assurances and have accepted them at face value without looking at the facts behind the comments. This is indeed a shameful situation.

Whilst the events in Nauru have caused grave concern for the rule of law, so to have events in Malaysia. Anwar Ibrahim was acquitted some years ago on charges of sodomy. Apparently a court of appeal has somehow overruled that acquittal and has sentenced Mr Ibrahim to 5 years jail. This disqualifies Mr Ibrahim from contesting upcoming elections in Malaysia. The United States has voiced its concern and disapproval of the events that have transpired and the threat to the rule of law.

We must all raise our voices in protest against these events which remind us that there are places in the world and individuals who pay lip service to the rule of law only while it suits them and who are prepared to ride roughshod over it when it does not.

Greg Stretton SC

President

The Supreme Court has identified Further Central Criminal Listing of Trials in 2014

One week commencing 23 June 2014;

4 weeks commencing 25 August 2014;

2 weeks commencing 24 November 2014.

MESSAGE FROM THE EDITOR

Restorative Justice

The Bulletin welcomes the contribution by the Attorney of his article on 'Restorative Justice'. It is critical that government look at the new ways to improve the delivery of effective criminal justice. The Bulletin applauds the Attorney's endorsement of and support for the approach to providing a more satisfactory outcome for victims of crime and the offenders.

The Attorney points out that the 10 studies looked at in relation to violent and property crimes commited by juvenile and adult offenders showed dramatically that 9 out of 10 results showed the restorative justice conferences were more effective than court alone. The victims who participated were more satisfied than those who went throughthe court system, especially in the areas of violent crime as opposed to property crime. The results who showed that restorative justice was more effective when used as an addition to conventional justice.

The Attorney states that with the backing of legislation and a greater implementation restorative justice can be used at every stage of the criminal justice system. The scheme is victim focused making their needs the highest priority. It is not difficult to accept that victims would get more out of restorative justice than simply providing a victim impact statement to the court and not knowing how that statement affected the offender and/or the court.

The system of restorative justice can be applied as a diversion from formal charging and also post sentences. the scheme is proposed for the ACT is designed to be implemented in two phases as set out in the Attorney's paper. The so called goals of sentencing of punishment, retribution, protection of society and rehabilitation of offenders can only benefit from having restorative justice as an adjunct. Restorative Justice also aims at reducing recidivism which is important and worthwhile. NSW has a system of restorative justice also. It states similar objects to the ACT in providing better outcome for both the victims and the offenders by addressing what happened, how people have been affected and what can be done to make things better. However the NSW scheme only comes in the operation after sentence. Victims can register on the Victims Register and are advised by Corrective Services (NSW) of proposed release dates of offenders and also if the offender escapes from custody.

We congratulate the Attorney on his endorsement and support for a useful and worthwhile adjunct to the Criminal Justice system.

FJ Purnell SC

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.

For further information about the ACT BAR ASSOCIATION contact:
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International research confirms restorative justice benefits victims, offenders and the community

As a community, we are constantly looking for ways of improving – improving the way we do things and improving the outcomes we achieve.

Restorative Justice began as just that – a way of increasing the results we can achieve when an offence has occurred and harm has been caused.

Restorative Justice brings together the people most affected by an offence - the victims, offenders and their respective supporters –to discuss what happened, who has been affected, and how and what can be done to make things better. This exchange, known in the ACT as a conference, can happen either face-to-face or indirectly.

Restorative justice conferences can meet the needs of victims by giving them a voice, allowing them to describe how the offence has affected them, to ask the offender questions and to have a say in deciding what needs to be done to repair the harm. It gives offenders an opportunity to accept responsibility, helps them to understand the impact their behaviour has had on the victim and their own family, and provides the opportunity to be accountable for their actions.

I recently launched the Campbell Collaboration Systematic Review of Restorative Justice Conferencing Using Face-to-Face Meetings of Offenders and Victims, conducted by Professor Lawrence Sherman and Dr Heather Strang.

The Campbell Collaboration review includes only the most rigorous tests of restorative justice conferencing, namely those using a randomised controlled research design model, as used in medicine for testing new drugs. After an extensive international search, ten eligible studies on three continents (including two studies based here in the ACT) were identified, with a total of 1,879 offenders and 734 victims interviewed.

These ten studies looked at the effects of restorative justice conferencing at different points in the justice system, for both violent and property crimes committed by juvenile and adult offenders. It also looked at the use of restorative justice conferencing both as a diversion from court for less serious offences and in addition to court for more serious offences.

Included in the review are the results of two studies of restorative justice conferencing undertaken in the ACT in the late 1990s and known as the Reintegrative Shaming Experiment (RISE). RISE was conducted in partnership with the ACT Government, Australian National University, University of Maryland and ACT Policing. It involved a randomised controlled trial of the effectiveness of restorative justice conferences compared to court and resulted in two of the four research groups being included in the Campbell Collaboration review. These research groups were violent offenders under 30 years and young offenders charged with property crime against personal victims.

This review provided an opportunity to reflect on the ACT's pioneering role in conducting the first tests of restorative justice conferences which not only influenced the spread of restorative justice conferencing to four other continents but led to further testing of restorative justice in the United Kingdom and the United States.

The review demonstrates positive results for offenders and victims as well as cost benefits. This review reports clear and compelling evidence of a beneficial relationship between restorative justice conferences and subsequent reoffending over a two year period. Nine out of ten results showed that restorative justice conferences were more effective than court alone.

For victims the evidence is clear. Victims who participate in restorative justice are more satisfied with their restorative justice experience than those whose cases are dealt with in court. Restorative justice conferences were more effective than court in reducing post-traumatic stress symptoms experienced by victims, especially victims of violent crime. The review also reported a reduction

in the desire in victims, especially victims of violent crimes, to seek personal vengeance against their offenders.

In the research, neither court nor restorative justice conferences were effective in delivering significant material restoration for material harm. However, not only were restorative justice conference victims more likely to receive material restoration, they rated it as less important than the court victims did.

The review identified that the strength of restorative justice conferences was in delivering the emotional restoration that victims seek, especially in receiving an apology from their offenders that they rated as sincere. This was an outcome in around 90% of restorative justice conferences but rarely in the court room.

Further to this, the review discusses the conditions under which restorative justice conferences work better including the kinds of people, offences and point in the justice system. The findings include:

- When comparing the impact of restorative justice conferencing on property versus violent crime – on average, and contrary to conventional wisdom, restorative justice conferences appear to work better for violent crime than property crime.
- When comparing the use of restorative justice conferences with juvenile offenders to adult offenders – at least for offences with personal victims, on average, again contrary to conventional wisdom, restorative justice conferences work better with adults than with juveniles.
- When comparing the effect of using restorative justice as a diversion from conventional (usually court-based) justice or in addition to it – the average effect of restorative justice conferences may be greater when used in addition to conventional justice rather than as a diversion from it.
- When comparing the effect of restorative justice conferences dealing with serious crime to less serious crime - the results from the United Kingdom burglary and robbery experiments in particular suggests using restorative justice conferences on low-seriousness crimes is not as effective.
- A cost-effectiveness estimate for the seven United Kingdom experiments found a ratio of eight times more benefit in costs of crimes prevented than the cost of delivering restorative justice conferences.

In the ACT, we have significantly developed the initiative since RISE was first tested. The Restorative Justice Scheme has now held more than 1,000 conferences since January 2005. Since 2005, the Restorative Justice Unit has received 1,459 referrals consisting of 3,408 offences, 2,531 victims and 1,872 young offenders.

It has convened 623 face-to-face conferences and 377 indirect conferences, that is, conferences where the parties are present but not in the same room. These involved 1,324 victims, 307 victim supporters, 1,244 young offenders, 1,344 young offender supporters and 116 other invited participants such as witnesses, police officers, school and community representatives.

From these conferences, 1,215 individual agreements had been finalised and have delivered:

- $143,735 in reparation paid by young offenders to their victims;
- 840 hours worked by young offenders to their victims;
- $4,708 in donations paid by young offenders to community organisations;
- 6,203 hours worked by young offenders for the benefit of the community; and
- 4,226 hours completed by young offenders at counselling and other programs.

More than 90 per cent of 2,684 participants surveyed about their restorative justice conference experiences said that in the conference they felt they were treated with respect, were able to have their say, felt the process respected their rights, would participate in the process again and would recommend the process to someone else.

The Restorative Justice Unit's consistently positive survey results reflect the depth of the team's efforts to provide a respectful and meaningful process for victims, young offenders and their respective supporters in emotionally challenging circumstances.

The scheme is innovative and flexible in the delivery of its service, providing in-house, cross agency and outreach options for clients. This flexibility ensures constructive and meaningful

processes are convened in safe and carefully managed environments to meet the needs of all involved.

The results from the Campbell Collaboration review confirm that the ACT's Restorative Justice Scheme offers an important justice tool to the Canberra community that benefits the victims and offenders who choose to participate.

The ACT scheme is also considered an innovative model of restorative justice due to the legislation that supports it. As described in the recently released Australian Institute of Criminology report, Restorative justice in the Australian criminal justice system, restorative justice in the ACT is a unique scheme, underpinned by specific legislation and principles which uphold a victim-centric, voluntary process.

The Crimes (Restorative Justice) Act 2004 has great depth and breadth as it makes restorative justice conferencing available at different points in the system, from the point of apprehension through to post-sentence. Once fully implemented, restorative justice in the ACT can be used at every stage of the criminal justice system; for young and adult offenders; and for less serious and serious offences including family violence and sexual assault related offences.

It is the only scheme in Australia that is victim focused, making their needs the highest priority. It is designed so that it augments the criminal justice system without replacing it. It undertakes a crucial role in complementing the formal criminal justice system to meet the emotional and personal needs of people involved in the criminal justice system. Participation is entirely voluntary for all involved.

The legislative framework is designed so that matters resulting in lesser levels of harm, involving offenders with little to no criminal history, are referred at the early stages of the criminal justice system, for example referred by ACT Policing as a diversion from formal charging. Matters that have resulted in higher levels of harm, by offenders with more significant criminal history, are referred further along the journey through the criminal justice system. Most serious matters are intended to be referred post-sentence.

The objects of the Act are to enhance the rights of victims of crime and to ensure that their interests are given high priority in the administration of restorative justice. The Act emphasises the importance of restorative justice having a constructive impact on people who commit crimes.

The scheme is designed to be implemented in two phases. The first and current operational phase involves the ability to refer young offenders aged from 10 to 17 years of age for less serious offences where there is a defined victim. Phase one excludes the referral of domestic violence and sexual offences to restorative justice.

Phase two will see the scheme expand to include adult offenders as well as serious offences for both young and adult offenders. It will include domestic violence and sexual offences. Serious and domestic violence offences will only be eligible to be referred after a plea or finding of guilt. Less serious domestic violence offences that have been committed by a young person may be referred to restorative justice prior to a plea or finding of guilt, however, exceptional circumstances must exist to find these offences suitable for restorative justice.

In preparation for the possible future commencement of phase two, the Justice and Community Safety Directorate is currently consulting with key stakeholders to develop guidelines for the management of domestic violence and sexual offences referred to restorative justice. These guidelines, which have been in development in close consultation with key stakeholders for a number of years, will be a robust set of principles and procedures that build on the suitability criteria set out in the Act, and will encompass the particular dynamics inherent with these types of matters.

The guidelines will ensure procedural safeguards are embedded to limit risks through thorough assessment, intensive preparation, constant monitoring, and professional advice and support. Once finalised, they will ensure victim participation is safe, well informed and genuinely voluntary.

Restorative Justice in the ACT has already assisted many people affected by crime to feel more satisfied with the outcome of the justice system. We will continue working to expand the scheme, with caution, to benefit more Canberrans.

Attorney General Simon Corbell

From the DPP, Jon White

The pilot listing of trials in the Supreme Court is shaping up to be an outstanding success. I have to acknowledge the great work of many in the profession – not least my officers. The organisation on behalf of the court – particularly the arrangement of jury panels – had also been outstanding.

Accused persons, victims and witnesses are having the hearing of trials brought forward – which is of great benefit to them and the community generally. Unlike the previous "Blitz", the pilot listing includes trials of sexual offences. This is an appropriate acknowledgement that priority should be given to these matters if at all possible.

To give a snap shot of matters to the afternoon of 21 March, when I am writing this (and at time of writing, no fewer than three juries were still deliberating):

The statistics by themselves don't accurately reflect the work that has gone into the Pilot by this office. Some examples are set out below;

- Two of the matters where pleas of guilty were entered happened after juries had been empanelled and the trials were underway. A plea of guilty was entered after the opening in one case and after a complainant had given evidence in another;
- Two trials have run for significantly longer than estimated:
- Of the total trials included in this Pilot period 5 involved more than one accused on a joint indictment. One had four co-accused and another had three. The statistics have only recorded these as one trial each;

PG - confirmed	14
Completed trial - Guilty	5
Completed trial – Not guilty	6
Completed trial – Hung jury	1
NDTP filed to all charges	1
Notice of abatement filed	1
Total concluded	**28**
Adjourned on Crown application	2
Adjourned on Defence application	2
Trial vacated on Court's initiative	2
Case stated to Court of Appeal	1
Currently running	3
Adjourned PH to another date in Pilot	1
Outstanding matters	19
Total number of trials listed during Pilot	**58**

The success of the pilot listing will, I trust, lead to this sort of listing becoming a permanent feature.

Of course, this listing procedure is only suitable for short trials – say 5 days or under. Actually, that is the majority of trials in the Supreme Court. Longer matters will still have to be specially listed. There is also a case for specially listing some short trials with difficult features such as overseas witnesses or interpreters.

There will no doubt be time for some reflection of the success of the listing program to date. There are some lessons that can already be drawn.

The listing period of 7 weeks was too long. My officers are frankly exhausted. A period of say 4 weeks – with the last week mainly for sentences and overflow matters – would be ideal.

Importantly, there must be co-ordination with the Magistrates Court. Matters should not be listed for hearing in the periods when the Supreme Court has listed trials under the program. Of course lists will have to continue in the Magistrates Court, however, it will be an ideal opportunity for non-criminal matters to be listed. Neither my officers, legal aid ror private practitioners who practice in the criminal area, can split themselves between the 2 courts in periods of intensive overlisting in the Supreme Court. Co-ordination of listing between the courts will benefit both courts and the profession.

A Warning to All

Further timely instruction from the Full Court as to how to treat on-going indirect post-separation contributions.

George Brzostowski SC,
Adjunct Professor UC

The recent decision by the Full Court in Marsh & Marsh [2014] FamCAFC 24 (25 February 2014) (Ainslie-Wallace, Murphy and Le Poer Trench JJ) serves to inform practitioners, as well as first instance judicial officers, how to approach determination of contributions in a wide range of property cases under sec 79(4)(a)-(e) of the Family Law Act (FLA). The didactic content of each of the judgments is well worth reading, for there is much to be learnt, or refreshed in this case.

It is particularly relevant to cases where a party has been freed up to develop a successful income earning capacity, whether by being enabled to pursue a rewarding career or to develop a flourishing business, while the other party attended to domestic and parenting duties, and performed such duties well. The essential feature is that the home-bound party must show that he or she made an indirect contribution to the income-earner's capacity to earn income or to acquire property. That capacity can be seen as a portable investment that is carried away by the income earner even after separation.

To the extent that submissions by practitioners might not always enhance the best administration of justice, the case assists advocates (including solicitor advocates) in framing their submissions, and in ensuring their affidavits include all relevant evidence, as would minimize unfortunate decisions, which may ultimately lead to costly remittals for retrial.

The risk of costs of re-trials must be minimized as much as possible, as the bulk of such costs have to be met by the individual litigants. There is no meaningful recompense from the government because judicial officers made mistakes. The amounts payable to private citizens pursuant to the so-called "costs certificates" under the Federal Proceedings (Costs) Act are notorious for being little more than a soggy poultice.

Marsh was not just a case of relatively high financial success achieved by the parties, but it was also a case of a long period of separation. Cohabitation lasted for about 21 years, followed by a period of about another 10 years between separation and trial, during which time the parties made significant contributions in their specialized spheres, and during which accrual of valuable assets and accrual of superannuation continued.

Firstly, in order to assess correctly contributions under sec 79, it is necessary to recognize that upon separation the values of direct and indirect financial and non-financial contributions by each of the parties do not necessarily cease, although the nature, form and characteristics of those contributions may change. The mere duration of cohabitation does not lock in the period during which contributions are to be assessed.

Secondly, it is an error to start with the oft-heard phrase that "until separation, the contributions should be seen as having been equal", and then to proceed to identify what further adjustment should be made to the "contributions" finding (ie what should be the departure from "equality") to take into account the post-separation contributions of each party. This is particularly important in cases of long periods between separation and trial, but length of time is not of itself the critical issue.

Thirdly, the Court must consider the effect of sub-sec 75(2)(j), (k) and (n) and it is an error to ignore those provisions as "not relevant" just because the financially weaker party is not seeking maintenance.

Fourthly, it was a case where the Federal Magistrate confined his analysis to "percentage terms" and failed to assess the outcome of his

orders in real dollar terms. Had he done so, he might have arrived at a different outcome.

In short, this was a case where the judgment was just "plain wrong".

Fifth, this was a case where the findings of the Magistrate did not enable the Full Court to re-exercise its discretion, thereby compelling the parties to undergo all of the cost and trauma, emotional and material, of a further trial.

The principal background features were that the parties had cohabited for 21 years and separated for about another 10 years before trial. The parties had determined that the husband was going to be the breadwinner and that he was going to be freed by the wife to pursue his career both in Australia and overseas. She, reciprocally undertook the responsibility for home-making and parenting of their three children.

At the time of separation, the children were 17, 14 and 10 years old. They lived with the wife, and the husband paid considerable sums to support the wife's household and the cost of meeting the children's reasonable needs. Over 10 years it he claimed that he had contributed about $1,285,000 towards property acquisition (including boats and real estate investments) and about $2.6 million for the "benefit of the wife and children".

The husband was successful in developing his career while being freed from the parenting and domestic duties undertaken by the wife. To facilitate the husband's advancement, the wife did not engage in outside employment for over 23 years. The disparity in income capacity of the parties was enormous. The husband's annual income was about $640,000 (or about $13,000 per week) plus very generous bonuses (eg over $500,000 in 2011 alone).

By contrast, the wife was on Centrelink Newstart Allowance.

The Magistrate determined the pool was as follows (despite various issues of inadequate disclosure, and questionable use of "add-backs", and some modest mathematical errors) –

- Assets excluding superannuation, were found to be $3,106,313
- Superannuation was found to be worth $1,673,902

Total was therefore $4,780,215

His Honour noted that the assets had increased significantly in the 10 years since separation. Notwithstanding this enormous disparity of incomes, and the magnitude of assets, his Honour's assessments and reasoning leading to the erroneous orders were –

That until separation, the contributions were equal. His Honour expressed himself -

> 78 I would agree that the evidence would support an outcome of equal contributions being made as at the date of separation.

As to the period post-separation, the Federal Magistrate concluded that there was a need to make a further adjustment of 20% of the non-superannuation assets in favour of the husband. His Honour went on to say -

> 78 ……. That said, given the significance of the financial contributions made by the husband post-separation, I am not satisfied that the evidence supports an overall assessment of equal contributions being made. A further adjustment should be made in the husband's favour and I am satisfied that the evidence supports a further adjustment in percentage terms of 20%.
>
> 79 Consequently, I am satisfied that the evidence supports a contributions assessment outcome favouring the husband of 70% and 30% in favour of the wife.
>
> 80 I am further satisfied that such determination should apply to both the net property pool (excluding superannuation) as well as to the superannuation assets. There is evidence before the Court that the husband's superannuation has increased from $388,426.00 to $1,673.902.00 since separation.

Justice Ainslie-Wallace observed at [54] "The effect of this determination in dollar terms, given the net value of the property of the parties (excluding superannuation) was found by the Federal Magistrate at [56] to be $3,106,313.00; 30 per cent of that in the wife's favour amounted to $931,894 and $2,174,419 to the husband."

Justice Ainslie-Wallace continued her analysis at [55], [56] and [57] said –

> 55 "In this case the contributions of the parties after they separated were different in kind and nature to those made during the

relationship. Those of the husband were almost entirely made under s 79(4)(a) and those of the wife made pursuant to s 79(4)(c). Obviously the husband's contributions were of significant amounts of money. His ability to make the contributions was largely as a result of being able to build a career during the 21 years of the marriage during which the wife, by mutual agreement did not work outside the home but took on the role of homemaker and parent, a role in which, the husband said she had been and continued to be after separation "absolutely marvellous" [68]. (emphasis added)

56 To a degree, counsel for the husband accepted that in this case the parties' contributions continued after their physical separation however argued that during the same period, the husband was working and acquiring property and assets and these ought to be sequestrated in the sense that the wife made no contribution to their acquisition. (emphasis added)

57 That argument must be rejected. It does not give account to the wife's continuing indirect financial contributions to the husband's income (albeit in a different way from that during the relationship with the husband).

That last sentence should not come as a surprise, although even recently there are still occasional decisions where a post-separation property is sometimes treated as a sec 75(2) factor without any recognition that the other party had made a "continuing indirect financial contribution" thereto. Admittedly sometimes a Court is led into that error by submissions, the makers of which should be cognizant of what was said in Ferraro (1993) FLC 92-335 at 79,569, which her Honour quotes at [58].

58 …. The issue here is not whether the wife made direct contributions to the conduct of the business. His Honour found that she had not. The facts are that the husband, particularly in the latter years, devoted his full time and attention to his business activities and thus the wife was left with virtually the sole responsibility for the children and the home. That latter circumstance is significant not only in relation to the evaluation of the wife's homemaker contributions under paragraph (c) but is important under paragraph (b) because it freed the husband from those responsibilities in order to pursue without interruption his business activities. (emphasis added)

At para 59 her Honour emphasized -

59 Further, in Ferraro, the Court rejected the trial judge's finding that the wife made no contribution to property acquired after separation and said (at CCH page 79,569) (reference added):

The wife continued to make a significant contribution to this post-separation property for the above reason and because she continued to make her contributions to it during that period under paragraphs (b) and (c).

The fundamental obligation is to assess "the entirety" of the parties' contributions, of any nature, and to evaluate the significance of those contributions. It is therefore wrong to tie the assessment of contributions to any particular asset. See Farmer & Bramley (2000) FLC ¶93-060.

Where parties have embarked on a way of life with "specialized roles" it is usually an error to attribute different ratios to the values of their contributions just because a separation has taken place. Specifically, it is an error to fail to recognize the real on-going benefit flowing to the breadwinner by way of the other party's indirect contributions to to the breadwinner's opportunities to develop career paths and income capacity, and capacity to accrue assets.

Clearly, this indirect contribution to that ongoing benefit endures beyond separation. However this observation depends on the evidence supporting such a finding. There are cases where a party has walked into a marriage where the other party has already had a flourishing business and a high income. If that applies, then the duration of the subsisting cohabitation may determine the extent of any indirect contribution.

Logically, indirect contribution to the husband's capacity continues post-separaation, and is independent of how many (if any) children may still be living in the wife's care. There is no need for there to be any continuing concurrency of parenting contributions in order for there to be continuing indirect contribution to the income earning capacity. It is important to be aware that there is a distinction between the indirect contribution to a husband's on-going capacity on the one hand, and the wife's post-separation contribution as a parent, on the other. If applicable, she must be given credit for the former, and in addition, she may also be making a direct contribution as a post-separation parent.

In some cases, the "freeing" of the husband to pursue his business interests, may also continue post-separation. Where applicable, a wife can claim to have made an indirect contribution to the husband's post-separation economic capacity, particularly where the freeing from parenting duties enables a husband to continue to expand his business, or to up-grade it with new plant and equipment or new or renovated premises.

It is in this wide context that Justice Ainslie-Wallace said in para 64, "The wife has contributed to that ongoing earning capacity." See also para 65 where her Honour said –

> "Clearly then the husband's submissions that the increase in property after separation should be regarded as being referrable to a contribution made only by him is to be rejected. It not only ignores the ongoing contribution of the wife to his income but further seeks, impermissibly, to confine contributions to a particular class or list of assets."

This continuing economic capacity be recognized where a party has a business that involves asset development, and asset selling, eg a builder, whose business was developed during the marriage. The spec-built house constructed after separation constitutes a manifestation of the capacity that he was freed up to develop during the marriage. It also is a manifestation of potential income upon sale, but until sale, it is an asset in his hands.

In respect of each of these manifestations, the wife has made an indirect contribution. There is no basis for "sequestration" or quarantining of that asset.

Furthermore, it is suggested that there is no need for the capacity to arise from the conduct of a "business". It can arise from a hobby, or a part-time handyman occupation, or any skill built up during a relationship – eg, stock-market speculation.

None of the above observations diminish the importance in any given case of actual direct contributions by a spouse towards parenting. This direct contribution, to which sec 79(4)(c) applies, is in addition to the indirect contribution by the parenting spouse to the other party's economic capacity.

Conversely, the party who has facilitated the "freeing" of the primary income earner, often undergoes a personal fiscal detriment, like losing current workplace skills, or having no opportunity to accumulate superannuation entitlements, or enduring the consequences of work-related relocations, or being left with lengthy periods of sole responsibility for the children.

This is partly related to the relevance of sec 75(2)(k) even where no maintenance is sought, and this is discussed below in relation to the judgment of Justice Le Poer Trench.

The Federal Magistrate therefore fell into error by viewing the large "contributions" claimed to have been made by the husband, as being his alone, in that he failed to recognize that the husband retained the ongoing benefit of the wife's indirect contribution to his income earning capacity. His Honour then made the adjustment from 50/50 to 70/30 in the husband's favour of all assets, including superannuation.

In her Honour's words at [65]

> 65 Clearly then the husband's submissions that the increase in property after separation should be regarded as being referrable to a contribution made only by him is to be rejected. It not only ignores the ongoing contribution of the wife to his income but further seeks, impermissibly, to confine contributions to a particular class or list of assets.

When turning to the sec 79(4)(e) and sec 75(2) provisions, the Federal Magistrate made only a 10% adjustment in the wife's favour of the non-superannuation assets. She therefore received 40% of those assets and 30% of the superannuation to be paid sometime in the future.

Justice Ainslie-Wallace summed up the position at [82] when she said –

> 82 Given all the facts found by the Federal Magistrate and the evidence before him, the result of his determination is to leave the wife $1,242,525 plus $502,170 to be paid sometime in the future, a total of $1,744,695. The husband, on the Federal Magistrate's calculations is to retain $1,863,788 plus $1,171,732 in superannuation, a total figure of $3,035,520 together with his ongoing capacity to earn significant income and bonuses.

Justice Murphy identified the amount that the husband had to pay to the wife after taking into

account that she was to retain the home, was $125,178.20. This amount was described by his Honour at [137] was less than 6 months of salary for the husband. It was also less than what the husband received in 2011 by way of bonus (AU$503,668) (at [123]).

His Honour gives clear guidance to trial judicial officers from para 104 ff in referring to the reasons of the Federal Magistrate.

> 104First, I consider that [78] of the reasons in particular is redolent of his Honour having misled himself by, in effect, posing the question of what adjustment should be made to an equal division at separation to take account of contributions in the ten years or so post-separation. The question to be addressed was what did an analysis and weighing of all contributions of all types prescribed by s 79(4) made by both parties across 31 years (the approximate 21 years of the cohabitation and the approximate 10 years after their separation) suggest was a just assessment of contributions. (See, for example, In the Marriage of Aleksovski (1996) 20 Fam LR 894, particularly per Kay J at 903).
>
> 105For that same reason, it is not a matter, as is said at [67] of the reasons, of "competing" contributions by the wife "erod[ing] the significance of the husband's ongoing financial and non-financial contributions" (see, for example, In the Marriage of Pierce (1998) 24 Fam LR 377, particularly at 385-6).
>
> 106Inherent in the finding at [78] is the proposition that the contributions of all types recognised by s 79(4) made by both parties over 21 years in their "own spheres" (see, Mallet v Mallet (1984) 156 CLR 605 at 636, per Wilson J) results in contributions being assessed as equal, but the contributions of all types made by both parties in their own spheres over 31 years justifies a disparity between them of 40 per cent or, in dollar terms over both assets and superannuation, of about $1.91million. In my view, that conclusion pays no, or no sufficient, regard to the significance of the wife's contributions over 21 years, the impact of those 21 years of contributions on the property and income earning by the husband, and the fact that those significant contributions (as his Honour found them to be, at [69]) undoubtedly continued in the 10 years after separation. (emphasis added)
>
> 107The expression "post-separation contributions" has, of course, been used widely in many authorities within the context of discussions about the assessment of contributions. But, importantly, it is not the fact of separation or when contributions are made that is the delineator. It remains crucial to analyse and weigh the nature, form and characteristics of all contributions across the whole of the period under consideration. (emphasis added)

At [112] and [113] Justice Murphy highlights this continuing contribution by the parent post-separation.

> 112However, it is equally clear that the very same decision by the parties to "specialise their respective roles" permitted (or required) the wife to contribute significantly more time and energy to the care of the household and the rearing of the parties' three children not just in the 21 years to separation, but in the 10 years after separation.
>
> 113Although each party's respective role was conducted with increased exclusivity after separation, it was those same respective roles which continued. That is, each of the parties contributed within their "own spheres" in that respect in a manner similar to that which they contributed prior to separation. (emphasis added)

At [128] and [129] Justice Murphy identifies an omission by the Federal Magistrate to consider 75(2)(b) and (n), yet those considerations were "important to informing (his) view" that the adjustment of just 10% of the parties' property, was "plainly wrong".

Another example where no ground was pleaded as to an obvious error, is found at [131] and [132] where the Magistrate's conclusion that his orders "should improve the earning capacity of the wife" were without any evidentiary basis.

Setting aside a judgment upon appeal on grounds that have not been pleaded by the appellant, is not new law. See the High Court decisions in Warren v Coombes (1979) 142 CLR 531 at 553.

At [123] and [136] Justice Murphy refers to the failure of the Magistrate to have recorded an

awareness of the disparity of incomes, nor is there any finding as to the wife's future income earning capacity, yet that is a "crucially important" factor under sec 75(2).

Justice Le Poer Trench noted at [161] and [162] that the Federal Magistrate had failed to consider the real impact of his findings in actual dollar terms, thereby not having the benefit of a valuable aid to assess a valid adjustment under sec 75(2).

> 161 In this case the Federal Magistrate's determination of the division of net assets and superannuation, based upon assessment of contributions pursuant to ss 79(4)(a) to (c), was expressed in percentage terms. The learned Federal Magistrate, did not calculate, in dollars, the consequences for each of the parties resulting from that determination. Nor did he consider that difference when he came to consider the matters referred to by him under ss 79(4)(d) or (e). The reason for that omission appears to have arisen, at least in part, from what was stated by him at [97] of his judgment which provided as follows: (emphasis added)
>
> 97 For the sake of completeness, I note that considerations under s.75(2)(h), (j) and (k) of the Act are not applicable here as neither party seeks final orders in respect of spousal maintenance. I also note that s.75(2)(c), (ha), (l), (n), (naa), (na), (p) and (q) as well as s.79(4)(f) and (g) of the Act are not applicable in the circumstances of this case.
>
> 162 In relation to his Honour's determination that ss 75(2)(j), 75(2)(k) and 75(2)(n) were not applicable and/or relevant to the case, we conclude that determination is in error.

At [168] his Honour referred to Browne v Green (1999) FLC 92-873, where the Full Court considered how the phrase "the party whose maintenance is under consideration", found in ss 75(2)(g), (h) and (k), should be read when considering a property settlement application under s 79. Their Honours said:

> 67 It is fair to say that it has long been assumed in this Court that when s 75(2) is being applied in property settlement (as opposed to maintenance) proceedings, references in paragraphs (g), (h) and (k) to "the party whose maintenance is under consideration" can be read as references to a party to the proceedings with respect to property settlement. Such an assumption was made, for example, by Nygh J in Hirst and Rosen (1982) FLC 91-230, and we were not taken to (nor are we aware of) any authority to the contrary.

At [174] his Honour said –

> 174 There is nothing in any of the ss 79(4)(d) to (g), or elsewhere in s 79 which requires a judge to calculate in dollar terms the differential achieved between the parties if the judge has apportioned assessment of contribution in percentage terms. Nevertheless, it is a matter of common practice developed by judges exercising jurisdiction under section 79 of the Act, to carry out such an exercise, at least at the time matters relevant to section 79(4)(e) are considered. Section 75(2)(n), on one level at least, invites such an exercise. Had the Federal Magistrate carried out such an exercise, in this case, he may have reached a different determination as to the amount of adjustment which was required under section 75(2).

This judgment is likely to make a difference in those cases where the primary parent facilitates the income-earning capacity of the other party. There will be various points of distinction.

Some cases will involve established businesses. It then becomes a matter of degree depending on the scale of the enterprise and the opportunity that the stay-at-home spouse has, in order to be able to make any indirect contribution. For instance, there might not be much by way of establishing the economic capacity of a husband, but if he has to work to keep the business viable, and is for that reason freed to do so, then the wife can argue to have made an indirect contribution to the maintenance and continuity of the business.

By their nature, businesses need to stay open and trade, just in order to continue to exist. This constant commitment to the continuity of a business, and the associated constant rejuvenation of them, means there is a lot of scope for indirect contribution to be made post-separation, but this does not mean that there is a reduction in the significance of the indirect contribution that facilitated the establishment of the business.

What if each of a number of children reaches adulthood after separation and become independent? Surely there will be no scope for any "pro-rata" reduction in the significance of the home-parent's contribution. The judgments in Marsh do not accord any special consequence flowing from the departure of the child who was 17 years old at separation and then lived separately in one of the post-separation properties.

This takes us to the next step – what if there are no children to be minded, or what if the children are living in a week-about parenting pattern? The answer may have to depend on various subtle arguments, but none of them can take away the importance of the initial indirect contribution that facilitated the establishment of the husband's economic capacity.

What I am suggesting is that on-going parenting, if any, must be treated according to its significance in any given case, but it must not be confused with indirect contributions by the wife referable to the times when the husband was freed by the wife to establish his on-going economic capacity.

In this article I have used the terms "parties", "spouse", "husband" and "wife" not for the purpose of allocating a sexist role to either gender, but for the linguistic advantage that use of such terms makes it easier to illustrate the point being made.

G. Brzostowski SC

CASENOTE:

Barbaro v The Queen; Zirilli v The Queen [2014] HCA 2

Just in case you thought it was OK for prosecutors to assist a sentencing judge with a statement of sentencing range, this High Court decision tell us firmly, "Not so!". A first response is that this is good news for the defence, but it comes at a price – will the prudent sentencing judges now throttle a question they were intending to ask counsel? If so, will we be guessing as to what the judicial mien means? Another response is to ask, 'How will this decision affect charge negotiations? Will there be new aspects of 'agreed facts' designed to direct the judicial discretion down a particular pathway that leads less obviously to an agreed range?'

The two applicants, both sentenced to long prison terms, submitted that their sentencing hearing was unfair because the sentencing judge did not seek, and would not receive, any submission from the prosecution about what range of sentences she could impose. [The background was that plea agreements had been reached in light of the prosecution's views about an appropriate sentencing range.]

The applicants' argument was that the prosecution should have been permitted, perhaps required, to submit as to the appropriate range. The Court said that such a submission was mere opinion [paras 42 and 49]. It was a submission that could NOT be characterized as one of law or fact. Accordingly there is no place for it.

This decision of the High Court (with Gageler J taking the contrary view that the submission was one of law, see paras 59 -62) overturns the practice that followed the Court of Appeal view in R v MacNeil-Brown (2008) 20 VR 677 . There is nothing unclear about this instruction [at para 23]: 'To the extent to which MacNeilBrown stands as authority supporting the practice of counsel for the prosecution providing a submission about the bounds of the available range of sentences, the decision should be overruled. The practice to which MacNeilBrown has given rise should cease. The practice is wrong in principle."

The Court's approach is grounded in maintaining for sentencing an unsullied 'judicial exercise of discretionary judgement' [para 25]. We are all reminded of the Court's approach in Wong v The Queen [2001] HCA 64 as to how distortions must be avoided [para 34].

Allowing the prosecution to opine about range was to give them unacceptably the role of 'surrogate judge' [para

29] when, of necessity, they are less informed than the sentencing judge [see paras 36 and 37]. Practically, if the sentence is fixed within the prosecutor's suggested range that may suggest that the judge has been unduly influenced. Alternatively, a sentence outside the range will draw appeals from one or both parties.

We are reminded that the prohibition upon 'stating a range' does not affect the desirable practice of referring to sentencing statistics and comparable cases. Such referencing enhances 'the consistency in the application of relevant legal principles, not numerical equivalence' [para 40, applying Hili v The Queen [2010] HCA 45.]

The lack of certainty about the ambit of these 'instructions' is illustrated by the remarks of Button J in R v Paton [2014] NSWSC 71 when sentencing for murder just a week after the High Court's decision. His Honour set out that he had asked the Crown – before the High Court's decision - whether he accepted a submission made for the offender that distinguished this offender from a co-offender, and moreover for his view about the 'appropriateness' of the head sentence proposed on behalf of the offender. His Honour said, ' I am uncertain whether the adoption of that course by me was contrary to the principle expounded in the [High Court] judgment' [para 97].

What about 'charge negotiations'? There's a complementarity about the statement of agreed facts and what the Crown will 'opine' as to range. Now that the Crown has less to offer will Defence argue for an agreed plea to lesser gravity charges in return for the perception of increased risk to the offender?

Ah, the uncertainty that flows from seemingly clear dicta: a boon to our appellate practice colleagues!

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Tell us what you really think!

"39. In a case such as the present where conduct that is unlawful is found to have been engaged in by a prosecuting authority, in essence the courts are being asked to remedy two different forms of unlawful conduct: the unlawful conduct alleged to have been committed by the criminal defendant and the unlawful conduct found to have been engaged in by the prosecuting authority. The legislature has given no guidance as to which of these species of unlawfulness should be treated most seriously. However, in many cases the courts will be obliged to resolve that issue and in the starkest case choose between staying criminal prosecutions or condoning breaches of human rights. Whatever they do, a public interest will be, and will be seen to be, frustrated. If, as is likely to be the case, the empirical result is that continuation of criminal prosecutions is favoured over prevention of unlawful breaches of human rights, then that will be an outcome reached without the legitimacy given by legislative guidance. It will, by judicial decision lead to an erosion of status of human rights, the breach of which the legislature has determined to be unlawful. It will avoid the necessity for the executive government to make hard decisions for which it will be politically accountable about the extent to which extra funding is provided so as to permit the arms of the executive government to comply with the additional burdens placed upon them by the requirements of the HR Act"

LM v Childrens Court of the Australian Capital Territory and the Director of Public Prosecutions for the ACT [2014] ACTSC 26 Mossop M

Bryan Meagher SC

Permanent Stays and Abuse of Process in the Magistrates Court – 2 Important Decisions

In recent times there have been 2 interesting decisions involving the power of the Magistrate's Court to grant a permanent stay for "Abuse of Process". The first involved Magistrate Mossop (as he then was) in Russell v Pangallo cc2558 of 2005 (Pangallo) – the decision, however, was delivered on 24 August 2012 after argument on 24 August 2012. Magistrate Mossop was faced with an application for a permanent stay pursuant to an alleged breach of s22(2)(a) of the Human Rights Act 2004.

The second decision Canham v ACT Magistrates Court (2014) ACTSC14 involved the decision by the Magistrate to grant a permanent stay on 21 September 2012 on her own motion because of the perceived deficiencies in the prosecution case.

In Pangallo Magistrate Mossop had the Attorney intervening as well as counsel for the applicant (defendant) and the DPP. The first question addressed was whether the Magistrates Court had the power (jurisdiction) to grant a permanent stay. The Attorney through his counsel submitted there was no jurisdiction. Magistrate Mossop did not accept that submission for 2 reasons. Firstly because of s40C(2)(b) of the Human Rights Act 2004 and secondly because of what the Attorney himself stated in the explanatory statement which was presented with the Bill to amend the Human Rights Act, which made it clear that the amendment was "… intended to enable victims of unlawful acts by public authorities to rely on human rights in legal proceedings in courts and tribunals or to institute an independent cause of action in the Supreme Court".

Magistrate Mossop held that the Magistrate's Court has power to stay proceedings if they constitute an abuse of the Court's process based on the principle that every grant of power carries with it everything which may be necessary or incidental to the exercise of that power. After referring to High Court and other authorities Magistrate Mossop concluded that an abuse of process can arise for a variety of reasons, that the categories of abuse of process are not closed even though the abuse usually is that the Court's procedures are invoked for an illegitimate purpose or the use of the Court's procedures is unjustifiably oppressive to one of the parties or the use of the Court's procedures would bring the administration of justice into disrepute. If for example the continued conduct of a prosecution was declared by statute to be unlawful then it is likely that would amount to an abuse of process. Magistrate Mossop also found that the DPP was likely to be a public authority consistently with the views of Gummon J in MOMCILOVIC v R (2011) 85ALJR957 at paras 128 and 129. A stay was not granted because Magistrate Mossop found there was no breach of s22(2)(a) of the Human Rights Act 2004.

In Canham the Magistrate permanently stayed the prosecution on her own volition part way through the cross examination of the complainant for 3 reasons:

Because the "prosecution are not prepared to act reasonably in relation to this matter -

a) Because the prosecution is oppressive,

b) Because the prosecution was at the very outset foredoomed to fail

The DPP successfully sought relief from the stay by obtaining a writ of Certiorari from Penfold J. The learned Magistrate had relied on the High Court's decision in R v Carroll (2002) 213CLR635 and Walton v Gardiner (1993) 177CLR378.

Penfold J ordered that the decision of the learned Magistrate be quashed and remitted the prosecution to the Magistrate's Court differently constituted to be determined according to law.

In coming to her decisions Penfold J found the following:

a) That the Magistrate's Court has power to grant a stay (paras 26 to 30)

b) That the power to grant a permanent stay should be exercised sparingly and with utmost caution, only when there is a "fundamental defect" going to the "root of the trial" AND where there is nothing else the trial judge can do to remedy that defect para 34

c) That the scope for reviewing the prosecutorial discretion to institute and maintain a prosecution is very limited para 40

d) That in this case the Magistrate did not articulate any basis on which the prosecutor's persistence with what her Honour saw as a weak case (albeit unfinished) could as such have founded a conclusion that the prosecution was an abuse of process para 45

e) That her Honour did not give the prosecution procedural fairness …. in that … her Honour announced her determination that the prosecution should be stayed and proceeded to give her reasons for doing so, without inviting submissions from either party para 58

f) That the order in the nature of certiorari will be made by reference to the failure to give procedural fairness not in reliance on a finding that the Magistrate fell into jurisdictional error in staying the prosecution para 69

It is interesting to note that Penfold J stated in her judgment that the Attorney was notified of the matter, but after several adjournments arising from the uncertainty about the defendant's intentions, the Court was advised that the Attorney would not be intervening causing Penfold J to state "Thus I was required to determine the matter without a contradictor, an unsatisfactory exercise at best …" para 8.

F J Purnell SC

HUMAN RIGHTS & CIVIL LIBERTIES - THE ROLE OF THE BAR

This year marks the tenth anniversary of the Human Rights Act 2004 (ACT) and there is now a fairly considerable body of reported cases in the Territory jurisdiction ruling upon particular aspects of that legislation. This is not the place for any detailed exposition of the issues and tendencies which may be discerned from the course of those decisions. Erskine SC has already given us an excellent conspectus of developments in his presentations at local CPD sessions, and most recently in his March 2014 discussion on Separation of Powers in this Territory and the legacy of leading cases such as Liyanage v R. (1967) 1 AC 259. However, it is timely to note some current indications, not only in the Territory but also across Australia, which strongly suggest that we may now at last be entering upon a period when a body of jurisprudence will likely emerge which will vindicate the human rights and fundamental freedoms of individuals and their civil liberties even more strongly than hitherto has been the case in this country. The ACT Bar along with the Australian Bar as a whole, clearly has now, and will continue to have, a central role to play in the positive development of the law in this very important field.

Whilst the Human Rights Act 2004 (ACT) has provided a platform and framework for attempts to vindicate the rights it declares and proclaims, we cannot be complacent about the fact that it has a limited nature and offers only limited substantive relief. Although it enables claims to be raised and ruled upon in appropriate cases, it remains a very modest venture. It falls short of a full-blooded set of guarantees for individual rights and freedoms enforceable in the ordinary Courts in the ordinary and substantive manner, as might be achieved by an entrenched Bill of Rights. Moreover, the Act remains just that – a mere and thus repealable, statute. Australian jurisdictions have been and still are, curiously shy

of the notion of constitutionally entrenched Bills of Rights such as that which has existed in the United States of America since about the time of British settlement in Australia. Australia's ventures in the Human Rights field have thus been oddly tentative and limited. Even the experience with the Charter of Rights in Victoria, has not been a particularly happy one. In large part, the reluctance of Australian legislatures and of many Australian lawyers, in regard to full-blown Bills of Rights is due to a well-founded and Burkean suspicion of untrammeled judicial activism. It is not just judicial activism of the "Progressive" kind – there is sometimes a "Conservative" judicial activism - which also has to be contended with.

It is also very odd that, despite the widespread discussion of Human Rights and associated matters such as civil liberties in contemporary political and social discourse (not to mention the reams of academic commentary upon it) our Australian Human Rights legislation has tended to be of the more limited kind, such as this Territory's statute of 2004. True, there are instances where it is argued that legislation has gone too far, as instance the current debate about section 18C of the Racial Discrimination Act 1975 (Commonwealth) as it has been interpreted in the Federal Court of Australia. That instance points up the important difficulty of arriving at an appropriate balance as between protecting human rights and ensuring that traditional civil liberties are not squashed. As to the issue of "balance", I offer some further comment in due course. Another odd thing is that many human rights advocates seem to assume that human rights were only invented in 1945. Whilst that appellation may be novel, the notion of fundamental rights and freedoms has a lengthy pedigree, reaching back to Classical Natural Law through to the Modern Doctrine of Natural Right as expounded by Locke and others, not to mention the various particular instances in English legal and constitutional history where the power of the Crown has been restrained and the liberties of the private individual likewise enhanced or protected.

Here in the ACT, we at least have had the salutary and hopeful experience of seeing that now, experienced and effective Counsel, in both the Criminal and Civil fields of Advocacy, are increasingly enabled and prepared to seek to vindicate the rights and freedoms of individuals by invoking, particularly alongside other traditional remedies, the provisions of the Human Rights Act 2004. Among many examples, the most recent case in point is R v Nona; Nona v The Queen [2014] HC Trans 44, 14 March 2014. Whilst the High Court of Australia has refused Special Leave applications in that matter, brought by the ACT DPP and by Mr Nona respectively, it is notable that both Senior and Junior Counsel of the ACT Bar have been prepared firmly to assert rights under the Human Rights Act 2004 in clear and unequivocal terms at both the Court of Appeal and High Court levels. Only decades ago, such submissions would have been but testily received. This great change gives us some cause of hope for the future, since as a general rule, much earlier generations of the Australian judiciary and practising lawyers had, for too long (but with various honourable exceptions) remained not exactly well-disposed to parties to civil litigation and in criminal proceedings, vigorously asserting their "human rights and fundamental freedoms". Why that was so admits of many answers. There was a conception that the common law would suffice: but it can generally be overturned by simple legislation of a repressive or confiscatory nature. There was also the fact that by reason of their own relatively short histories, the Australian judiciary and legislatures came strongly under the influence of the rather self-satisfied orthodoxies of Victorian times. At the same time, despite at least a persistent awareness of English constitutional history, there was a widespread view that such assertions of the Natural Rights of individuals (other than proprietary rights) were vain and vague concepts of Continental and therefore suspect, origin. Indeed, even in Britain, such was the self-confidence of its Victorians, that many of the achievements of great eighteenth century Judges such as Lord Mansfield and others, were sometimes overlooked, only to be rediscovered by modern jurists.

These themes played out also in the Australian Colonies and the Commonwealth as a Dominion. The Constitution of the Commonwealth of Australia thus deliberately contained no Bill of Rights, but only a very limited number of express provisions such as, for example, relating to trial by jury, which itself turned out to be of limited utility as interpreted. Today, the problems in vindicating Human Rights are often of a somewhat different kind, in that the limited nature of what human rights legislation in Australia

typically provides, introduces the danger that Courts may get bogged down with the over-elaboration of minute distinctions and limitations, which ultimately does little to enable full and proper vindication of the human rights of individuals. There is also an understandable impatience whenever unmeritorious or unjustified assertions of "human rights" – often in the form of quite generalized claims by self-represented (or perhaps it is best to say, unrepresented) civil litigants or criminal defendants. Yet even there, note the US case Gideon v Wainwright (1963) 372 US 335, in which the applicant had decided and said for himself that he wanted a local State lawyer to defend him. The relevant exchange at trial was: "THE COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case. GIDEON: The United States Supreme Court says I am entitled to be represented by Counsel." Justice Hugo Black, of whom more below, wrote the opinion of the Court, overruling an earlier limiting authority, Betts v Brady (1942) 316 US 455.

This reminds that even a garbled claim by an unrepresented person may contain a good point of law and Judges need constantly to be on their guard in that respect. However, it is the role of the Bar, as always, to do what it can to assist the Courts to vindicate claims in respect of Human Rights and fundamental freedoms, where appropriate and as applicable.

Of very recent times, there have been some "straws in the wind" which remind us that we cannot be self-satisfied or complacent in thinking that because Australia has a fairly high standard of living and we enjoy a generally strong heritage of common law and the rule of law, that breaches of the human rights of individuals are "few", or of little impact. As well, in recent months, we have seen instances of legislation overriding human rights and fundamental freedoms under the guise of the "police powers" (to adopt the US Supreme Court terminology) of jurisdictions. It now seems likely that the High Court will be called upon to rule further on the scope of civil liberties and the freedom of association in regard to statutes such as the Vicious Lawless Association Disestablishment Act (Qld) (known amongst Queensland lawyers as the "VLAD" Act) and also to deal with legislation (whether ad hominem or wider) cognate with that challenged in Kable's Case (1996) 189 CLR 51.

From a local ACT perspective, we have also seen the spectacle of an experienced lawyer and former Attorney-General of this Territory, Bernard Collaery Esq., having had his law offices searched and material seized by Commonwealth authorities, resulting in a special application to the International Court of Justice at The Hague by his client, the nation State of Timor Leste, for appropriate relief, which was indeed, granted. On that occasion, we were able, via today's audiovisual technology, to watch and hear those proceedings by internet broadcasting, when we could see and judge for ourselves the arguments advanced by the Australian Solicitor-General Justin Gleeson SC and of the venerable Sir Elihu Lauterpacht QC and Sir Michael Wood QC of the English Bar, who are both eminent United Kingdom human rights advocates. Indeed, whilst I believe we ought demur from the public broadcastings of criminal trials as carrying their own dangers, the increasing internet audiovisual coverage of appellate courts hearing major matters may well, in itself, provide a new level of public interest (and accountability) in regard to the vindication of human rights norms and the civil liberties of individuals.

All of these considerations are indications that the Australian Bar, including in no small measure the ACT Bar, will continue to have a major role in the vindication of human rights and the preservation of the civil liberties of the individual in civil litigation and criminal proceedings. This is so not merely by virtue of what we have always done, but now also by virtue of what we can also do by reference to Human Rights legislation, and often in association with other more traditional remedies.

It is very much a matter of adequate awareness not only of the law itself, but of the wider principles and of practical matters of fact which attend the circumstances in which the law of the land is enforced properly or otherwise. I therefore refer to this extract from Dunne's biography of one of the greatest Justices of the US Supreme Court Mr Justice Hugo Black (1886-1971) in regard to issues of due process and civil liberties matters:

"Rochin v California (1952) 342 US 165 concerned the seizure of critical evidence via the action

of three Los Angeles deputies in pumping out the defendant's stomach, and here Frankfurter [J] wrote for the Court in reversing the conviction on the traditional, if nebulous, due-process grounds, that the police action departed from the fundamental standards of decency and fairness of English-speaking peoples and shocked the judicial conscience. Black [J] concurred in overturning the conviction, but his nominal agreement was in fact dissent. In his view, the Fifth Amendment ban on self-incrimination applied to California as well as the United States – he had said that before – and he now held that that ban covered not only admissions extorted from the mind but also objects extracted from the body. And in something of a waspish professorial streak of his own, he made a point with two Socratic questions of his own: why should the Court consider "only the notions of English-speaking peoples to determine what are immutable and fundamental principles of justice?"; and "what avenues of investigation are open to discover 'canons' of conduct so universally favoured that this Court should write them into the Constitution?" He then gave a hint of what the answer should be in referring to contemporary abridgement of expression and its inevitability under an "accordion-like" judicial formula, before suggesting its substance – "the absolute and unqualified words of the Fifth Amendment.": (Dunne, Gerald, Hugo Black and the Judicial Revolution Simon & Schuster New York, 1977 at pages 288-289).

It is necessary to know that, in addition to his other wide life experience including active Army service in the First World War, Hugo Black had practised extensively as a defence attorney, police prosecutor and sat as a Police Court Judge in the southern State of Alabama before entering the US Senate and being appointed by Roosevelt to the US Supreme Court.

He was thus speaking from hard experience; and not mere doctrinaire adherence to any set of remote or theoretical norms; but to a Bill of Rights adopted by the national Founders. Indeed, so effective were Black's devastating attacks as a Senator upon various forms of corruption and malpractice in the United States in the 1920s, that his enemies – unsuccessfully, as it turned out – tried to use the fact that, like perhaps many other lawyers in that earlier Alabama, he had been at one time a member of the notorious Ku Klux Klan, in order to block his appointment as a Judge. Yet, he was later to become key architect of the racial desegregation case Brown v Board of Education and other civil rights and civil liberties cases. He emphasized practical results, in clear judgments, which were noted for an "austere logic [which] fitted the gravity of the case". It is submitted that it is by such a downright and clear legal approach, and not by oversophisticated notions about human rights and civil liberties, that the same are truly and effectively vindicated. One wonders what Black would have made of these oddly didactic words that appear in the preamble to Human Rights Act 2004 (ACT): "Few rights are absolute." and the long Australian diffidence about express human rights.

One interesting question for the development of the Territory's law and jurisprudence relating to Human Rights and Civil Liberties is the true effect of the interplay between the provisions of the Human Rights Act 2004 (ACT) and especially section 7 of that Act, with the broad nature of the provisions of section 20 of the Supreme Court Act 1930 (ACT): eg., see Kelly v Apps [2000] FCA 687; and also, Nona v R [2013] ACTCA 39.

The A.C.T. Bar Council has recently established a new Committee on Human Rights and Civil Liberties to monitor Australian developments in this important field of contemporary legal practice by advocates. As its name implies, it will concern itself not only with matters pertaining to Human Rights alone, but also the effects of legislation and judicial decisions thereon, upon the traditional Civil Liberties of the individual.

Having regard to the various Human Rights and Civil Liberties issues which we have seen arising in Australia and in the Territory recently, it is a timely development that our A.C.T. Bar has created such a Committee.

Douglas Hassall
Barrister-at-Law, Silk Chambers
Chair - ACT Bar Human Rights Committee

Law and (dis)order

By Christopher Ryan, Barrister, Silk Chambers

King (not) Wills was the survivor of the Burke expedition.

The margins of the world ought to have been "southwest Qld" (not southeast).

Law and (dis)order in the wilds, wiles, and (Irish) eyes. Part 2.

By the early 1880s Pat Durack had decided to cash in his success in his Qld cattle and business interests, and start afresh in the Kimberley region. Oral and handshake agreements has worked thus far. But with progress came a written agreement with his younger and more trusting brother. '

"…the said Duracks shall carry on the business of partnership on the leasehold lands known as situated in the Kimberley comprising several blocks containing 300 thousand acres or thereabouts".

A written trust document evidenced, as between certain family members, title to half the cattle to be driven from Qld to the Kimberley.

The big one was the formation of a Qld based pastoral company to purchase the massive Cooper region Durack properties and some of the Kimberley runs, the cattle thereon and the butchering and other businesses. It all seemed fine until the fatal decision.

Pat's agreement to company request to pay the bulk of the purchase price in one years time. This from a company with a declared paid up capital of half a million pounds.

The ooold lesson. Don't let them in before settlement. Patrick Durack never saw his money. He could have sued the directors today, but the corporate veil was thick in the 1880's.

His trusting nature was the beginning of the end for Patrick (he died in 1898, infra). Penury after the years of Kimberley struggle resulted from denial of profit arising from WA legislation - cattle movement restrictions designed to prevent cattle tick spread. Not even the famed Duracks' political influence could remove the restrictions.

Late 1880s, one of Pat's sons (the father of Mary, author of Kings in Grass Castles) was on the NT/WA border, desperate for clearance from a WA stock inspector for a mob from Wave Hill (a name we now know from the 1960s). Riding with the inspector, pointing out the splendid health of the mob. This good Goulburn Christian Brothers educated son, well schooled in ethical behaviour, whilst not asking the inspector to depart from his duty, did ask (him) to facilitate entry in the name of justice and common sense. Bush justice and, er well, common sense ??!!.

In his Kimberley years, Patrick and other Duracks took on a variety of enterprises. Gold mining featured prominently. Pat went big and imported expensive machinery for Halls Creek; Others went humble panning. One party of Duracks came up against a rather amateurish and likeable mob of old rogues passing themselves off as feared bush rangers. These panners managed to locate a fine Durack horse (branded in Cooper Creek, Qld) amongst the rangers horses.

Relations with Aboriginals in the Kimberley were mixed, as in Qld. Some worked on the stations, most kept clear, and some actively attacked white men and cattle. Violent times.

Police parties were active in roundups. Interestingly, Duracks encountered Aboriginal women working as stockmen in the NT, valued highly for their horsemanship. Dressed proudly in prized moleskins, coloured shirts, kerchiefs, and hats, advanced beyond domestic house duties and sexual exploitation by whites. What went wrong? Later government regulation forced them onto missions. The nanny, paternalistic state set back a huge gain by 100 yrs.

A Durack journal entry, late 1880s – many associates have in so short a time gone the majority in a somewhat violent and untimely manner. Good Old Pumpkin (the loyal native from Qld days) however carries on his duties with the same quietness and efficiency. What a wearisome track where few are encountered but our sable brethren with unpredictable habits and where lonely graves tell of murder by the blacks, suicide under the influence of drink or the delirium of fever.

In his last years, Pat's sister in law was swindled on the death of Pat's brother (Michael) by one of Michael's partners on title to land. The rogue partner (not a Durack) was mortgagee of the mortgage executed by Michael against his share of the land. Rogue also co-executor of Michael's will. Realising his conflict (and opportunity??!!), rogue relinquishes executorship. After a swirl of rumours about the decreased value of the land, the rogue successfully bids at auction for the equity of redemption in the mortgage. One pound, he being the only bidder.

A fine solicitor took up the case for the impoverished widow. The first action, breach of trust, was (probably rightly) dismissed. The rogue was not co executor when he bid. The judge declared that if the widow had a case at all it should be based on fraud. Following this judicial advice - 2nd action (Anshun estoppel would prevail today). Good tactic, producing an attractive offer (a handsome annuity payable to the widow). Frustrated by the remaining executors refusing to co-operate. Next offer lower - the humiliation of it being described as a charitable concession without liability, and in redemption of all claims against both the remaining title holders (the rogue being one, the other being another Durack, a brother of Michael). Yes, family arguing over money. Offer rejected.

At the fraud trial the Durack brother gave evidence for the rogue. The sudden upturn (post death of Michael) in value of the mortgaged land was due to a boom in local markets (Kalgoorlie gold field). Case lost. Brother's conflict self interest v family loyalty. Always back self interest (as PM Keating wisely said). Widow retreated to hostel keeping (a comedown for a Durack). The Durack brother titleholder had been behind the attempts at settlement, and later offered to help support the widow by adopting one of her daughters. Offer declined.

Another oooold lesson. Take the money from the party with it, and RUN. Back to Ireland, El Dorado, anywhere, away from court.

One Durack retreated from massive NT & Qld holdings to his original 1000 acres in Grabben Gullen (near Goulburn). He had wisely listened to his wife prior to leaving it 20 yrs earlier for Qld. You may be glad of it some day.

Pat Durack was powerless in his old age and relative penury to assist the widow. At his zenith he could have bought out the mortgage (confidentially). Cleared his brother's debts, and set his sister in law up for life. But he had lost his clout.

He died very shortly after hearing (from the remaining brother on title) that the widow had proudly refused to see him on his last visit. I am sorry. The family has always been, except for this, nothing could ever break the family (Quoted from book).

Toward the end, Pat would mumble to his sister - All the little kings in their grass castles, the wind and the water sweeping them away

Christopher Ryan

Barrister, Silk Chambers

Commissioner for Standards Appointed by ACT Assembly

The Honourable Dr K Crispin QC was appointed as the inaugural Legislative Assembly Commissioner for Standards on 14 February 2014

Background

The creation of the position came as the result two ACT Greens motions moved by Minister Shane Rattenbury in the ACT Legislative Assembly last September 2013 which asked Members of the Legislative Assembly to formally agree to adhere to an updated code of conduct, and to set up the role of a Commissioner for Standards. The measures, it was suggested, would boost the expectations of behaviour for the ACT's politicians.

Minister Rattenbury is quoted at the time as saying:

"Members of the public or other members of the Assembly could lodge a complaint with the Speaker, ...The Speaker makes an initial assessment of whether there's some level of credibility to the complaint or whether it's vexatious . . .If it proceeds past that first threshold, then the Commissioner for Standards would be asked to investigate the matter. If the Commissioner uncovers a breach, the Assembly would determine an appropriate punishment."

In further, statements Minister Rattenbury made the points that the new role would raise standard and create a feeling impartiality by way of external non-partisan oversight.

"In having an independent commissioner for standards there can be a confidence that there is a level of higher standard of external oversight but without the potential perception of partisanship . . . "

Purpose of Commissioners Role

The Commissioner's role was created following a resolution of the ACT Assembly on 31 October 2013 as an independent officer responsible for investigating specific complaints referred by the Speaker or Deputy Speaker, including possible breaches of the Members' Code of Conduct. The Commissioner is required to report their findings from investigations to the ACT Assembly's*Standing Committee on Administration and Procedure*.

The *Standing Committee on Administration and Procedure* will review the operation of the position after two years, following Dr Crispin initial appointment.

About the New Commissioner

The new Commissioner commenced his career in law in 1973 and is reported as having a long and particular interest in ethical standards, especially in the areas of law and government. The new Commissioner's career has included positions as Supreme Court judge, Director of Public Prosecutions, and the chair of the ACT Law Reform Commission. The new Commissioner is mentioned in the *media release* by the Speaker as having a strong background in consultation and negotiation across the judiciary, government and the community and a reputation as an impartial arbiter(an important element in this new role).

In other Jurisdictions

In the UK, the *Office of the Parliamentary Commissioner for Standards*, according to its website, "deals with the application of the Code of Conduct and related Rules that apply to Members of Parliament" including the registration of financial interests held by MPs and the investigation of complaints about MPs who have allegedly breached the Code of Conduct or related Rules.

In New South Wales, the concept has been the subject of private members bills in 2004 and 2006 and discussed at various levels of administration as recently as July 2013 at the *Presiding Officers and Clerks' Conference* in Canberra (see *A Parliamentary Commissioner for Standards for New South Wales? Paper to be presented at the 44th Presiding Officers & Clerks' Conference*Canberra, 1-4 July 2013) but no formal position as yet appears to exist in NSW. The opening lines of the conference paper state:

> "As the UK model has developed in recent years, particularly since the 2009 expenses scandal, the advantages of the model and its potential for redressing flaws in the NSW regime have become increasingly evident."

In Victoria and the other Australian jurisdictions apart from the ACT there is no specific role/ position of Parliamentary Commissioner for Standards in place. In these jurisdiction the relevant mechanism is "**the privileges committee**" which is made up of members of parliament themselves, meaning that impartiality and objectivity might be more difficult to

achieve. As a Victorian paper on the role of the privileges committee says of the Parliamentary Commissioner for Standards system:

> "The advantages of this system is that it allows an independent investigation to take place. The Commissioner fulfils the role of the presiding officer in the Victorian Parliament of deciding whether there is a *prima facie* case to answer, however has greater powers with the ability to conduct investigations and produce a report.
>
> The Commissioner also has a wider role of educating members on ethics and appropriate conduct. A written code of conduct clearly outlining the responsibilities of members assists with this. The Commissioner also has a role in interpreting and suggesting modifications to the Code of Conduct."

It would seem that the ACT initiative in appointing this role is a good one and one that should be considered further by other jurisdictions including the Federal parliament, especially in the light of question time antics and the poor behaviour in recent years evident in several of the Australian Parliaments.

The Bar Association congratulates Dr Crispin his appointment.

To QC or Not to QC that is the Question at the ACT Bar

The Bar Council has resolved to seek comments from members on the desirability of reinstating the use of the term "Queens Counsel" in the ACT.

At present, both Queensland and Victoria have reinstated Queens Counsel. The NSW Bar is currently considering this issue.

The question is:

Should the ACT Bar Association reinstate the title of Queens Counsel under the current Silk Selection Protocol?

Your comments can be forwarded to the ceo@actbar.com.au

For your information, we have published a discussion paper at page 29-30 prepared for the Victorian Bar by Michael D Wyles S.C. in March 2013.

"Queen's Counsel" must be reinstated.

Michael D Wyles S.C. March 2013

The decision of the Queensland Attorney General Jarrod Bleijie to reinstate the title Queen's Counsel in that State is far sighted and a boon for the Queensland Bar. Mr Bleijie displays a keen understanding of the utility of the Queen's Counsel title, and the overwhelming value which that title carries in the market for legal services, both here and overseas: *"Q.C. is also more widely known and understood by the public as a mark of professional distinction at the Bar… it is important that Queensland silks are competitive internationally… Asian countries employ Q.C.s from as far as the United Kingdom …"* [1]

Reinstatement of the title has little to do with ideology and everything to do with facilitating the Queensland Bar obtaining a greater share of the ever tightening market for legal services, particularly litigation services. The Australian Bar should have been first to Asia. We were not. We now have to follow the English Bar into Asia where we will be competing with the title "Q.C." which has a 400 year pedigree.

Even within Australia, "Senior Counsel" are at a disadvantage. The proposition can be tested at any suburban shopping centre, football match or golf club: "What do you do mate?" "I'm an S.C." "What's that?" As opposed to: "What do you do mate?" "Oh, I'm a Q.C." "Really, you must be pretty smart!"

The origins of the office of Queen's Counsel and more latterly Senior Counsel reveal its essential role in the development of the common law of Australia, and the pursuit of the rule of law as the foundation-stone of our Australian democracy. Within the profession we fully appreciate that those whom the Chief Justice appoints Senior Counsel in and for the State of Victoria[2] possess the advocacy skills, legal experience, learning and personal qualities worthy of the mark of professional distinction. Indeed the recognition within the profession of the possession of these qualities is confirmed by the fact that the Chief Justice makes the appointment. This is essential to the efficacy of the appointment.

But the rank of "Senior Counsel" is not an internationally recognised quality mark. It is only necessary to turn to the letterheads of the majority of middle to upper tier law firms in Australia to see that proposition made good. There you will find a multitude of solicitors, possessing few if any advocacy skills, described as SC, or "Special Counsel". Indeed the title "Senior Counsel" fails almost wholly to convey to the public that those so appointed possess the experience, learning and personal qualities worthy of the mark "Q.C.".

In stark contrast: *"… the rank of Q.C. is a good indication, even if not a guarantee, to a client with an important and difficult case that an advocate … can be trusted to handle such a case… The rank of Q.C. is an internationally recognised quality mark which plays an important role in ensuring the competitiveness of English advocates in litigation outside the UK and in international arbitrations"*. So wrote a committee of the English Bar chaired by Sir Sidney Kentridge.

Reinstatement of the title is a matter of serving the community, which is entitled to feel secure in the stability which the institutions delivering and reinforcing the rule of law bring. This is particularly so in times where too many politicians have come to eschew statesmanship in favour of the immediate gratification of popularity.

The office of Q.C. (and from time to time K.C.) was an institution integral to the system of adversarial justice which, has served our Australian community well. The emasculation of the title "Queen's Counsel" to the form "Senior Counsel" has never been explained and is not understood by the Australian community. The community knows the title Queen's Counsel and is comfortable with it. The community is entitled to have the title restored as part of the fabric of a society in which the rule of law prevails.

Whilst the English Bar continues to enjoy international recognition of that professional distinction which appointment as "Queen's Counsel" brings with it, members of the Victorian Bar were denied the issue of letters patent by the then

1 Press release 12 December 2012.

2 ***Ord 14.10 Chapter II Rules of the Supreme Court (Miscellaneous Civil Proceedings) Rules 2008.***

Victorian Attorney in 2000. Acting against the wishes of the profession the Attorney unilaterally chose to replace the title "Queen's Counsel" with "Senior Counsel" because he thought it was appropriate to do so. That action was not desired by the public, and was neither logical nor rational. As a reflection of the then Attorney's personal views, it can be respected but not concurred in.

At its best the shorthand explanation of the title "Senior Counsel" is that it "used to be Q.C., now its S.C.". This invites the immediate response – "why, are they not as good?" The mark "S.C.", in the mind of the public we serve, does not bring with it the association of excellence in advocacy, or expectation of erudition in law which the mark "Q.C." immediately stimulates. This is not to say that individual performances cannot overcome the immediate and understandable perception that the S.C. is in every sense, not a Q.C. But even if this perception is overcome, it will only be in individual cases.

At best, imbuing the mark "S.C." with the immediate associations of excellence and professional distinction which the rank "Q.C." carries in the community, is many generations away. The wheel is having to be recreated, and for no logical or rational reason. In the interim the services provided by "Senior Counsel" have become commoditised and we have been denied the opportunity to compete to bring work to the Victorian Courts, together with the associated benefits which flow to the wider community of Victoria.

As the ranks of Queen's Counsel swell in Queensland, the disadvantage suffered by "Senior Counsel" in and for the State of Victoria will be further compounded. That disadvantage, having no foundation in law, nor in ideology, should be removed.

If it is the case that Senior Counsel are not presently permitted by ***Ord 14.08***[3] to use the form "Q.C.", the Attorney could put in place a procedure whereby those appointed Senior Counsel by the Chief Justice, be eligible to be appointed Queen's Counsel by the Governor-in-Council. Such reinstatement, is sought by some two thirds of those presently holding the office of Senior Counsel in and for the State of Victoria to whom I have written on this issue. It is a reinstatement of form which confirms the essential role of the Chief Justice as the final arbiter on who has earned the professional distinction and can only enhance the standing of the Victorian Bar, and in turn the standing of the Supreme Court.

3 ***Chapter II of the Supreme Court (Miscellaneous Civil Proceedings) Rules 2008.***

Seldon's Corner

Trout Fly Fishing in New Zealand

Fly fishing is a sport with unexpected adherents and enthusiasts. I am now aware that in the Hawkes Bay area a quite famous fishing guide, Gary Harlen, has amongst his clients Dame Kiri and a certain Justice of the High Court and the odd All Black. Recently, Robert Clynes and his son, Peter, fly-fished in New Zealand, as did yours truly, together with my son, Teighe and his wife, Anna.

With crystal clean, fast flowing waters and plentiful big trout, all you need is good weather and a bit of luck to ensure a wonderful time. We went with Gary Harlen, who takes you to at least 4 different rivers (over 6 days) with lovely Maori names, such as the Ngaruroro, the Tuki Tuki, the Tuttaekuri and the Waipana. Walking around 10 k's a day, one encounters wild deer, wild turkeys, pheasants, geese, ducks, fantails, eagles, mud larks, sea birds and, of course, monster trout, apparently up to 18 lbs. We saw trout, ranging from 10-12 lbs and hooked and lost numerous trout between 8 and 10 lbs. The ones we landed and released ranged from 2 lbs to 8 lbs. With tasty venison, lamb and fresh seafood, washed down with New Zealand Pinot Noir and Sauvignon Blanc, pleasant dreams and memories were ensured.

Thieves without taste

Stretton was greatly offended when he found his car (which he left unlocked in his driveway overnight) had been invaded by someone taking all the coins, polariod glasses and couple of other small items and leaving his Bob Dylan and Celine Dion CD's behind - do they not have any taste he yells!

A PRE-SCHOOL TEST FOR YOU

Which way is the bus below travelling?

To the Left or to the Right?

Can't make up your mind?

Look carefully at the picture again.

Still don't know?

Infants all over the United Kingdom

were shown this picture

and asked the same question.

90% of the Infants gave this answer.

"The bus is travelling to the right."

When asked, "Why do you think the bus is traveling to the right?"

They answered:

"Because you can't see the door to get on the bus!"

How Smart do you feel now?

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