Bar Bulletin

Issue: Nov/Dec 2014

ACT Bar Association

President's Message

I have always thought that it is a useful rule of thumb, when conducting litigation, to engage in as few fights as possible, and in doing so to pick the ones that count. Arguing, and fighting, for the sake of the combat it generates, grates as unnecessary and counterproductive. If the wolf, in the story of the three little pigs had settled for two pigs out of three, he would have had overall success and two very nice pork dinners. It was the wolf's pursuit of the unnecessary argument with the third pig in the brick house that led to the wolf's demise.

Unnecessary arguments tend toward unhappiness on the part of the bench and the other arms of government. However, the criterion for engaging in the argument in the first place is neither the happiness of the bench, or the executive, or the legislature.

It is not the role of counsel to make governments, courts and judges happy. It is our duty to be truthful. It is our duty to apply our skills diligently for our clients. It is our duty to act fearlessly. There is no duty of the bestowal of happiness, and there cannot be one.

While judgment must always be exercised as to what point to take or not take, what issue to pursue or not pursue, this judgment is one to be made on the basis of our true duties and responsibilities. Accepting that we ought not waste the court's time, it must be acknowledged that taking slow, difficult or uneasy points is not wasting time when it is in accordance with our true duties and responsibilities.

Where there are systemic issues that undermine what we do for those we speak for, it is the role of the Bar to take steps to ameliorate those effects, or oppose them, even if it is unpopular to do so. This principle means that is proper for the Independent Bar to take views contrary to those of the different arms of government on issues of law reform, case management and moves that worsen the inequality of arms issues faced by those we speak for. Likewise, reforms that undermine, or do not recognize the work of the independent Bar in trying to secure just outcomes for people ought properly be the subject of opposition by the Bar.

The Independent Bar is almost unique in its position to comment on law reform. Whether good laws are made, or bad laws, barristers can ply their trade, yet we continually advocate for better laws. The fact that we express interest and exercise expertise in pursuing better laws is the product of a widespread personal commitment within our profession to a better system.

As we approach 2015, the year that marks 800 years since the Magna Carta first drew breath, the requirement for fearless counsel who are prepared to make government and judges unhappy, where it is their duty to do so, remains as important to the administration of justice as it ever was.

Shane Gill

President

Send in the Clowns

Why am I feeling pessimistic about where Australia in particular and the world generally is heading? Age perhaps... Time spent perhaps... Looking back at past failed expectations and hopes perhaps...

I remember when at Sydney University the hopes and expectations for great improvement in the health, education, imprisonment rates and well-being of the Aborigines was actually a goal that was believed achievable. The imprisonment rates are worse now than ever!

Next year we celebrate 100 years since Gallipoli. The war to end all wars. The British Prime Minister recently said WWI was a war where we "fought for truth and freedom". Well, the 23 listed reasons I learnt, as the causes/reasons, did not mention truth and freedom. We are still fighting wars and always will. The reasons Australia fought in Iraq, i.e. Weapons of Mass Destruction, have been proven false. The war in Afghanistan for 14 years was transmogrified from "destroying" Al Qaeda to "thwarting" the Taliban.

Did we achieve anything at all in that war or will the Taliban and the warlords regain control? Now we are fighting IS - a truly despicable group of apparently mad murderers – but is it our fight and what can be achieved without troops on the ground?

Whitlam was ready to build a second airport at Badgery's Creek 42 years ago. With the many changes of government still nothing has happened. The very fast train was promulgated as an expensive, but totally necessary, investment 40 years ago also. But will any practising barrister today be alive when, or if, the VFT from Brisbane to Melbourne is ever built? University education has gone from free to now costing, if the "reforms" go through, upwards of $100,000 and apparently $250,000 for a medical degree! It is hard for some to see that as progress.

We have become less free as a society with increasing restrictions due to the so called "Terror Laws" and the fear level is rising about our safety and our future – justified or not.

Ebola is posing a threat to world health, but Australia will not "send" medical teams to confront this virus at its source, apparently because we have no proper evacuation procedure.

In the ACT we have the asbestos crisis. Persons who contract mesothelioma have a death sentence. When this contaminated insulation was "allowed" to be placed into our homes, the scientific/medical evidence was of such a nature that this course should never have been allowed. Compensation for lost lives will always be inadequate.

And then there is climate change. Some have described this scientifically proven event as "crap" and we are now downgrading our efforts to combat it and to utilise non-coal alternatives for the future. Coal, like greed, is now good for us.

Anyway, it is probably just me getting older...

Dock System - Does it undermine the Presumption of Innocence?

Jason Om reported on Lateline on 7/11/14 about 400 mock jurors being involved in a mock trial

concerning a "fake" terrorism charge trial concerning a supposed Muslim accused. The thesis to be addressed was that people can predict their own prejudices and ignore them and focus on the evidence, so that when confronted by the accused in the glass dock they can still just focus only on the evidence.

The mock trials involved the accused sitting in 3 different locations:

1. at the Bar table (as per the United States);
2. in an open dock; and
3. in a glass dock.

The results were dramatic and disturbing. When the accused sat at the Bar table the conviction rate was 36%; when in an open dock 40%; and when in the glass dock - 60%.

The mock jurors recognised that the glass dock signified that the accused was violent or dangerous or a threat to the persons in the Court.

Anthony Whealy QC (former Supreme Court Judge NSW) was interviewed and spoke about a terrorist trial he presided over, wherein he ruled in favour of the accused submission that he be allowed to sit at the Bar table. Whealy QC said he made that ruling to ensure that the trial was as "fair as possible".

Should defence counsel now be making similar applications in ACT trials? I believe that applications should be made!

And Finally!

Happy Christmas to you and your families and I hope 2015 will bring you all joy, good health, happiness and a belief for a better future.

FJ Purnell SC
Editor

Symposium agrees to launch Better Justice for Australia campaign

A national symposium has been told of "frightening" and "staggering" failures in justice systems which are likely to indicate major problems in Australia…but we don't collate the information and statistics to know just how bad the situation here is.

Legal academics, forensic scientists, lawyers, social scientists and community groups came together at Flinders University in Adelaide in November 2014 to try to assess and find solutions for the problem of the legal system going haywire. They agreed to work together to try to improve justice in Australia. There will be particular emphasis on:

• validating and setting higher standards for expert forensic evidence in courts;

• learning and implementing lessons from common police errors;

• identifying where and how prosecutorial mistakes and misinterpretations occur;

• evaluating how wrongful convictions fail to be caught at least at appeal stage by courts: and

• advocating federal/state inquiries, and/or creation of a Criminal Cases Review system.

The Better Justice group will mount a decade-long information and education campaign to convince legislators and the judiciary to lift legal fairness and equity in Australia to higher quality standards. Overseas, the Criminal Cases Review Commission in England and Wales is helping to raise the standard of justice, while improved standards are also emerging in America with wrongful-

ly-convicted prisoners being released through Innocence Projects highlighting mistakes in the US legal system.

Australia has no robust system for recording how many mistakes the legal system makes, and no self-correcting mechanism to prevent errors and inappropriate behaviour being repeated. For example, legal experts say new forensic science evidence presented in courts is often not rigorously validated so that scientific opinion can be relied on as accurate, relevant and appropriate. A tunnel vision approach by police and one-sided access to "plant" media articles frequently skews cases, and helps cause prosecutors to pursue convictions in error.

Keynote symposium speaker Prof Kent Roach explained that his country, Canada, was experiencing similar problems. Through him, the Better Justice campaign will also run simultaneously in Canada, using jointly developed materials. He said that wrongful convictions – another name for miscarriages of justice – were just the "tip of the tip of the iceberg" of problems in the legal systems of both countries.

While many prisoners claim innocence, he said, statistics from the UK and the USA indicate that between 1 and 5% of people in jail for major crimes like murder are actually innocent. If a conservative estimate of 1.5% of 30,000 prisoners in Australia were innocent, there would be 450 people locked up in jail tonight who should not be there. A wrongful conviction is itself a criminal offence perpetrated by the legal-justice system of the state against the citizen, he said.

"We know there are problems," symposium initiator and legal author, Dr Bob Moles of Adelaide, said. "We have known for 30 years for example of forensic problems in the Lindy Chamberlain case… but our police, legal and judicial systems have no self-correcting mechanism so that we don't repeat the errors of this year, last year and yesteryear."

Dr Moles, who worked with Flinders University's Centre for Crime Policy and Research to bring the symposium together, said justice in Australia suffered from "complex system constipation". The justice system had shown "stubborn resistance to change": lawyers, judges and others in the system knew it was not working properly or fairly according to international human rights law, he said. Australian needed state-by-state legal inquiries, or a Criminal Cases Review Commission in each state. Alternatively the federal government, through its ministerial council process, could grasp the nettle and provide a national mechanism for correcting individual errors, reviewing and preventing future systemic failures, and bringing the legal system in Australian into the 21st century.

Dr Bob Moles (left), Gordon Wood, and Perth barrister Tom Percy (right) at the symposium. Wood spent three and half years in prison In NSW before being exonerated on a charge of killing his girlfriend by 'spear-chucking' her off the cliff at The Gap in Sydney, according to the evidence of an 'expert' forensic scientist which was subsequently discredited on appeal as "unsophisticated", among other criticisms. "Governments says citizens are entitled to justice, but they will not take the necessary steps to ensure their legal systems deliver it," Dr Moles said.

WA barrister and queen's counsel Tom Percy spoke emotively of his sitting next to the last woman in Australia sentenced to death as the black-hooded judged pronounced the grim words…"hang until dead." He disclosed that journalist Estelle Blackburn had worked on the Button case for six years before she brought it to him, indicating how work is required to even start to overturn the dual decisions of the original trial and appeal courts when they get it wrong.

Director of the Victorian Institute of Forensic Medicine and foundation chair of forensic medicine at Monash University, Prof Stephen Cordner, said the numbers of wrongful convictions in the USA was "staggering"; in the UK, the numbers were "frightening". "We just don't know what the numbers are in Australia."

He said Victorian chief appeal court judge Chris Maxwell was so concerned about misinterpretation of forensic evidence that he had called the legal and forensic 'industry' together for consultation, resulting in the issuing of a new practice direction in July 2014.

Dr Rachel Dioso-Villa of Queensland's Griffith University said many people in Australia – perhaps as many as five new cases a year – were

spending an average of up to 15 years in prison for crimes such as murder they did not commit. She said the aviation industry had rigid standards for investigating crashes, and the medical profession rigorously evaluated systemic errors found in hospitals and medical practice. The legal system, she said, had no comparative mechanism for self-correction: errors appeared to repeat, decade after decade, with no procedures in place to learn from mistakes and improve the delivery of justice to Australians.

Bond University lecturer and barrister Joe Crowley told the conference that the justice system values the decisions of juries, "perhaps too much" and particularly so when scientific evidence was the basis for a jury decision. He warned that the bars for people trying to achieve justice after being refused by an original court and an appeal court were far too high. A new appeal law passed in South Australia in 2013 (and proposed for Tasmania in 2015) was progress, he said, but the very high requirement of "fresh and compelling" new evidence had allowed a new definition to creep from the common law into statute law.

Lynne Weathered, the law academic from Griffith University who manages Australia's longest- running (14 years) Innocence Project, explained that there had been 321 exonerations based on re-examining DNA evidence in the USA, freeing people who had spent a total of 4337 years wrongly and unjustly in prison. Another 1150 cases had been overturned on other than DNA evidence: in 56% of these cases, there had been perjury or false accusation by a witness (the figure rose to 81% in cases involving child sexual abuse).

"We need robust DNA testing legislation throughout Australia," she said. Common standards and rules for retaining DNA evidence, which might be needed for testing by currently unknown techniques, were needed in every jurisdiction.

Prof Gary Edmond (left) of Sydney University, who sits on Standards Australia panel relating to forensics, said the current system prevented the few standards which exist being "robustly based". Courts were told the likelihood of someone else's DNA being the DNA from the crime scene might be 1 in 1,000,000: they were not being fully informed that the chance of an error by a forensic laboratory might be 1 in 100 or 1 in 1000, dwarfing the probability on which a person was being convicted.

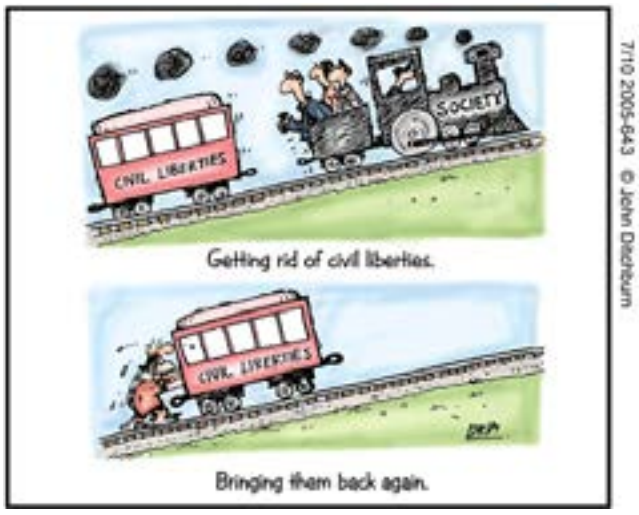
Barbara Etter – now lawyer, former pharmacist, assistant commissioner of police in WA and integrity commission chief – outlined how many of the errors and mistakes mentioned by speakers at the symposium had coalesced into a case in Tasmania where a women, Sue Neill-Fraser, had spent five years in jail. A petition for mercy would soon be lodged to seek her release, she said.

Film director/producer Eve Ash, who is helping to lead the campaign to fee Ms Neill-Fraser, explained how the public didn't want to hear that the justice system they believed in could be so fundamentally flawed. She outlined multimedia techniques -– print, radio, TV, songs, film showings, TV shows which expose mistakes, a play, protests outside parliament and community action down to postcard campaigns – was needed to move public opinion.

The Better Justice group will spend a year preparing materials before launching a campaign in early 2016, the symposium decided. Anyone connected with the legal 'industry', or who is interested in ensuring better justice in Australia, is invited to make contact.

By Bill Rowlings,
CEO of Civil Liberties Australia

CLA Civil Liberties Australia A04043
Box 7438 Fisher ACT Australia
Email: secretary [at] cla.asn.au
Web: www.cla.asn.au



Productivity Commission

The final report of the Productivity Commission was sent to government on 5 September 2014 and the government must table the report within 25 sitting days of release, an event yet to happen.

The Terms of Reference suggested the Productivity Commission "to undertake an inquiry in Australia's system of civil dispute resolution, with a focus on constraining costs and promoting access to justice and equality before the law".

The Honourable Sir Anthony Mason AC, KBE, GBM, QC, a former Chief Justice of the High Court also is regarded as one of Australia's outstanding jurists, has criticized aspects of the Productivity Commission's Draft Report published on 5 June 2014. Whilst it is not known whether all aspects of the Draft Report will be incorporated into the final report, there must be a high probability they will be.

A summary of Sir Anthony's criticism is as follows:

1. The claims that increasing court fees to allow courts to fully recover the costs of a dispute through fees is misconceived as even the present level of court fees affects the decision of some parties to go to court, thus restricting, rather than facilitating, access to justice.

2. Justice is not to be treated as a commercial service. The State should provide the justice system as a "public good" i.e. as an essential element in the institutional framework of society and the maintenance of the rule of law. Australian governments should recognise their responsibility to resource the court and the tribunal system just as they do with other essential services such as Police, Defence and Security Services.

3. Legal Aid funding in Australia is below the levels available in comparable jurisdictions and needs to be addressed.

4. Productivity Commission has commented unfavourably on what is described as "creeping legalism" and asserts that legal representation increases the costs incurred by the parties. Whilst this appears to be advanced as a reason to exclude legal representation before same tribunals, it ignores the fact that self-represented litigants require greater court resources and time and may be unable to adequately present arguments to the court or tribunal, particularly when they have limited education and poor command of the English language.

   Unfortunately the Productivity Commission, by calling for more rigorous enforcement of restrictions on legal representation, is impeding rather than promoting access to justice. In addition, restricting access can provide an unfair advantage to the other litigant, e.g where the litigant is an insurance company with access to in house legal advice and experience.

It is perhaps as well to reflect our own Chief Justice's recent observation that of "quick, cheap and just" - you can only ever have two out of three. I know of no litigant who would not choose "just" as the prime and major consideration.

When such a renown jurist as Sir Anthony Mason speaks out publically on such important "access to justice and equality" issues, it is time for governments to take notice and heed his advice.

Greg Stretton SC

Blackburn Chambers

Launch for Women at the Bar Scholarship

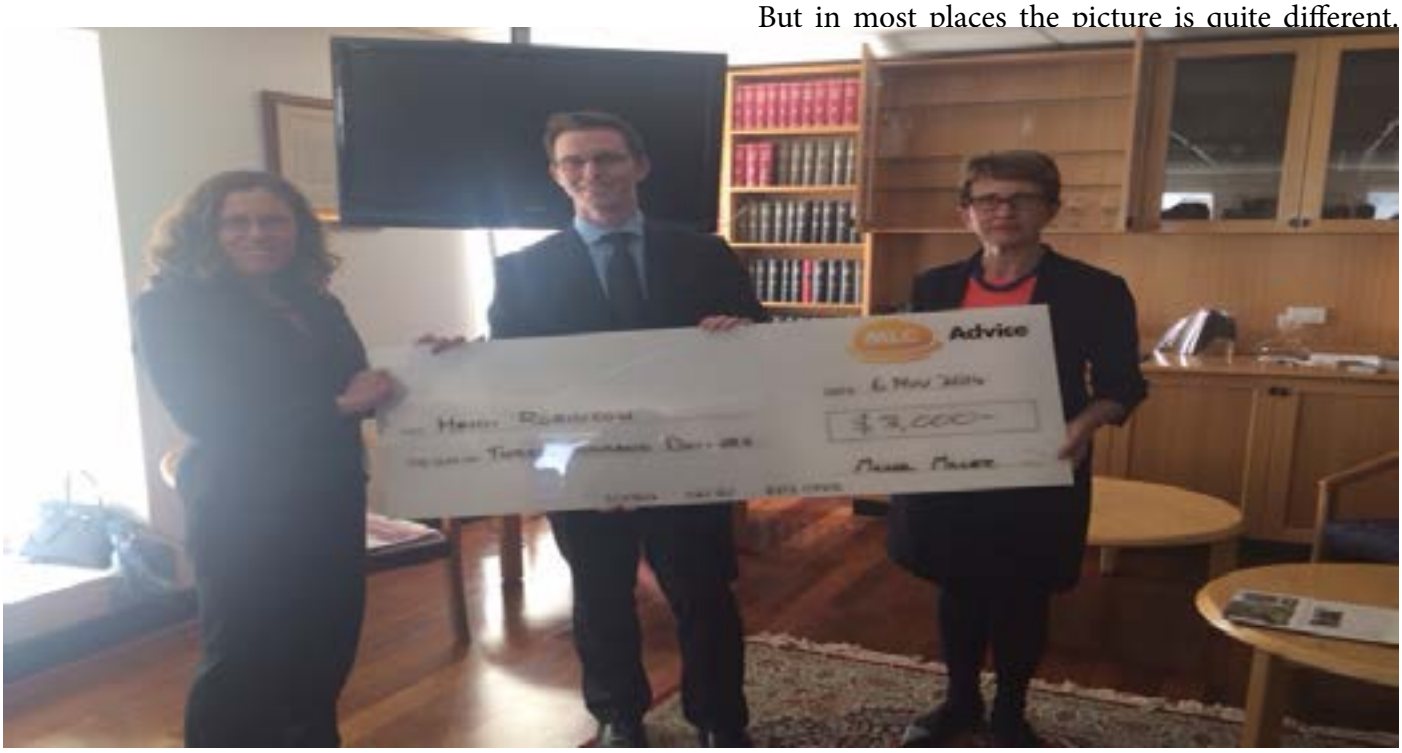
6 November 2014

Launch Speech by

The Hon Chief Justice Murrell

This evening, we celebrate three things.

First, we congratulate MLC on its decision to support women at the bar by sponsoring this scholarship. Corporate support for women in all fields and at all levels is critical to achieving gender equality.



Second, we support the ACT Bar's decision to take this very practical step towards strengthening the representation and retention of women at the Territory bar.

Third, and most importantly, we celebrate the award of the first scholarship to an outstanding recipient – Heidi Robinson.

Heidi studied law at ANU, practised briefly at Vandenberg Reid lawyers, and then joined the ACT Government Solicitor. She rose rapidly through the ranks. Since 2009, she has been Special Counsel and Head of the Employment and Industrial Relations Practice Group within the ACT Government Solicitor's Office. In that role, she has advised and litigated a wide range of complex and high profile matters. Along with the ACT DPP, the ACT Government Solicitor's Office has been a launching pad for some of the best and brightest in our legal community.

Congratulations, Heidi – no doubt this scholarship is but one of many accolades that you will earn over the course of a brilliant career.

At times we ACT lawyers may be forgiven for thinking that the battle for gender equality is behind us. After all, the ACT Chief Minister is a woman, the heads of both jurisdictions and ACAT are women, and the Director of JACS is a woman. At high-level meetings in the Territory, there may be no man at the table.

But in most places the picture is quite different.

Across Australia, 63% of law graduates are women but only 19% of the Australian bar and 6% of Queens Counsel or Senior Counsel are women.

One only has to cross the Great Dividing Lake to enter a land of limited opportunity and insidious discrimination.

When the opposition leader was characterised as an "economic girly man", what was that saying? It wasn't a compliment. It was an insult; it was an

assertion that Mr Shorten was "too weak to repair the budget mess".

Is that what a "girl" is? Someone who is too weak to get the job done? Someone who is inherently incapable of leadership?

Last weekend, my partner and I were inspecting dishwashers at "The Good Guys". Observing that most of the staff were "girls", my partner inquired of our female attendant as to why the store was known as "The Good Guys" rather than "The Good Girls". Perceptively, she responded that, whereas the "girls" did not mind being called "guys", the "guys" would object to being called "girls".

Recently, when addressing the topic "A new kind of normal – transforming the legal profession" Fiona McLeod SC, Vice President of the Australian Bar Association, said:

At the core, we need to expose and reframe our deep held beliefs about girls and women's worth in society – to celebrate the feisty, boisterous nature of girls, to encourage them to express themselves and their needs and dreams fully and frankly as we do our boys. To resist the temptation to idealise and sexualise them. To observe and record the points along the way at which being "like a girl" diminishes us rather than celebrates us.

Women are not succeeding at the bar when they can and should be succeeding. Only yesterday, two women barristers appeared before the Court of Appeal and each did the best possible advocacy job by using her inner "girliness"; each was fearless, focussed and persuasive. Anyone who says that "the available women barristers are not sufficiently capable to argue that brief" is deluding themselves.

Women are not succeeding because of the unacknowledged bias against "girls" that operates at many levels; when firms are deciding whom to brief, when barristers are selecting applicants for chambers, and when senior barristers are choosing whom to mentor.

The awarding of this Scholarship is a small but important step towards addressing that bias.

If we do run short of women barristers, we will have to recruit "girly men" barristers. To qualify, they will need the essential "girly" characteristics. They will need to be:

- People of integrity
- Strong and confident communicators who also know when to keep quiet
- Big picture people who can steer a case towards the best result for their client

To Heidi and the other women barristers present I say - you are both a woman and a barrister. Embrace this. Each will enrich the other.

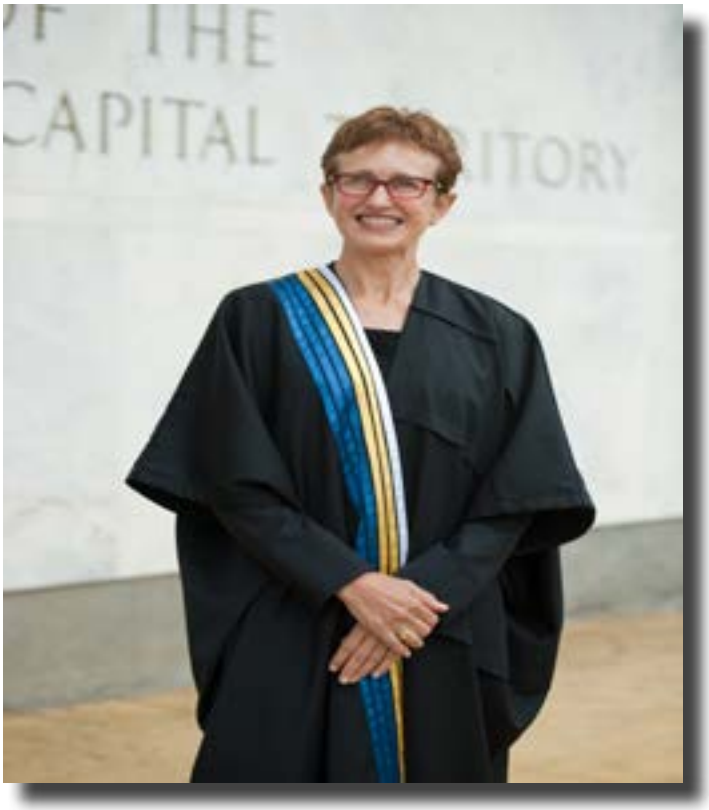
Commencement of Legal Year 2 February 2015

On Monday, 2 February 2015, the Supreme Court will commence hearing all matters at 11.30am to follow attendance at the procession and celebration ceremony to celebrate the commencement of the legal year.

The ceremony will be held in Courtroom 1 of the ACT Supreme Court, commencing at 9am.

At 8.50am ALL Judges, Magistrates and members of the legal profession form a procession outside the venue. **Barristers are requested to be fully robed for the ceremony.**

The President encourages all members of the Bar to attend the ceremony.



The principle of open justice is a fundamental aspect of the system of justice in Australia and the conduct of proceedings in public is an essential quality of an Australian court of justice. The Supreme Court can promote the goal of making the Court "open to the public" by ensuring that complex decisions that are of public importance are quickly and easily understood by the media and the public generally. The media plays a critical role in open justice. Most members of the public get information about court decisions from the media, rather than by attending hearings in person or reading decisions in full.

The Court has adopted the practice that, in cases of public importance, the media are provided with advance notice of judgment hand down.

To aid public understanding of complex decisions, the Court endeavours to produce judgment summaries of the decisions made in complex and important cases. The summaries provide a concise statement of the facts, outline the essential reasoning of the Court and state the outcome of the case. The summaries and the full judgment are posted on the Supreme Court website within approximately one hour of being handed down.

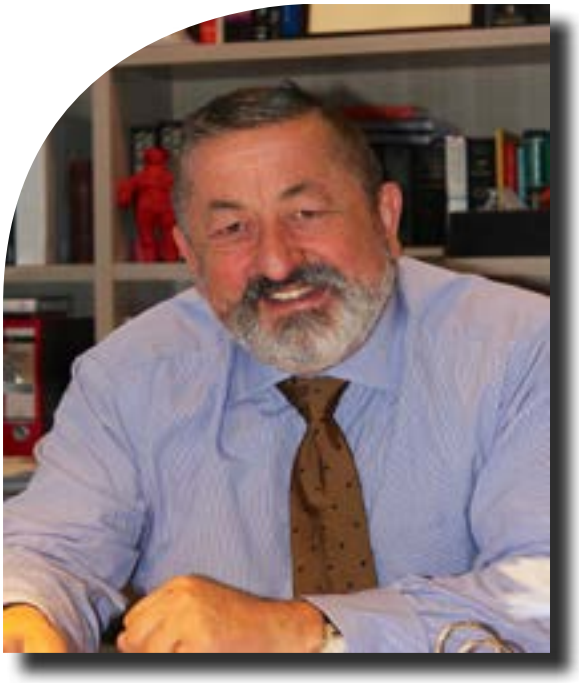
This procedure was followed in two recent cases, Eastman v Director of Public Prosecutions [No 2] [2014] ACTSCFC 2 and the "Bush fires Appeal" (Electro Optic Systems Pty Ltd v State of New South Wales; West & Anor v State of New South Wales [2014] ACTCA 45). Summaries were prepared and read when the decision was handed down. Copies of the summaries were made available to members of the media and public who attended the judgment hand down. The full judgments were uploaded to the Court's website as quickly as our (somewhat antiquated) technology permitted.

The practice that we have adopted is consistent with that adopted elsewhere. The High Court now prepares summaries of all its decisions and the UK Supreme Court has been preparing press summaries since it was established in 2009. The Federal Court, the New South Wales and Victorian Supreme Courts also produce judgment summaries for significant cases.

As well as supporting the public's understanding about the Court's activities, the provision of readily understood summaries goes some way towards ensuring that any criticism of the Court's judgments is well informed.

In the future, subject to the availability of adequate human and technological resources, the Court will explore the use of social media such as Twitter and Facebook to inform the community about important decisions, and will consider live streaming or audio webcasting such decisions.

The Hon Chief Justice Helen Murrell



Crisis in our Supreme Court Case Management as an Art Form Whither the Interests of Justice?

Everyone in the ACT with a passing interest in our courts and our legal system, except, it seems, the Attorney-General, knows and understands that we need a fifth resident Supreme Court Judge.

The population of Canberra has grown from 270,000.00 people at about the time of self-government in 1989 to a present population of more than 379,000.00.

Unfortunately that growth in population has been accompanied by a growth in crime but also a growth in civil litigation.

The ACT Legislative Assembly recently voted to expand its number from 17 to 25 at the 2016 election, an increase of 47% and roughly in line with the 41% increase in population.

Unfortunately our judicial resources have not kept pace. Although large chunks of what was formally Supreme Court jurisdiction have been conferred upon the Magistrates Court the Supreme Court continues to be a busy court.

Not all judges work at the same pace and neither should a reasonable public expect them to.

The quality of justice is not measured by its speed of delivery. Indeed, often the converse relationship applies.

There ought to be room for judges who write detailed and careful judgments examining the law and laying it out in terms which not only lawyers but interested members of the public can comprehend and apply in their everyday dealings each with the other.

We have had and we continue to have such judges but too often they have been criticised for the slow delivery of judgments. The answer is not to pillory hardworking, conscientious judges but to provide sufficient and appropriate judicial resources to allow the work of the courts to be conducted in an orderly and unhurried fashion, resulting in the end in a high quality dispensation of justice.

Until you are caught up in either the criminal or civil justice system it may be hard to muster much enthusiasm for the subject of the provision of legal resources, proper case management or the amorphous concept of "the interests of justice".

Once you are swept into the legal system, however, it is hard to ignore those issues and more and more Canberrans are involved on an annual basis.

The quality of a judicial system is not measured by the number of cases that can be squeezed through the system in any 12 month period.

As I have commented in the past, dispensing justice is not like making sausages. You can't simply crank the handle faster and point to the growing pile of sausages as some measure of your efficiency and productivity.

I suggest there are a number of things anyone caught up in the judicial system as a litigant (civil or criminal) want and I believe deserve:

i. A timely but not rushed disposition of their case.

ii. Their choice of solicitor and barrister.

iii. A fair judge with sufficient time to hear their case, consider the facts and law and deliver a clear and

properly reasoned judgment.

iv. Affordability.

The present system is broken.

Those fundamental aims are not being met and nobody is apparently prepared to say out loud "The Emperor has no clothes".

The ACT Director of Public Prosecutions, Jon White SC, has recently complained about the listing procedures in the Magistrates Court (2013-14 Annual Report) including the need to abolish Case Management hearings. He is faced with a need to concentrate his trained prosecutorial staff on so-called "significant matters" in the Supreme Court and to delegate minor prosecutions in the Magistrates Court to "paralegals". That is to say, people without a law degree but with some knowledge of the law and how the system is meant to work.

Case Management hearings, like the now innumerable Directions Hearings in the Supreme Court add very little, if anything, to the efficient administration of justice and very considerably to the costs of litigation.

Case Management is the notion that a Judge or Magistrate, usually with only the most fundamental understanding of the issues in a case, can "manage" the case to early, efficient and cost effective conclusion more expeditiously that the trained and experienced lawyers who have had carriage of the matter from the start.

Occasionally, in my experience, there will be lawyers on both sides of a case who are inexperienced and need some degree of management but more often than not the entire exercise is a time consuming, costly, tedious and entirely unnecessary kowtow to the God of Management for management's sake.

In the Supreme Court we have seen the Civil Blitz as a tool designed to clear the backlog of cases and more recently the "Pilot Central Criminal Listing" (a blitz by any other name) as a tool for forcing ever more sausages through the machine.

Retired judges are brought in and rebranded as visiting Justices to try and turn out more and more sausages, presumably in an effort to please the keepers of statistics and to demonstrate just how effectively the system can work without a fifth judge.

The whole process is skewed by "management" and the idea that in a small jurisdiction like the Australian Capital Territory you can simply list matters to proceed in the Supreme Court before a visiting judge without any real regard to the commitments of legal practitioners on the same day in the Magistrates Court both here and in Queanbeyan or the District Court in Queanbeyan, which sits on a regular basis.

The retainer of a solicitor and a barrister is a decision which I imagine is made carefully, weighing up many factors including their experience, their reputation, there personal characteristics, their affordability and the seriousness of your situation.

Good solicitors and barristers, like good surgeons, good accountants and good professionals of every kind are busy and generally booked up well in advance and for good reason.

For a litigant to be told months and sometimes years into a court case that they simply have to find someone else to appear for them because it is expedient to "manage" their case into a hearing date which cannot be accommodated by their solicitor or barrister or both is not good case management. It can rarely, if ever, be justified by reference to that amorphous concept "the interests of justice".

There is an increasing demand for accountability in relation to functions which are described as administrative but which are closely related to the judicial process.

It has been said that the function of the head of a jurisdiction or judge administrator to assign members of a court to hear particular cases or to allocate the business of a court for disposition according to certain internal arrangements should be free from external interferences as an essential aspect of judicial independence. That does not mean, however, free from scrutiny.

Understandably the public and other branches of Government want to be satisfied that the courts are using the funds made available to them wisely. It is natural enough that there should be a demand for accountability in respect to the way in which courts apply public money. That, however, is not the end of the matter.

There is a well-recognised judicial immunity from suit in relation to acts done in the exercise of a judicial function or capacity. As expressed by President Kirby in Rajski v Powell (1987) 11 NSWLR 523 at 527:

"It is a fundamental principle of our law that a judge of a superior court is immune from civil liability for acts done in the exercise of his judicial function or capacity. Such immunity rests, as it has been said, upon considerations of public policy. Its object is not to protect judges as individuals but to protect the interests of society. The purpose of the rule is to preserve the integrity, independence and resolve of the judiciary and to ensure that justice may be administered by such judges in the courts, independently and on the basis of their unbiased opinion - not influenced by any apprehension of personal consequences".

Even if a judge were to take a bribe and enter judgment in favour of the corrupt party that judge would, nevertheless, be immune from a civil action for doing so. See Yeldon v Rajski (1980) 18 NSWLR 48 per Kirby J at 58.

There would, of course, be no immunity from the criminal consequences of such conduct.

For a Supreme Court judge to say 'well, it may cost your client $10,000.00 or $12,000.00 to retain another solicitor or another barrister at this stage; and that solicitor or barrister may not be the one you want and you might not like them or you might not have the same degree of confidence in their ability but that is just tough luck' is neither fair nor is it in the interests of justice.

The income of a Supreme Court judge is not that of an ordinary member of the community.

The Average Weekly Ordinary Time Earnings of a member of the public in the Australian Capital Territory is $85,845.00 per annum. Many who come before the Supreme Court are not earning $85,845.00 per annum. Even if they are, $10,000.00 or $12,000.00 represents about 14% of their gross annual income.

The interests of justice is a wide concept incorporating the interest of the community in the timely resolution of disputes and the timely administration of criminal justice; the interests of the parties to the dispute, including the interests of any alleged victims, and the interests of the community and the parties in a fair and affordable system of justice.

To ignore practitioner's commitments in other courts when listing matters for hearing in the Supreme Court or, if not to ignore those matters, to provide very little flexibility, is to engage in ostrich management.

Apart from the irrecoverable expense there is the serious erosion of confidence in a system which forces people, sometimes at a late stage or even after witnesses have been examined at a preliminary hearing, to find new legal representatives.

There are various statements in the cases about the importance of litigants being able to retain the lawyer of their choice but usually qualified by the observation that the public interest in litigants not being deprived of the lawyer of their choice is not an absolute and choice may have to give way to "good cause". 1

"Good cause" is not defined.

The impossibility of recovering costs thrown away or wasted by the court managing a case in such a way that counsel of choice becomes unavailable is rooted in arcane tradition to do with "The Crown".

As Chief Justice Griffith expressed it in the High Court in 1906 "The reason formally given for the rule was that it was beneath the dignity of the Crown either to receive or pay costs". 2

That position can be reversed by statute but has not been in relation to Supreme Court criminal prosecutions in the Territory.

In 1992 Justice Higgins of our Supreme Court, as he then was, considered the question whether it was "just" that someone "accused of an indictable offence and committed to stand trial ... should be financially penalised by properly incurred legal costs if the accusation fails or is withdrawn". 3 He concluded without doubt that it was unjust.

His Honour pointed out that since the 1972 decision in McEwen v Siely the "general rule" in inferior courts had been thrown out and commented that the so-called "general practice" (not to award costs against the Crown) in the Supreme Court "though

hallowed by repetitive application had no more underlying virtue to support it than the "general rule"".

In the Sam Scott case Justice Higgins found a way around the so-called "general practice" because the Crown withdrew the charges against Mr Scott before an Indictment had been presented.

His Honour said he was exercising supervisory jurisdiction and not criminal jurisdiction and he ordered the Crown to pay Mr Scott's costs of and incidental to the committal proceedings as well as his costs in preparing for his trial in the Supreme Court.

Our Attorney and the ACT Government has, since that time, all but abolished committal hearings so that there is now virtually no sifting and analysis of evidence gathered by the police. Matters pass through a perfunctory committal process which involves, in almost all cases, a Magistrate reading the various witness statements prepared by police and satisfying themselves by application of a test heavily slanted in favour of committal that the accused has a case to answer. The matter is then committed to the Supreme Court for hearing.

That process is yet another unnecessary and expensive speed bump on the road to justice.

If committal hearings are a rubber stamp process (and they now largely are) get rid of them altogether.

The fact is committal hearings as they once were served a very useful purpose in pointing out Swiss cheese holes in cases put together by myopic policemen and women.

Many people were discharged at the committal hearing stage and had their costs paid and their outlays reimbursed.

No doubt the bleating of the law and order claque demanded more people be sent to trial no matter how unsatisfactory the evidence against them might be and despite that fact that if acquitted at trial they could be financially ruined.

In due course Justice Higgins' small step in the Sam Scott case was completely reversed on appeal by a bench of three judges. Hill J found that the proceedings before Higgins J were inextricably part of criminal proceedings that would have followed the filing or presentment of an Indictment and were, therefore, to be classified as criminal proceedings so that the "general practice" applied.

Cooper J found there was no jurisdiction for Higgins J to make any order because the Director of Public Prosecutions had determined not to proceed with Mr Scott's case and he was thereby discharged from the Magistrate's order of committal and his bail obligations.

Miles J simply agreed with Cooper J but endorsed the views of Hill J.

In the concluding words of F Scott Fitzgerald's novel The Great Gatsby:

"So we beat on boats against the current borne back ceaselessly into the past".

Every week in the Supreme Court matters are called up for Directions Hearings; micro-management takes place; lists are formed, re-formed and amended; matters are listed for hearing to suit the convenience of the Crown, the judges (both resident and visiting) and accused persons are afforded very little leeway in terms of their convenience; their choice of legal representative or the irrecoverable costs to which they are exposed.

Cooper J in 1993 in the Sam Scott appeal concluded his judgment with the observation that Mr Scott had "suffered a serious detriment in the matter of costs" but one which could only be cured by statutory law reform.

In the intervening 21 years there has been no such law reform and the sausage factory management of cases in the Supreme Court results in more and more irrecoverable costs being incurred on a regular basis.

Accused persons should not be treated as second class citizens when it comes to case management. Their interests (especially their financial interests) should not be subjugated to the so-called interests of justice in pushing cases through the system.

Statistics do not make a good, fair or healthy justice system. In fact they tend to obscure the underlying ills and injustices of the system.

My understanding is that some of these concerns have been raised by the Bar Association of the Australian Capital Territory with the Chief Justice.

Notwithstanding those approaches management of cases continues apace.

Someone at some stage needs to take a good long, hard look at just exactly what is being achieved by micro-management of cases in the Supreme Court; how much that management is costing litigants; where that expense will eventually appear in the public balance sheet and whether the failure of the Government to provide sufficient judicial resources is the real driving force behind the management and the root cause of the problem.

Jack Pappas
Barrister-at-Law

Footnotes:

1 Black v Taylor [1993] 3 NZLR 403; Grimwade v Meagher [1995] 1 VR 446 and Kallinicos v Hunt (2005) 64 NSWLR 561
2 Affleck v R [1906] HCA 2
3 R v Sam Scott [1992] ACTSC 32

SELDON'S CORNER

Vale Edward Gough Whitlam QC PM

Gough Whitlam died aged 98 on 21/10/2014. He has been described as a visionary by his then opponent, Malcolm Fraser PM. Whitlam was indeed a visionary and his Government brought passion, excitement and anticipation for reform and needed change in Australian political life, not seen in Australia since 1972. He also created, through his electoral program and subsequent dismissal, the most divisive period in Australian politics since WWII. Tony Abbott PM paid tribute to him calling him a "giant of his time, who inspired a legion of young people to get involved in public life." Indeed that was true. I remember members of the Bar and solicitors leaving their comfortable existences in Sydney and Melbourne, moving to Canberra to be involved in what was seen as a new era. The reforms he made to the legal system in Australia are still with us today. He left a legacy which in some eyes has not been surpassed. There are many, many memorable quotes for this ex Canberra Grammar student, but to my mind his most memorable was perhaps "… Well may we say God Save the Queen, because nothing will save the Governor-General. The proclamation which you have just heard read by the Governor-General's secretary was countersigned 'Malcolm Fraser', who will go down in Australian history from Remembrance Day 1975 as Kerr's cur ….. Maintain your rage …"

After the passage of years Whitlam and Fraser struck up a friendship wherein they shared similar views on politics. Vale Gough!

"When is a Risk Material?"

In Medical Negligence, the High Court, in a "failure to warn" case, refers to the risk that should have been warned about by the treating medical practitioner as a "material risk". The definition is that if "the risk is material, if it is a risk to which a reasonable person in the position of the patient would be likely to attach significance, OR if it is a risk the medical practitioner knows or ought reasonably to know, the particular patient would be likely to attach significance choosing whether or not to undergo the proposed treatment" para 8 of judgment of French CJ Crenna, Keifel, Gageler and Keane JJ in Wallace v Kan (2013) HCA19.

Meagher Defection

Meagher SC has given up following the Wallabies and now follows the Woman's Netball (The Diamonds). I watched part of their 17th victory in a row (against Blad). They play with absolute commitment and passion and will go down in history as one of Australia's greatest sporting teams. Peter Fitzsimmons is advocating a change to the laws of rugby from 80 minutes to 79 minutes and 50 seconds, so that the All Blacks will stop beating Australia in the dying seconds.

Congratulations to Justice Ruth McColl

Former ABA and NSW Bar President and current NSW Court of Appeal Judge was presented with the Lasting Legacy Award at the annual Women in Law awards. Justice McColl accepted the award on behalf of all female advocates, including early pioneers Ada Evans, Justice Roma Mitchell, Justice Elizabeth Evatt and Justice Mary Gaudron. Australia is fortunate indeed with the quality and competence of women who have served and are serving in the Judiciary and as practicing advocates. Canberra, in particular, is dominated by successful and competent women, who lead the Supreme Court, the Magistrates Court, the Family Court and ACAT. This welcome fact must provide inspiration and example to women entering the profession in the ACT.

David's 12 Months Gestation

Master Mossop has promulgated "new" directions for case management in proceedings commenced by originating claim. The stated aim is to facilitate the just resolution of these matters with a minimum of delay and expense. No one can argue with the stated aim. There will, inevitably, be some hiccups along the way. However, the bar and the profession generally and hopefully all our clients will benefit with this attempt to deliver speedier "justice". We thank and congratulate the Master on the enormous and efficient effort he has put into discharging his judicial functions.

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

NOTICE TO PRACTITIONERS - CALLOVER OF CIVIL MATTERS

Tuesday 16 December 2014

Annie Glover, Registrar (14 November 2014)

A call over will be conducted on Tuesday, 16 December 2014 from 9.30am. Parties have been advised previously of the listing on 16 December 2014.

At the call over on 16 December 2014, all parties must appear and be in a position to advise the court in relation to the following:

a. A timetable, if possible agreed with the other parties, which will have them ready for hearing / mediation in the period March to July 2015.

b. If a timetable cannot be agreed, the respective parties must appear at the call over with a draft timetable that details the steps that that party requires to be addressed to enable the matter to be listed for hearing / mediation;

c. Counsel's and witnesses' available dates from March 2015 through to July 2015;

In relation to directions in proceedings, practitioners should note:

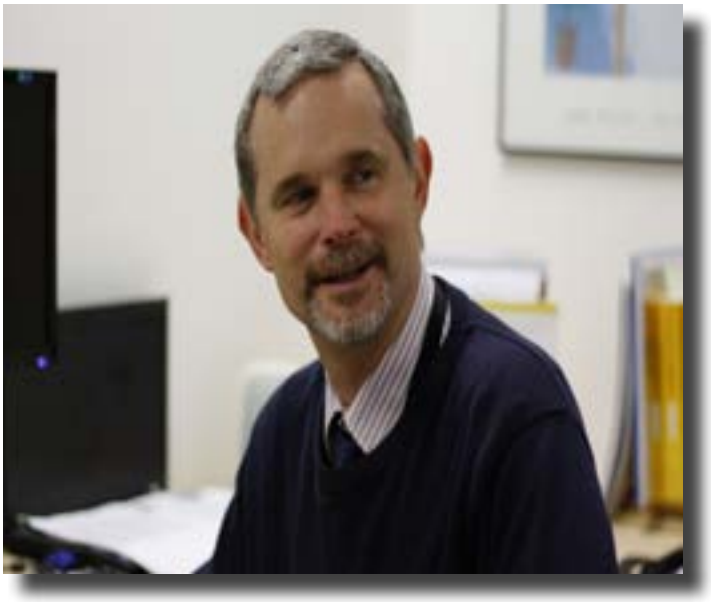
a. any lawyer representing a party at the call over will be expected to be fully familiar with the case in relation to which they appear and be able to explain the rationale for or against any proposed directions and answer the Court's questions in relation to the case;

b. parties should take care in formulating the directions proposed and seek any necessary advice from counsel as to the terms of those directions;

c. parties subsequently seeking directions which should have been sought at the listed directions hearing (whether due to the failure to get counsel's advice or otherwise) will be met with appropriate cost sanctions;

d. in the event that matters have settled or are otherwise not proceeding practitioners should arrange for the appropriate orders or Notice of Discontinuance to be filed forthwith;

e. in the event that a matter is appropriate to be transferred to the Magistrates Court, that should be identified in proposed directions.



Legal Aid - An Update

The Law Society and Bar Association have recently drawn to the attention of the Commission a number of matters about which practitioners have expressed some concern. These matters relate to the discretionary grants of legal assistance to private partitioner's as well as some of the terms and conditions which it is indicated are being expected by the Commission, specifically:

1. The exercise of discretion in limiting grants of legal aid
2. The use of paralegals; and
3. Independent Children's Lawyer costs

In relation to the first matter I refer to early articles in the Bar Bulletin and Ethos where the Commission has indicated that due to the restrictions in funding, it has been necessary to tighten the exercise of discretion in granting legal assistance and in granting extensions of assistance, for example, extensions for expert reports require more evidence and applications for assistance, and extensions of grants require more information on for example, the merits of the matter or particular stage.

In regard to the use of paralegals, there seems to be some misunderstanding. The Commission does <u>not</u> require the use of paralegals to instruct counsel in criminal matters. Rather we seek to negotiate the circumstances in which practitioners may be able to utilise paralegals rather than instructing lawyers in certain types of trials. The circumstances in which a paralegal might be used include, but are not limited to:

- During the course of a trial where the barrister is already fully and properly instructed and there is only a need to take notes.
- Where the matter is short and the barrister again is fully instructed.
- Where even though the matter is in the Supreme Court it is straightforward and of a short duration.
- Where the lawyer knows that they will be unable to attend the trial during certain times due to having other matters in another court

In regard to ICLs, grants in these matters now account for one in every five grants of legal aid in family law matters. This is twice the number granted two years ago. This has placed tremendous financial pressure on the Commission and to keep this service up, we are now seeking to share the cost of the ICL by seeking a contribution from the parties where they have capacity to pay.

All these provisions are intended to stretch the legal aid dollar further; the Commission is not receiving $815,000 that had been expected in our budget this year ($400,000 less from the Commonwealth and $415,000 less from the Statutory Interest Account). We appreciate that our colleagues in the private profession will find some of these saving measures irksome. However, given the limits of legal aid funding, it is essential that we optimise the expenditure of legal aid funds wherever possible. We certainly do not intend to undermine the delivery of legal principles, the rights of clients, or judicial processes nor to disadvantage either our clients or those practitioners that undertake legal aid work. It is however necessary to find ways to deal with our current financial situation. On a further note, the Commission welcomes your comments and suggestions in relation to these matters or any other measures.

Dr John Boersig

CEO, Legal Aid Office (ACT)

Legal Aid ACT

Avoiding dud investments

Financial planners are frequently asked, what's the best investment? Should I buy an investment property, what about Medibank Private shares, should I have some of my money in gold?

All of the above is largely unimportant. Picking the best investment isn't important, it's avoiding mistakes that is crucial.

So what are some common mistakes that you should watch out for?

1. Buying mislabelled investments

This has been the cause of a significant amount of capital losses in the past. A lot of these funds have been aimed squarely at retirees by providing higher than term deposit interest rates, but the marketing suggests that they are similar to giving your money to a bank.

In reality, the assets are normally something much riskier, usually along the lines of financing the very early stages of a massive property development. There's actually nothing wrong with investing in the very early stages of property development, but if you knew that's what you were doing you would probably only risk a small amount of your capital. Because they are marketed as being like a term deposit, unaware investors instead contribute large portions of their retirement capital (even up to 100%).

2. Being too aggressive for your timeframe

If you're a 45 year old barrister, you have at least 15 years until you can draw on your superannuation. There are very few traditional assets (your investment in whiskey or red wine is not in this category) that you would expect to experience a capital loss over a 15 year time period – so you can afford to hold some risky assets in your super.

But if you have money set aside to fund next year's school fees for the kids your timeframe is much shorter, and the shorter your time frame the more conservative you should be with your investments. Nobody wants to front up to the school office and explain that you can't quite pay the fees this year because you put the money in the stock market and that didn't go too well.

3. Insider dealings

I recently reviewed the documentation for a trust to purchase a prominent local asset. In addition to the investor's capital the trust was going to borrow about 50% of the purchase price for this asset (a figure of around $29 million).

The manager of the fund will arrange the loan, and there is also going to be a covenant on the loan that if the unit-holders (those who've contributed the capital) choose to remove the manager, that $29 million loan will be immediately in default – a good way to keep your management agreement in place!

Much of our wealth is not inherited – it is built through a lifetime of work, and when getting closer to retirement you don't want a dud investment to force you to start all over again.

Give us a call on (02) 6247 1233 or email Canberra@mlcadvicecentre.com.au if you'd like to start your own planning today.

MLC Advice

ESTRANGEMENT AND FAMILY PROVISION CLAIMS

The recent decision of Hallen J in the Equity Division of the Supreme Court of New South Wales in Underwood v Gaudron [2014] NSWSC 1055 is of particular note in regard to the issue of estrangement of family members applying for orders for provision, or further provision, out of a deceased estate for the applicant's maintenance, education and advancement in life. The case was of course one decided under the Succession Act 2006 (NSW) Part 3 of which deals with Family Provision, but to the extent that the Australian Capital Territory's (admittedly now rather antiquated) statute, the Family Provision Act 1969 (ACT) contains provisions that are broadly cognate with the relevant parts of the New South Wales legislation, the decision will be of interest to practitioners in this Territory, both as to ACT and to NSW Family Provision proceedings.

The Plaintiff was a daughter of the Deceased. The two Defendants were also children of the deceased. The Deceased's Will made no provision for the Plaintiff but, unlike many such wills, it contained a clause giving some explanation for the Deceased's having not made provision for the Plaintiff and one of the Deceased's children other than the Defendants. The evidence showed a period of 20 years during which there was no contact between the Plaintiff and the Deceased. The estate was a small one, it had been distributed and the proceedings were commenced well out of time, some three years after the Deceased's death, by the Plaintiff herself apparently without legal professional advice. The main questions before Hallen J were: whether sufficient cause was shown to extend time; whether adequate and proper provision for the Plaintiff was not made by the Deceased's Will and if so, the nature and quantum of any provision to be made; whether property was to be designated "notional estate" and in that regard, whether there were "special circumstances" duly established.

The Reasons for Judgment are quite lengthy and so for present purposes it must suffice to note what the Court held upon the particular issue of the effect of the estrangement upon the Court's exercise of its discretion. The Will stated, in regard to the Plaintiff, "In further definition of my wishes under this will I say that I have expressly made no provision for my other daughter MARGARET HELEN GAUDRON as I have had no contact with her since 1990 and our relationship has broken down and I do not have any moral obligation to see to her welfare." The facts as found by the Court were that "from 1990, [the Plaintiff] did not have anything more to do with the Deceased", who died in 2010 at the age of 92 years. It was the case that the Plaintiff had, for about two years from 1985, occupied the Deceased's home unit with the Deceased, but that there had been arguments and a breaking down of the relationship leading to the Deceased vacating the unit in January 1987 and in March 1987 issuing a summons seeking possession of the home unit and an order that the Plaintiff be restrained from entering that property. Hallen J accepted the evidence showed the Plaintiff had screamed abusively at the Deceased and, on one occasion, had thrown a half jug of coffee over the Deceased.

In 1990, the Plaintiff commenced using her middle given name instead of her first given name as she had been known in the family and she also change her surname to "Audron" instead of "Gaudron". In 1994/95 the Plaintiff married a Mr Underwood. She neither informed the Deceased of her marriage, nor invited the Deceased to her wedding. The Plaintiff went to live in Queensland and did not contact the Deceased, nor sent any Christmas or birthday cards to the Deceased from 1990 onwards. Plaintiff asserted that it was the Deceased who had wished to end the relationship; but Hallen J found that it was the Plaintiff "who chose to place distance, geographical and otherwise, between herself and the deceased." Hallen J noted that it was "not a short-term estrangement or a case where an otherwise long and loving relationship between a daughter and her mother had been ruptured shortly prior to her death. It was not a temporary but a longstanding, estrangement. For about 20 years, there was a complete and unequivocal severance of ties between the deceased and [the Plaintiff]. Also, it was not a case, unlike some, in which an applicant for provision has made personal or financial, sacrifices in caring for the deceased, or in contributing to the deceased's estate. On the contrary, it was the Deceased who took [the Plaintiff] into her home in about 1985 and allowed her to live there, for about two years, during which it would seem, [the Plaintiff] did not pay the deceased any rent or occupation fee" but that the Plaintiff had paid some $1,050 for "outgoings" and "contributed to food and drove the Deceased around…" .

In deciding to dismiss the Plaintiff's claim for provision, with no order for costs, to the intent that both parties pay their own costs, Hallen J noted as follows. "Clearly the deceased wished to disclose the reasons that actuated her to make the dispo-

sitions she had made. The Court will consider any explanations given by the deceased in the Will, or elsewhere, explaining why she made her Will as she did. However, such explanations do not relieve the Court from engaging in the enquiry required by the Act: Slack-Smith v Slack-Smith [2010] NSWSC 625 at [27]. What an explanation may do is cast light on the relationship between the deceased and that person, at least from the deceased's perspective." Hallen J explained at [264]-[265] that: "… an obligation or responsibility, to make adequate provision for the proper maintenance, education or advancement in life, is recognized in the case of a child. In Flathaug v Weaver [2003] NZFLR 730 at 737, the origin of the obligation which underpins the Act's recognition of the duty owed by a parent to a child was put in this way: 'The relationship of parent and child has primacy in our society. The moral obligation which attaches to it is embedded in our value system and underpinned by the law. The Family Protection Act recognizes that a parent's obligation to provide for both the emotional and material needs of his or her children is an ongoing one. Though founded on natural or assumed parenthood, it is, however, an obligation that is largely defined by the relationship which exists between parent and child during their joint lives. [265] The fact that the applicant was financially independent of the deceased, for many years, before the deceased's death, is a relevant consideration in determining the extent of any obligation or responsibility owed. The size of the deceased's estate is also relevant to the extent of the obligation or responsibility." Hallen J this concluded that: "Ultimately, the important matter is not who is at fault, or who is to blame for the relationship, but whether, in all the circumstances, it would be expected by the community that the deceased would have to make a greater benefaction than she, in fact, did, to constitute adequate and proper provision for the applicant." [at 315] [and] "the deceased, understandably and not unreasonably, took the stated view that their relationship had broken down and that she no longer had any obligation to provide for [the Plaintiff]." [at 316] [and] "I am of the view that there was no failure, on the part of the deceased, to make proper provision for [the Plaintiff]" [at 317]. The claim was dismissed: [at 317].

Even so, some important points must be borne in mind about estrangement in regard to family provision claims. The subject case before Hallen J is, like all family provision cases, very much a decision upon its own particular facts and circumstances as found by the Court and as weighed up in regard to the various statutory factors involved. Indeed, Hallen J in this instance went to the trouble of going through each and every one of the statutory factors involved and indicating how each of them was or was not, relevant to the case before him. Further, the case does not stand for any simple proposition that a lengthy estrangement will always spell, much less require, dismissal of the claim. Hallen J noted, as submitted for the Plaintiff, that Courts have ordered provision where estrangements of 30, 35, 36 or even 38 years were proved: Khreich v NSW Trustee & Guardian [2012] NSWSC 1299; Andrew v Andrew [2011] NSWSC 115; Doshen v Pedisich [2013] NSWSC 1507; Keep v Bourke [2012] NSWSC 64. In other cases, where the Court had refused to order provision, there had been not only estrangement, but also "aggravating factors" such as physical abuse, callousness and hostility, contested litigation with the deceased and so on. [see per Hallen J at 246 (a) and (b) and the relevant cases cited therein]. Hallen J noted that "'estrangement' is not a term used in the Act" [250] but that it can be a factor where the estrangement is complete, especially where, as here, it was by the choice of the Plaintiff to become estranged. Whilst Hallen J also quoted what Dixon CJ said in that very problematic case of Pontifical Society v Scales (1962) 107 CLR 9 at 19 and as Bergin CJ in Eq said in Ford v Simes [2009] NSWCA 351 at [71], to the effect that there may well be cases where a testator is entirely justified in making no provision for an adult child, that is not to say that the Court will or should "lean against" making an order for provision for an adult child where appropriate. Testators can still have a "moral obligation" to make provision, for their children, including adult children (depending on the circumstances), as Gleeson CJ noted in Vigolo v Bostin (2005) 221 CLR 191, notwithstanding various statements by other Judges of recent years, who have been concerned to eschew, or expunge, the "moral" considerations from the Family Provision jurisdiction (perhaps in reaction to overtones of what "moral" implied from its usages in Victorian times).

Hallen J noted at [220]-[221], that "what is adequate and proper provision is necessarily fact specific. [and] The Act is not a 'Destitute Persons Act' and it is not necessary, therefore, that the applicant should be destitute to succeed in obtaining an order: In re Allardice (1910) 29 NZLR 959". At paras [230] to [244] Hallen J provides a detailed review of the cases upon estrangement. Hallen J also deals with and makes observations upon some topics in the case other than estrangement, including: on ex-

tension of time at [112] et seq; on leave to re-open evidence (refused) at [94] et seq; on the statutory scheme of the New South Wales legislation at [109] to [111]; on Eligibility and Inadequacy of Provision at [130] et seq; on Notional Estate at [183] et seq; and other relevant principles, from [208].

Overall, the decision in Underwood v Gaudron serves to underscore that a Plaintiff who has deliberately decided, of his or her own volition and without any good or reasonable cause, totally to distance and thus estrange himself or herself from, a testator parent for a very considerable time (here it was 20 years and thus about one-third of the Plaintiff's life) and especially absent any special personal circumstances or special needs, is likely to face a real difficulty in obtaining an award of provision.

However this decision does not mean that every and any estrangement, as sometimes occurs in the ebb and flow of family life, will bar a claim. Courts examine the whole of the facts and circumstances in each matter.

Douglas Hassall

Barrister-at-Law, Silk Chambers

Judicial Conference of Australia

MEDIA RELEASE
12th November 2014

Recent actions by the Government of Timor Leste

"Recent actions by the Government and Parliament of Timor Leste against foreign members of its judiciary are very concerning for the administration of justice in that nation" Justice Steven Rares, President of the Judicial Conference of Australia said today.

"The circumstances that led to the secret session of Timor Leste's Parliament in late October 2014 that resulted in the dismissal of all foreign judges raise real issues about the integrity of the administration of justice in Timor Leste. The lack of transparency itself is disturbing."

"The constitutional processes of Timor Leste providing for the independence of the judiciary, security of tenure of judges and investigation of complaints against judges do not appear to have been followed."

"Public confidence in the rule of law in a democracy depends on the judiciary being independent, unbiased, transparent and of unquestionable integrity. The public of any sovereign state, such as Timor Leste, must be able to be confident that in the Court system, justice is not only done but should manifestly and undoubtedly be seen to be done."

"Secret decision-making about judges and Court decisions outside of court and constitutional processes undermines public confidence in the judiciary, and that, in turn, undermines the rule of law."

"The circumstances surrounding the resignation in February 2014 of the President of the Court of Appeals, Claudio de Jesus Ximines, also raise very significant concerns as to the independence of the judiciary, the observance of Constitutional provisions for protecting the rule of law and the separation of powers in that country. Citing particular court decisions as the reason for appointing, assigning or dismissing judges inevitably raises concerns of political or other inappropriate attempts to improperly influence judicial outcomes."

"The Judicial Conference of Australia strongly condemns these most serious interferences with the independent and effective operation of Timor Leste's courts and with the rule of law," Justice Rares said.

For further information contact:
Christopher Roper
Secretary, Judicial Conference of Australia
0407 419 330
secretary@jca.asn.au

The Judicial Conference of Australia is the representative body of the Australian judiciary.

The President Mr Shane Gill, cordially invites

Members to the ACT Bar Association's Christmas Lunch

to be held at

University House

(Drawing Room)
1 Balmain Crescent, Acton

On

Friday 19 December 2014
to commence at 12.30pm

Cost: $95.00 per person (inclusive of GST)

R.S.V.P - 12 December 2014

Tax Invoice & Registration Form — ABN 84 008 481 258

Please accept my registration for the Christmas Lunch on 19 December 2014. Return the completed form together with payment to:

ACT Bar Association, GPO Box 789, CANBERRA, ACT 2601 (DX 5654 CANBERRA)

or by email ceo@actbar.com.au

Registration Details — ACT Bar Christmas Lunch		Payment	
☐ Please reserve ticket/s @ $95.00 each	$	☐ Cash	☐ Cheque (to ACT Bar Association)
Name:		☐ Please debit my: [ ] Visa	[ ] Mastercard
Chambers:		Card No.: _ _ _ _ /_ _ _ _ /_ _ _ _ /_ _ _ _	
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Merry Christmas

2.2% Merchant Fee Charge applies to all credit card payments.