BAR BULLETIN

THE AUSTRALIAN CAPITAL TERRITORY BAR ASSOCIATION

Edition: Nov/Dec 2015

INSIDE...

PLUS

EVENTS


A LAW COUNCIL INITIATIVE
DIVERSITY
&
EQUALITY
CHARTER

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ACT BAR BECOMES SIGNATORY TO THE DIVERSITY AND EQUALITY CHARTER

FACTS

The Bar Council, at its meeting on 26 October 2015, agreed to sign the Law Council of Australia's Charter on National Diversity and Equality.

The ACT Bar Association, is committed to promoting diversity, equality, respect and inclusion consistent with the principles of justice, integrity, equity and the pursuit of excellence upon which the profession is founded.

We recognise that diversity benefits the legal profession and the community as a whole. Accordingly, the ACT Bar Association and its members agree to:

- ***treat all people with respect and dignity regardless of sex, sexuality, disability, age, race, ethnicity, religion, culture or other arbitrary feature;***
- ***create and foster equality through a supportive and understanding environment for all individuals to realise their maximum potential regardless of difference;***
- ***promote and support a strong and fair legal profession comprising, accommodating, encouraging and respecting a diverse range of individuals and views.***

FROM THE EDITOR

F.J. PURNELL SC

DOUBLE JEOPARDY

The ACT Government is considering changing the law in relation to double jeopardy. An excellent paper has been prepared by the Territory which is well worth reading. It looks at what has happened in Australia following the High Court's affirmation of the common Law rule in *R v Carroll (2002) 213 CLR 635*. After the decision in Carroll, there was a national concern that such a strict operation of the double jeopardy rule meant court processes could be compromised at the cost of the community and victims of crime. The situation in New Zealand and the United Kingdom is also referred to.

Five changes to the law in the ACT are proposed, with three of the five proposals being recommended to be adopted in the ACT. The two proposals not being recommended for adoption are:

- "A prosecution appeal against directed acquittals on the basis of an error of law in any jury trial or an error of law in a judge alone trial; and

- "A prosecution appeal against a ruling on the admissibility of evidence where the ruling substantially weakens the prosecution case".

The three proposals that are being recommended are:

- "Retrials following an acquittal where there is fresh and compelling evidence";

- "Retrials following acquittal where there has been a tainted trial"; and

- "Prosecution of acquitted people for administration of justice offences that call into question the acquittal".

Safeguards are proposed to accompany these changes. It is clear that the five recommendations would be intolerable. Council is currently formulating a response to the proposal for the three.

WILL WOMEN EVER BE ABLE TO HAVE IT ALL?

This topic was the subject of an address on 15 October 2015 made to the Law and Justice Foundation by the Hon Catherine Branson QC. I commend readers to read the full text.

The speaker made many valid and important points. One of the themes addressed was that

> "WOMEN WILL BE ABLE TO HAVE IT ALL - BUT ONLY WHEN MEN CAN ALSO"

"equality is not to be equated with justice and that the demands of justice may require us to depart from strict equality". Attention was drawn to a recent finding that fewer big Australian companies are run by women than by men called Peter and that now over 60% of law graduates are women, but only 28% of the Australian judiciary are female. (Canberra has a

much higher representation, having 50% of the Supreme Court and 58.3% of the Magistrate's Court and the Chiefs in both courts being female).

Further, more than half of the academic staff in Australian universities are female, but just over a third are above the level of senior lecturers.
The average super payout for women is approximately a third of that for men. The argument was put that "Justice for men requires that they be able to spend time caring for their families without significant cost to their careers and to their long term financial security. The paper concluded:

"Women will be able to have it all – but only when men can also!"

LEO TOLSTOY - FACTS YOU MAY NOT KNOW

On 15 October 2015 Margaret Throsby interviewed Rosamund Bartlett, an English author who is fluent in Russian and did a PHD on "Wagner's Influence in Russian Society". Bartlett has recently written the latest and apparently most comprehensive autobiography on Tolstoy. Having started, but never finished, War and Peace I thought I might share with you some facts, old and new, I learnt from the interview.

Tolstoy and his wife, Sofya, had 13 children. She was his proof reader and wrote out his novels and other works for the publishers. She wrote out eight versions of War and Peace.
The famous estate Tolstoy was born on and owned, at Yasnaya Polyana, contained a number of peasant villages and the famous and beautiful family home.

After giving up studying law, Tolstoy turned his hand to gambling. Like most gamblers he lost heavily, including one of the peasant villages and his family home. He subsequently bought back the family home. After failing as a gambler he joined the army and fought in the Crimean War. Immediately after the war he 'retired' from the army and wrote Sevastopol Sketches, which were three short stories on his war experiences. He was very critical of what he called the 'vanity' of war and stated that the only hero in his book was 'truth'.

In 1908 he wrote a work entitled A Letter to a Hindu, the theme of which was that, if India practised non-violence it would gain independence from Britain. Yes, you guessed it, Gandhi read this work when he was practising as a lawyer in South Africa and thereafter corresponded with Tolstoy and yes, this work greatly influenced his non-violence approach to Britain.

Tolstoy stated that his two favourite composers were Chopin and Wagner, but acknowledged that he was frightened by the influence of music as he couldn't control music the way he could control words. He separated from his wife 18 months before he died, aged 82, and this was portrayed in part in the film "The Last Station" in which Christopher Plummer played Tolstoy and Helen Mirren, Sofya.

I thought I would write about something other than law-related matters for a change – although Tolstoy was a failed law student.

NEW FEDERAL FUNDING TO ESTABLISH A SPECIALIST DOMESTIC VIOLENCE UNIT IN THE ACT

The Women's Legal Centre has received one of the biggest single injections into its funding in the Centre's 20 year history. The Centre will receive $1.05 million over three years as part of the Australian Government's recently announced $100 million package to respond to family and domestic violence.

Elena Rosenman, Executive Director of the Centre said that "While women in crisis need specific assistance to protect their immediate safety, to ensure that safety is sustainable and long term, women need intensive, sustained and expert legal advice and representation throughout their legal processes, particularly in the Family Court. They also need support to access essential services. This funding will allow the Centre to provide that support to women in the Canberra community who are most at risk".

According to the additional State and Territory data released by the

Australian Bureau of Statistics (Catalogue 49060) from the 2012 Personal Safety Survey on 7 July 2014 showed:

- in the 12 months prior to the survey, around 8,900 ACT women had experienced some form of violence;

- 6,900 had experienced physical violence, and 3200 had experienced sexual violence;

- younger ACT women reported higher levels of violence than older women, during the 12 months preceding the study with 15.3% of 18 to 24 year olds and 10.1% of 25-34 year olds reporting violence in the preceding 12 months; and

- ACT women experiencing violence in the last 12 months were more likely to experience violence from a current or former intimate partner or other known person, than a stranger.

While domestic violence can happen to anyone, some people in the ACT are more at risk than others, and it can be harder for people who are marginalised in some way to seek help. In particular, the survey showed that:

- Aboriginal and Torres Strait Islander women are nearly 10 times more likely to die as a result of assault than other Australian women, and are 35 times more likely to be admitted to hospital for family violence related injuries.

- Women from culturally and linguistically diverse (CALD) communities who experience domestic and family violence can face significant difficulties, including lack of support networks, language barriers, socioeconomic disadvantage and lack of knowledge of their rights and Australia's laws.

- Women with disabilities are more likely to experience violence than other women, and the violence can be more severe and last longer.

Although the Federal funding will undoubtedly significantly increase the Women's Legal Centre to assist women who are subjected to violence, the Productivity Commission's recommendations was that an interim funding injection of $200 million per year (with 60% to be contributed by the federal government) is required to maintain existing frontline services and broaden the scope of legal assistance services.

The ACT Government has committed $1.2 million in the 2015-2016 budget to combat domestic violence in the ACT, however only $250,000 has been allocated to be shared amongst the Domestic Violence Crisis Service, Canberra Rape Crisis Centre and the Canberra Men's Centre. Addittional funding (totalling $555,000) through the Confiscated Assets Trust Fund will also be allocated to top up women's safety grants and support the Domestic Violence Prevention Council.

As such, whilst restoring some funding has been applauded, there is a critical need for the profession to advocate for ongoing funding to ensure that the justice gap is curtailed and organisations such as the Women's Legal Centre and Legal Aid Office can continue to do the important work they do to protect the vulnerable community.

Svetlana Todoroski, CEO

FROM THE PRESIDENT

SHANE GILL

There is good reason why the justice system ought be kept immune from even the perception of influence from the Executive. It is arrogant to think that because we function in an advanced economy, in a western democracy, in a wealthy country that we can ignore the sorts of protections that have been typically applied to the justice system to protect it from influence.

The history of Australia, from the Rum Corps through to the recent hearings of the Independent Commission Against Corruption make it plain that even in a country such as ours constant vigilance is required to protect the justice system.

There are a number of practices that have become accepted in the Territory that undermine the independence of the justice system. In criticising these practices, I am making no comment upon the people who have been appointed under these arrangements. The issue is the practice rather than the person.

The arrangements for Superior Court judges are that they are provided with appropriate remuneration, with security of tenure and with security provided through a generous pension scheme. These act together to mean that, in terms of security of position, a judge is protected whether he or she decides a case in a matter comfortable, or uncomfortable to the Executive, or to public opinion. So far, so good.

Acting appointments are vital to the operation of our Supreme Court. In fact, if we do not receive judges on an acting basis our lists will be in significant peril of regressing. Typically, historically, they have been sourced from judges with current positions before other courts, especially the Federal Court. Where this occurs, their appointment arrangements are such that they too are protected, in terms of security of position, from influence.

However, a practice has developed in relation to acting appointments for judicial officers, whereby people who are not otherwise current judicial officers are appointed and reappointed to a judicial position in the Territory.

The very prospect of reappointment undermines the systems that are in place to protect the judiciary. A judge under such a system is required to make decisions in the context that the judge may or may not be appointed again. This is in conflict with the arrangements we have in place that protect judges from such pressures.

It must be said that this is not confined to the Supreme Court. We have systems of rolling appointments of Special Magistrates in the Magistrates Court. Again, judicial officers are there required to make decisions under the question of whether they will, or will not be further appointed. If they are appointed to determine cases, they ought receive the security of position that protects them from such a circumstance.

The same issue arises in relation to ACAT. While ACAT has a different status to a court, Members of ACAT are called upon to make determinations in relation to the rights and actions of government agencies. These decision makers are placed in the position of being subject to transient appointments. How is such an arrangement protective of independence in the discharge of such a decision making role?

Similarly, a practice has developed involving the promotion of judicial officers from one jurisdiction to the next. In this

context decision makers are charged with determining matters in the context of potential advancement. Again, this provides a poor protection of the independence of the office.

Recently the Association has advocated for single terms for the Director of Public Prosecutions. The Director plays a vital role in the administration of justice within the Territory and the independence of that position is best protected by a single term wherein the various incumbents discharge their duties without the question of reappointment hanging over his or her head.

I reiterate that these criticisms are of the systems, not of the people who inhabit them, who invariably labour strenuously for the benefit of our community.

It can be argued that abandoning these systems of rolling appointments is inconvenient, or increases expense, but it is difficult to accept these as cogent arguments against the preservation and promotion of independence within these bodies. If we do not take every step to preserve the independence of those involved in the justice system, then we place at risk the ability to use the word "justice" in describing the system at all.

FROM THE CHIEF JUSTICE

HELEN MURRELL

I am pleased to be able to report on a number of positive developments affecting the Supreme Court.

Most importantly, the Court is looking forward to the appointment of a fifth resident judge to commence in July 2016. The appointment will make it much easier to list both civil and criminal matters in an efficient manner. We are hopeful that, over the medium to longer term, the civil backlog will be eliminated.

However, with change comes adjustment. As noted by Mr White in the DPP's 2014–15 Annual Report, the appointment of a fifth judge and the associated increase in the Court's ability to list criminal trials will place pressure on the DPP and Legal Aid, who may struggle to find the necessary resources. If there is no scope for existing resources to be utilised more efficiently then the DPP and Legal Aid will need to be provided with additional resources if the appointment is to increase efficiency in the Supreme Court.

Meanwhile, we anticipate that we will receive adequate additional funding to enable the engagement of an Acting

Judge for what promises to be a busy February/ March central criminal listing period. With the assistance of an Acting Judge we hope to maintain the current position that most criminal trials are listed expeditiously.

The Courts Legislation Amendment Bill 2015 (No 2) (ACT) proposes two changes of significance to the Supreme Court: amendments to the Juries Act 1967 (ACT) in relation to identification of jurors, and amendments to the Court Procedures Act 2004 (ACT) in relation to the office of Principal Registrar.

I welcome the proposed amendments to the Juries Act 1967 (ACT) which will mean that potential jurors are identified by number rather than by name and occupation. The proposal is modelled on the NSW system, which works well. The Explanatory Statement highlights that it is 'designed to protect the privacy of individuals, reduce any fears of reprisals and reinforce the confidential nature of the deliberations of a jury.'

The Bill also includes amendments to make the position of Principal Registrar a statutory appointment, stipulating that the function of the Principal Registrar is to "support" the Chief Magistrate and I in relation to our administrative functions. The intent is to strengthen the independence of the judiciary. Unfortunately, the proposed amendment does not ensure that the Principal Registrar is independent of the executive in relation to non-financial matters. The term "support" is unclear, particularly as, under the current proposal, it seems that the Principal Registrar is to come under the Public Sector Management Act 1994 (ACT). Consequently, the Principal Registrar may be obliged to comply with a direction given by the executive that conflicts with a direction given by the judiciary. The Chief Magistrate and I will continue to advocate for greater independence for the Courts' Principal Registrar.

Murrell CJ

COMMENCEMENT OF THE LEGAL YEAR 2016

THE COMMENCEMENT OF THE LEGAL YEAR CEREMONY
WILL BE HELD ON

MONDAY, 1 FEBRUARY 2016

Members of the Legal Profession, Judges and Magistrates will form a procession outside of Courtroom 1 at 8.50am.

ALL Practising Barristers are requested to Robe including wearing of wigs for the ceremony.

WALKER SC PROMISES...

"THE LAST ARTICLE ON MAGNA CARTA FOR 2015"

PHILIP WALKER SC

MAGNA CARTA AND THE A.C.T. LEGISLATIVE ASSEMBLY

On 15 June this year, it was my good fortune attend the ceremony at Runnymede for the 800th anniversary of King John sealing the Magna Carta. For those who have not been to Runnymede, the site is a beautiful green field in the upper reaches of the Thames.

Apart from its historic significance it is a pleasant place for a morning stroll on a sunny day. If you take either bridge or boat across the river to Ankerwycke, it is possible to visit the spectacular, sprawling, 2,000 year old yew tree which some say was the actual spot where King John did the great deed.

I should perhaps also mention that the train station for Runnymede is Egham. It is only three stops from Twickenham so it is possible to go to Runnymede in the morning and stop off at the rugby on the way back to London.

One of the most recognisable sites at Runnymede is the round Magna Carta memorial erected in 1957 from donations by the American Bar Association. The American Bar took the view that in order to strengthen and perpetuate the spirit of Magna Carta and the liberties for which it stands, it was essential that there be a fitting memorial and it was prepared to pay to make sure of it. The American Bar Association has kept the flame alive, re-dedicating the memorial in 1971, 1985, 2000 and 2105.[1]

The importance of such a memorial is not so much to the memory of Magna Carta but to the principles which that great document inspired – that the power of government is not unlimited, that the power it does possess must be exercised according to law and that the individual has liberties which governments cannot take away. The Americans thought that these principles were so important that they donated to build a monument an ocean away. How important do we think they are?

Benjamin Franklin is supposed to have said, "No one's life, liberty or property are safe while the legislature is in session." This applies in the ACT as much as anywhere else in Australia. Certainly, the Human Rights Act 2004 fails to protect citizens' rights from the predations of the ACT Legislative Assembly and the Executive. ACT experience demonstrates how merely writing rights in a document is not enough. Constant defence is required. Two quite different examples demonstrate recent attacks on basic rights. Others examples could have been chosen.

1 Speech William C Hubbard, President, American Bar Association 2015.

MAGNA CARTA [2]

(39) No free man shall be disseised or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

(40) To no one will we sell, to no one deny or delay right or justice.

HUMAN RIGHTS ACT 2004

"21 Fair trial

(1) Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing".

Disregarding these provisions entirely, in October, the Assembly passed domestic violence legislation[3] which denied access to the courts and delayed justice and the resolution of rights. Under the new legislation, unless both parties consent, a respondent to a domestic violence order who is charged with a domestic violence offence, will be denied the right to contest the merits of the DVO until the conclusion of the criminal proceedings, whenever that may be.[4]

DVOs can have a profound effect on people yet many are issued ex parte and often on very limited evidence. They can lock respondents out of their homes, separate them from their children, and create enormous difficulties for anyone whose job requires a security clearance. Fine, if the DVO is justified, but they are not always. Sometimes DVOs are obtained entirely disingenuously as a tactic in a Family Court battles. Now, a respondent will not be permitted to show that a DVOs is not justified until the conclusion of any related criminal charge - which also may not be justified. The rewards to be gained from the misuse of DVOs have just been significantly increased.

> *"In October 2015, the Assembly passed domestic violence legislation which denied access to the courts and delayed justice and the resolution of rights"*

The *Judicial Commissions Act 2006* provides for a commission to examine misbehaviour on the part of ACT judges and magistrates. The un-commenced *Judicial Commissions Amendment Act 2015* introduces a "Council" to deal with more minor matters. Remarkably, the ACT Assembly has chosen to abolish the right of any judicial officer to seek judicial review of the proceedings of the Commission and recently, the Council.[5] One can only ask, "Why?"

The ACT Executive sponsors most ACT legislation. The Executive Branch of government undertakes the assessment of whether Bills are compliant with the HRA. Final sign off for HRA compliance is by the Attorney General[6] ie a member of the ACT Executive. This works about as well as you would expect – about as well as Arthur Anderson working for a company as a consultant and auditing its accounts.

Section 28(1) of the HRA provides that human rights may be subject only to reasonable limits set by laws *that can be demonstrably justified in a free and democratic society* (italics added). Section 28(2) then provides five non-exclusive criteria to assist deciding whether a limitation is reasonable. The test is therefore in subsection 28(1) and the most exacting part of that test is in the words which I have italicised. This part of the test is regularly and, it is hard to escape the conclusion, deliberately omitted from the human rights analyses in explanatory statements.

Why "deliberately"? In 2012 the ACT Government introduced a Bill to abolish the defence of self-defence if a person resisted illegal arrest by the police.[7] The human rights analysis of this Bill completely omitted any consideration of subsection 28(1) of the HRA and confined itself to the criteria in subsection 28(2). The Standing Committee on Justice and Com-

2 Both these sections are still part of the statute law of the ACT by virtue of (1297) 25 Edw 1 c 29.

3 Crimes (Domestic and Family Violence) Legislation A2015-40 Amendment Act 2015

4 *Domestic Violence and Protection Orders Act 2008* sections 41B, 42A and 42B.

5 In light of the decision in Kirk v Industrial Relations Court (NSW) (2010) 239 CLR 531 this legislation is almost certainly unconstitutional in the States and is equally likely to be unconstitutional in the Australian Capital Territory: Ebner v Official Trustee in Bankruptcy (2001) 205 CLR 337, 363 [81]; North Australian Aboriginal Legal v Bradley (2004) 218 CLR 146, 163 [29]; Attorney-General (NT) v Emmerson (2014) 253 CLR 393, 425 [42] and North Australian Aboriginal Justice Agency Limited v Northern Territory of Australia [2015] HCA 41[41], [119], [182].

6 Section 37 *Human Rights Act 2004.*

7 *Crimes (Offences Against Police) Amendment Bill 2012.*

munity Safety noted this omission extensively and unanimously[8] concluded:

"…greater attention to other subsections of section 28 of the Act is warranted, and would be likely to produce a less favourable picture of the human rights implications of the Bill."[9]

One would have expected that the Executive would have been chastened by this conclusion and the Assembly would be forevermore on its guard. Not so. The human rights analysis for the DVO legislation notes the existence of subsection 28(1) but entirely omits any analysis of whether the denial of access to the courts is "demonstrably justified in a free and democratic society". Instead it made comments which have very little legal merit at all (Italics added):

EXPLANATORY STATEMENT

"This Bill also supports the section 21 right to a fair trial for respondents to DVOs who are also subject to criminal proceedings by ensuring they do not have to make admissions or disclose any information during a hearing for a DVO.[10]

Respondents who have criminal charges related to the DVO are no longer forced to make admissions of guilt before their criminal matter has been determined to the appropriate standard in a criminal court."[11]

The "analysis" makes no mention of the fact that -

(a) a respondent used to have a choice whether to contest a DVO;

(b) were never and could not be "forced" to make admissions of guilt;

(c) that consent orders can be and are made "without admissions"[12] and that if necessary

(d) the court could give a certificate under section 128 of the Evidence Act 2011 barring the use of evidence in later criminal proceedings.

The human rights analysis for the *Judicial Commissions Amendment Bill 2014* did at least mention subsection 28(1) of the HRA. It dealt with the abolition of prerogative relief against the Council in a far cruder fashion. It just did not mention the abolition at all!

Both Bills were introduced by the Attorney General. It is no surprise that he certified that they were human rights compliant. That governments will subvert any constraint placed upon them should not be surprising.

On 15 June 1215, King John sealed Magna Carta and took an oath that the liberties in the charter were granted "for ourselves and our heirs, for ever". He promptly broke his commitment. Around a week later he sent to the Pope to have his promise annulled. On 24 August the Pope declared the Charter null and void.

However, the Charter had a built in enforcement mechanism. Chapter 61 provided for a Council of Twenty-five. If King John failed to keep his promise, Council members were enjoined to "distress and distrain" the king in every way until he had made amends. When the King failed to keep the Charter, that is exactly what the Council did.

We could be forgiven for thinking that we had a modern day equivalent to the Council of Twenty-five in the Legislative Assembly and that it would perform a similar role. (The numerical coincidence after the next election should not go without mention.) After all is not the Legislature supposed to hold the Executive to account?

The ACT Executive is much smarter than King John and the Assembly not so ready to defend rights as were the barons' Council. The Executive has not even emailed the Pope yet sadly and most frightening of all, like many other measures, the trampling of rights in the Bills above and the drivel in the "human rights analysis" passed the Assembly without a whimper.[13]

Philip Walker SC
Blackburn Chambers

8 Three members Labor, Liberal and Green.

9 Committee Report No. 12 June 2012 par. 5.15. It is also not without interest that the Committee found that the submission the Government made in support of the Bill was so selective in is use of court authority that it was "slanted so that they are consistent with the course of action adopted by the Government in this instance." – par. 5.19.

10 Explanatory Statement p. 5.

11 Explanatory Statement p. 12.

12 Elsewhere in section 43, the Act expressly recognizes that orders can be made by consent "without proof or admission of guilt".

13 Both Bills passed on the voices.

TRASK & WESTLAKE [2015] FAMCAFC 160

By Alicia Irving, Barrister, Blackburn Chambers

Delivered on 14 August 2015

In this full family court appeal, the husband appealed against the orders made by the family court regarding the settlement of the property to the marriage between the parties. The parties were married for 11 years and had lived together for 13 years. They had four children together aged 15, 13, 11 and 9 at separation. During the marriage, the husband's employment resulted in a considerable family income. The wife made significant indirect financial contributions to the family, which was considered to be direct non-financial contributions to the husband's ability to be employed. Both parties were unemployed at the trial.

The relevant ground, upon which the appeal was allowed, is that the form in which the trial judge made the orders does not reflect the findings in the judgment. His Honour Aldridge J, made findings that entitle the wife to 60% of the net property and superannuation interests of the parties. This was to be achieved by selling certain real property assets and apportioning a percentage of the sales to the wife. The issue arose, however when the actual sale price of the assets were greater than the valuation. As such, the wife's portion of the property pool resulted in 63% in the wife's favour, a disparity of approximately $1.422m.

The principle in Noetel & Quealey (2005) FLC 93-230 provides that the court should favour the practice of drafting orders based on a percentage entitlement rather than a fixed sum to achieve fairness between the parties in the event of sale. However in this case, it was held that "His Honour's percentage formula makes no allowance for the fact that, as the assumed values of the two properties rise or fall they bear a greater or lesser proportion of the total value of the pool" (at [41]). The consequence is that there is an error if the orders do not reflect what was intended.

The Full Court rejected the submission by both parties that the orders could be changed under the slip rule. Under this rule, the "courts have an inherent power or implied jurisdiction to amend judgments which do not correctly state what was actually decided and intended." (Elyard Corporation Pty Ltd v DBB Needham Sydney Pty Ltd (1995) 133 ALR 206; DJL v The Central Authority (2000) 201 CLR 266). Here, the mistake resulted from a mistaken but deliberate calculation urged upon the trial judge (at 47) rather than an accidental error or omission.

The Full Court exercised discretion to make orders in the terms which were ultimately agreed by the parties and which more accurately reflected the findings of the trial judge. Those orders were in the following terms:

"(f) The wife be paid an amount $X calculated in accordance with the following formula:

$X = [(A + $4,795,101) x 60%] - $2,241,154

Where:

- A is the balance remaining consequent upon compliance with the sales and payments required by paragraphs 1 and 2(a) to (e) of these orders;
- $4,795,101 is the total value of the property and superannuation interests of the parties as found excluding the assumed value of the two properties the subject of sale; and
- $2,241,154 is the value of the property retained by the wife as found;

(g) The husband be paid the balance."

It can be concluded that where assets are to be sold for uncertain amounts it may be necessary to draft orders which take into account any differences in sale prices, liabilities and agreed valuations. This may require more complex orders with mathematical formulas to allow more precise drafting.

Alicia Irving
Barrister
Blackburn Chambers

ABOUT ALICIA

Alicia Irving is a current Reader at Blackburn Chambers. She practices in areas of Family Law, Child Protection, Military Law, Employment and Administrative Law.

Alicia was previously employed as a reserve legal officer in the Australian Defence Force.

Alicia is also the successful candidate of the 2015 ACT Bar Association's Women's Scolarship, sponsored by Michael Miller of MLC Advice, Canberra Branch. Alicia in her application for the scholarship said that she recognised the ACT Bar Association's efforts to identify the importance of a diverse and representative work environment, in particular "taking active steps to improve the recruitment and retention of women".

Alicia has said that the overall contribution that she wishes to make to the ACT Bar is to encourage and support more women to consider the Bar as a profession. "I am able to offer advice and support to women who wish to discuss the practicalities of practice, childcare and balancing other professional commitments".

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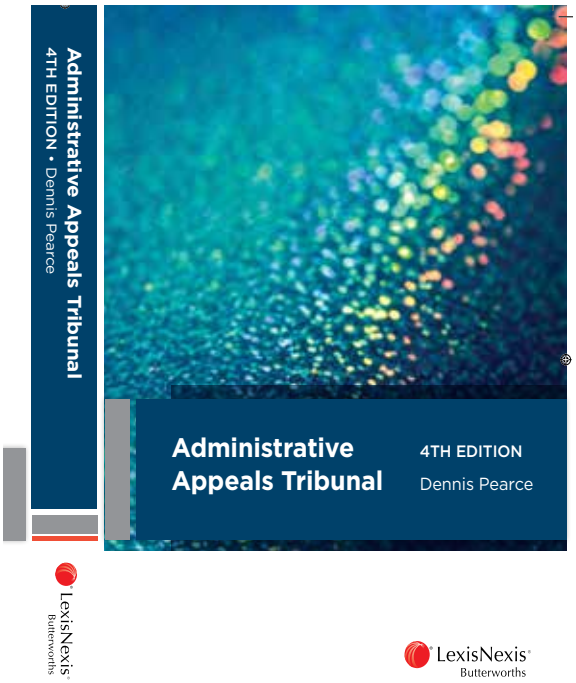

THE NEWLY AMALGAMATED AAT

Practitioners in the migrant and welfare support tribunals jurisdiction will be looking hard at the Tribunals Amalgamation Act 2015 (Cth) (Amalgamation Act) which brought the migration and welfare support tribunals within the ambit of the AAT.

What will be the effect of this amalgamation, both from a technical legal perspective and in relation to procedure before the AAT? Will the body of law and procedure built up so far by the newly incorporated tribunals be adopted or subsumed within the AAT, or lost forever?

And how will the complex and detailed arrangements included in the Amalgamation Act for the transition of the amalgamated tribunals into the AAT structure be managed by the tribunal?

A significant new provision is one declaring that the Tribunal must provide a mechanism for review that is proportionate to the importance and complexity of the matter. This is clearly a direction to the Tribunal to temper its procedural practices to the subject matter before it. How is this to apply to both welfare and migration issues, each single one of which has the potential to carry multifaceted, highly subjective nuances? How are those nuances to be weighted, and how will the Tribunal's practices be tempered accordingly?

As usual Pearce, in his seminal text Administrative Appeals Tribunal (4th edition) provides guidance to the answering of those questions.

Emeritus Professor Dennis Pearce AO FAAL writes extensively on administrative law and on other spheres of Australian law (eg delegated legislation[1], statutory interpretation[2] and is regularly named by his contemporaries as one of Australia's leading lawyers in the field of public law.

For example, in the latest edition of his text on the AAT, Pearce reassuringly comments that, unless there is legislation expressly relating to it, AAT procedure based on pre-amalgamation jurisprudence will, in most cases, be that which will also be followed in the proceedings to be conducted in the Migration and Refugee Division. The general intention, he believes, is to interfere as little as possible with the work of the amalgamated tribunals by bringing the members into the AAT and continuing proceedings there to the extent practicable within the structure of the AAT.

The fourth edition of Administrative Appeals Tribunal is being published by LexisNexis. A copy should be on the shelves of every practitioner in the field, private and government; of every member of the Tribunal itself; and indeed of every judge likely to be tasked with reviewing decisions of the AAT.

It will be on mine.

Fergus Thomson

(Retired Barrister)

1 D Pearce and S Argument, *Delegated Legislation in Australia* (LexisNexis, 4th ed 2012)

2 D Pearce and R Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8th ed 2014)

FROM THE LEGAL AID OFFICE

DR JOHN BOERSIG

LEGAL AID ACT REPORT NOVEMBER 2015

OVERVIEW OF COMMISSION ACTIVITIES

The Commission's Annual Report 2014-2015 was recently tabled in the Assembly. The Report details a strong story of performance over the past year – the decline in grants of legal assistance has been stemmed and managing well the sheer volume of work that must be undertaken, and it also highlights the new directions we are taking in Outreach to the ACT community.

Over the initial few months of the 2015-16 grant numbers and general services are maintaining growth in accord to last year's trends. Significantly, we have had to meet additional demand in the civil (Helpline calls and DV area) and in the criminal area (due to changes and impending changes in the Magistrates and Supreme courts operations which continue to stretch our staff). We have also had to respond to expanding work in the Family Courts (particularly as independent Children's lawyers) and are maintaining service levels in FDR, notwithstanding the cut last year in Commonwealth funds.

One of our key performance objectives for this year is to improve family and domestic violence services to the community. In that regard we are in discussion with JaCS, both in terms of possible involvement in Territory initiatives overseen by the Coordinator General, but also to leverage off recent funding offered by the Commonwealth to the Women's Legal Centre. We have a strong capacity to improve services through our DVU, and of course in particular through the work of the general and family practices.

NATIONAL PARTNERSHIP AGREEMENT ON LEGAL ASSISTANCE SERVICES 2015-20 (NPA)

The NPA, which covers the Commonwealth component of legal aid funds, commenced in July of this year. It will conclude in 5 years time, which, on the positive side, gives some sense of stability about funding over the years though limits government investment in legal aid and does not allow for growth in services or increases in costs. The funding arrangement with the Territory is not impacted by the NPA, however the agreement does put a more direct onus on the Territory to account for the expenditure of Commonwealth funds. Nor does the NPA include funding to the Commission through the Statutory Interest Account, which, sadly, continues to decline.

Service planning at a jurisdictional level is a key feature of the NPA. This planning is being coordinated by JaCS. A working group, comprising a sub-group of ACTLAF members (including the Commission and CLCs) has met on several occasions. Reporting by us to JaCS under the NPA has not really changed, but it now includes the CLCs. We are progressing IT development based on new categories/rules; while this is not causing any real difficulty as our case management system is quite a flexible platform – it is time consuming and requires detailed changes to the system.

NEW DEVELOPMENTS: OUTREACH

As part of an expanded Community Legal Education and Outreach program we appointed a (part-time) African Communities Liaison officer. This position has had some success in attracting African people to use our services, and we are currently looking to appoint 2 liaison officers to the Muslim communities within the ACT. The Commission is strongly committed to improving services to the culturally and linguistically diverse peoples within the ACT. The key responsibility of these positions is to ensure the Commission is open to these communities, and that they are able to make use of our services. Cross-cultural training is also provided to staff, and we are looking to expand this to other partners in the justice sector. This is part of our

drive to better service the CALD communities within the ACT. In this approach we are building on the successful work of the Aboriginal and Torres Strait Liaison and Support officer position which has been operating for a number of years.

Outreach sights have been chosen to optimise our availability to the community – chiefly for information, advice and minor assistance. But also to make quick referrals if more detailed advice or representation is required, and to ensure better connectivity with non-legal services and support. Early intervention is often the best way to solve problems. As you will see in the list below we are now providing coverage across the ACT, and are partnering with social service providers to jointly deliver services.

OUTREACH CLINICS SCHEDULES 2015

Tuggeranong Communities at Work Legal Advice Clinic - This clinic operates each alternate Tuesday from 9.30am-12.30pm and is located at Communities At Work premises at Tuggeranong Community Centre, 245 Cowlishaw Street, Greenway. People can either drop in between the hours of 9.30am-12.30pm or make an appointment by contacting Communities at Work on (02) 6293 6500.

Gungahlin Child and Family Centre Legal Advice Clinic - This clinic operates each alternate Monday from 10.30am-12.30pm and is located at the Gungahlin Child and Family Centre at 51 Ernest Cavanagh Street, Gungahlin. People can either drop in between the hours of 10.30am-12.30pm or make an appointment by contacting the Child and Family Centre on (02) 6207 0120.

Woden College CCCares Legal Advice Clinic – for pregnant teens and young parents This clinic operates each alternate Friday from 9.30am-12.30pm and is located at the campus of Canberra College, Launceston Street Woden. The clinic is for students enrolled at CCCares. However pregnant teens or young parents who want to inquire about the school could potentially have access to the clinic.

Migrant and Refugee Settlement Service (MARSS) Legal Advice Clinic - This clinic operates each alternate Friday from 9.30am-12.30pm and is located at MARSS premises at 180 London Circuit Canberra. The clinic is for migrants and refugees and people can either drop in between the hours of 9.30am-12.30pm or make an appointment by contacting MARSS on 6248 8577.

Muslim Women's Group CLE and Legal Advice Clinic – "NOT TO BE ADVERTISED" This service is not to be advertised except by lawyers speaking confidentially and in person to a muslim woman who they think may benefit from the service.

Beryl Women's Inc CLE and Legal Advice Clinic This CLE and legal advice clinic operates on a Thursday from 10.30am-12.30pm every six weeks and is located at the premises of Beryl Women's Inc. This is a closed clinic for women living at the refuge and for women who attend the Beryl Women's Group.

Prisoner Legal Service Advice Clinic This clinic operates each alternate Tuesday for prisoners at the Alexander Maconochie Centre. The clinic alternates between operating in the morning from 9.30am-12.30pm one fortnight and in the afternoon from 1.30pm-4.30pm in the next fortnight.

Belconnen Youth Service Legal Advice Clinic This clinic operates on the last Thursday of every month from 2pm-4pm and is located at BYS @ Corner premises at 26 Chandler Street Belconnen. The clinic is open to any young person in the Belconnen area who can either drop in or call the service on 62640200 for an appointment.

Youth in the City Legal Advice Clinic - This clinic operates on the last Wednesday of every month from 3pm-4.30pm and is located at Youth In the City premises at 14 Cooyong Street Canberra. The clinic is open to any young person in the City and Inner North region who can either drop in or call the service on 6247 0770 for an appointment.

Youth Engagement Woden Legal Advice Clinic This clinic operates on the last Friday of every month from 3pm-4.30pm and is located at 26 Corinna Street Woden (opposite the Woden Bus Interchange). The clinic is open to any young person in Woden and surrounding south Canberra area who can either drop in or call the centre on 6282 3037 for an appointment.

Dr John Boersig
CEO, Legal Aid Office (ACT)

A STREAM GREATER THAN ITS SOURCE: THE TERRITORIES POWER, CHAPTER III AND THE KABLE DOCTRINE IN NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY LTD V NORTHERN TERRITORY [2015] HCA 41

In *North Australian Aboriginal Justice Agency Ltd v Northern Territory*,[1] the High Court confirmed in obiter that Territory legislatures were not restrained by the separation of powers doctrine when investing judicial power in a Territory court. Five justices held, however, that the *Kable* doctrine limits the powers a Territory legislature can confer upon a Territory court.

Background

Section 133AB of the *Police Administration Act* (NT) permitted a member of the police force to hold a person arrested in relation to an infringement notice offence for up to four hours (or longer if the person was intoxicated). The second plaintiff, Ms Bowden, was arrested and held in custody for nearly 12 hours on 19-20 March 2015, after which time she was issued with an infringement notice. She joined with the first plaintiff, a corporation providing legal services to ATSI people in the Northern Territory, in proceedings in the High Court's original jurisdiction challenging the validity of her detention. In a special case referred to the Full Court, the Court was asked to determine:

1. Whether the legislation conferred punitive detention powers on the executive of the Northern Territory;

2. Whether the legislation, if a Commonwealth Act, would be beyond the powers of Parliament and was, therefore, beyond the powers of the Legislative Assembly of the Northern Territory; and

3. Whether the legislation undermined or interfered with the institutional integrity of the courts of the Northern Territory contrary to the Kable principle.

The plaintiffs' Special Case failed 6:1.

Five justices of the High Court (French CJ, Kiefel and Bell JJ in one judgment, and Nettle and Gordon JJ in a second) held that the detention powers granted by s 133AB were administrative, not punitive, and declined to answer the second question.[2] Nettle and Gordon JJ also declined to answer the third question.[3] This case note does not address the construction of s 133AB.

The remaining elements of the case are highly relevant to members of the ACT Bar, as they concern the application of Chapter III and the Kable principle to self-governing territories.

Keane J, concurring in the result, held that the characterisation of s133AB was irrelevant as the plaintiffs' case failed on both constitutional grounds. Gageler J dissented and held that the legislation was an unconstitutional grant of punitive detention power which offended the Kable principle. French CJ, Kiefel and Bell JJ set out seven propositions forming the Kable principle before confirming the application of that principle in the Territories. Their Honours held, however, that the legislation did not violate those principles.

S 122 and Chapter III

Keane and Gageler JJ each held that the separation of powers in Chapter III of the Constitution did not apply to the Northern Territory Legislative Assembly.

In so holding, Gageler J made the following observations:

1. The Commonwealth Parliament is the only body that can invest the judicial pow-

1 [2015] HCA 41.

2 At [36]-[38] (French CJ, Kiefel and Bell JJ), [236]-[239] (Nettle and Gordon JJ).

3 At [239].

er of the Commonwealth in a court.[4]

2. The legislative power of the Legislative Assembly, although derived from the Parliament, is not an exercise of the Parliament's legislative power.[5]

3. The High Court in *Kruger v The Commonwealth*[6] rejected the proposition that judicial power invested by a law enacted in exercise of a power conferred under s 122 of the Constitution is judicial power of the Commonwealth.[7]

4. As a result of the High Court's judgment in *North Australian Aboriginal Legal Aid Service v Bradley,*[8] Territory courts are the same as State courts in that the Commonwealth can invest federal judicial power in each,[9] a result that maintains congruity across the Commonwealth appellate structure by placing State and Territory courts on an equal footing.[10]

His Honour concluded by stating plainly, "the legislative power of the Legislative Assembly is not constrained by Chapter III of the Constitution."[11]

Keane J reached a similar conclusion regarding the relationship between s 122 and Chapter III, albeit in much more direct terms. After dismissing the plaintiffs' submission that a "stream cannot rise above its source" as little more than a rhetorical device,[12] his Honour deprecated the view that the Commonwealth could not grant legislative power greater than that which it possessed itself, for reasons including that that that view was inconsistent with the terms of s 122 and also with those of s 121 (the latter section permitting the Commonwealth to admit a territory into statehood).[13] It appeared to Keane J that, in a circumstance of the Commonwealth converting a territory to a state, the Commonwealth would "undoubtedly" be granting power to the Northern Territory greater than the power it possessed itself.[14] Those matters, amongst others, told against the plaintiffs' power-limitation submission.

His Honour agreed with Gageler J that, "[o]nly the Commonwealth Parliament can invest the judicial power of the Commonwealth in a court."[15] Characterising the plaintiffs' argument as requiring that the Northern Territory Legislative Assembly have, "vested the judicial power of the Commonwealth in the Territory's courts without knowing that it was doing so",[16] Keane J held that what was granted was a Territory judicial power not constrained by Chapter III.[17]

The Kable Principle

French CJ, Kiefel, Bell, Gageler and Keane JJ all held that the Kable principle applied to the Territories, though their Honours reached different conclusions regarding the application of that principle in this circumstance.

French CJ, Kiefel and Bell JJ at [39] set out seven propositions forming the Kable principle:

1. A State legislature cannot confer a function upon a state court which substantially impairs its institutional integrity as such conferral is compatible with its role under Chapter III as a repository of federal jurisdiction;

2. "Institutional integrity" refers to the court possessing the essential characteristics of a court, including the reality and appearance of independence and impartiality;

3. It is also a defining characteristic of a court that it applies procedural fairness, adheres to the open court principle and gives reasons for its decision;

4. A State legislature cannot

4 At [104], [114].
5 At [105], quoting Svikart v Stewart (1994) 181 CLR 548 at 562.
6 (1997) 190 CLR 1.
7 At [107].
8 (2004) 218 CLR 146.
9 At [111].
10 At [116].
11 At [118].
12 At [159].
13 At [159].
14 At [159].
15 At [176].
16 At [178]
17 At [179] to [181].

enact a law which purports to abolish the Supreme Court of the State, or excludes any class of official decision made under a law of the State from judicial review for jurisdictional error by the Supreme Court of the State;

5. Nor can a State legislature validly enact a law which would effect an impermissible executive intrusion into the processes of the court;

6. A State legislature cannot permit the executive to enlist a court to implement decisions of the executive in a manner incompatible with the court's institutional integrity, or which would confer a function on a court incompatible with the role of the court as a repository of federal jurisdiction; and

7. A State legislature cannot enact a law conferring upon a judge of a State court a non-judicial function which is substantially incompatible with the functions of the court of which the judge is a member.

Relying upon the majority judgment in *Attorney-General (NT) v Emmerson*,[18] their Honours held that Kable applies to the Supreme Court of the Territory and to Territory courts as Chapter III courts.[19] French CJ, Kiefel and Bell JJ held that the conferral of power on the executive in this circumstance did not breach any of the seven propositions set out, and that the plaintiffs' challenge to the validity of s 133AB failed.[20]

Keane J took a similar but narrower view of the Kable principle, holding that it only applies in circumstances where, "a particular function that is apt to impair the court's institutional integrity has been conferred on a court."[21] As no such conferral had been effected, the plaintiffs' complaints about s 133AB did not engage the Kable principle.[22]

Gageler J stated that Bradley "demonstrated independence and impartiality to be defining characteristics of a court capable of exercising the judicial power of the Commonwealth."[23] The terms of section 133AB violated Kable as they were repugnant to the judicial process to a fundamental degree[24] and had the effect of making courts of the Northern Territory, "support players in a scheme the purpose of which is to facilitate punitive executive detention."[25] Gageler J thus concluded that s 133AB was unconstitutional.[26]

Commentary

The judgments discussed above confirm two aspects of the constitutional position of the ACT. First, the ACT Legislative Assembly is not constrained by the separation of powers doctrine in Chapter III of the Constitution when investing Territory judicial power. Second, the ACT Legislative Assembly is bound by the Kable principle. While the former proposition avoids problems possibly caused by the separation of powers applying in the Territory, further issues may yet arise from the confirmation that Kable applies in the ACT.

Notably, it is likely that, unless read down, s 60 of the *Judicial Commissions Act 1994* (a privative clause that seeks to insulate certain decisions under that act

18 (2014) 253 CLR 393.

19 At [41].
20 At [44].
21 At [184].
22 At [188].
23 At [120].
24 At [128]-[133].
25 At [134].
26 At [136].

ABOUT BRODIE

Brodie Buckland is a current Reader at Blackburn Chambers. Brodie has a keen interest in all aspects of public law, especially the relationship between a government and its citizens as governed by the principles of administrative law. Beyond that area, he also has an interest in the limits on judicial power and the relationship between the judiciary and the executive, especially as it relates to privative clauses and other limits on the jurisdiction of courts.

Brodie was previously employed as a solicitor at Aulich Civil Law before he decided to move to practise at the ACT Bar.
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from judicial review and prerogative or injunctive relief) is invalid on the authority of *Kirk v Industrial Court of NSW*.[27] In Kirk, the High Court held that a privative clause that purported to oust the supervisory jurisdiction of the NSW Supreme Court offended the Kable principle and was invalid. Given the confirmation in this case of Emmerson and Bradley, it is likely that s 60 would be held invalid, or at least read down, if challenged on a Kable-principle basis.

Brodie Buckland
Barrister
Blackburn Chambers

27 (2010) 239 CLR 531.

FROM THE AUSTRALIAN BAR ASSOCIATION

FIONA MCLEOD SC

President's Report to Members
19 November, 2015

1. LEGAL AID

The tight budgetary situation continues to impact severely on the availability of funds for legal aid in Australia hurting many in the community and creating huge pressures for many of our members. Australia spends about $28 per head on legal aid services. In England, which has recently undergone massive cuts, they spend $60 per head. The failure to provide people with legal representation not only risks the chance of an unfair outcome for the individual, but it also has flow on effects to the family of that individual, to the community, to the cost of running the court system, to the economy and the correctional system.

The ABA has continued to advocate for permanent and long-standing improvement of legal aid funding to the legal assistance sector and will work with the Law Council and the Commonwealth Attorney General to focus awareness on the budgetary allocation for legal aid.

2. DIVERSITY AND INCLUSION

Developments in the area of diversity and inclusion have been very exciting this year with real momentum gathering for the adoption of a National Diversity and Inclusion Charter, a National Equitable Briefing Policy, National Guidelines to address bullying and harassment and the sharing of ideas to encourage return to work by women lawyers, including women barristers. Work on the revised National Briefing Policy has been underway for many months now and was an agreed outcome of a taskforce of State and Territory Law Council Directors, CEOs and EO Committee representatives, managing partners of large law firms and many others. A key recommendation of this task force

was the revision of the Law Council National Equitable Briefing Policy to ensure harmonisation of effort.

It is expected that a revised National Equitable Briefing Policy will be adopted this year or early in 2016 and the bars, firms, government and corporate counsel will be invited to sign on to the policy. Various bars here adopted briefing policies and initiatives including, recently, Commbar of the Victorian Bar. The New South Bar Council adopted an Equitable Briefing Policy in October available here: http://www.nswbar.asn.au/the-bar-association/media-releases.

3. CITIZENSHIP

In response to a proposal to strip citizenship from dual nationals under a "self-executing" regime in legislation before parliament the ABA has been vocal in opposition noting the potential that it is too broad and unconstitutional: http://www.austbar.asn.au/wp-content/uploads/2015/08/ABA_citizenship-10-8-15.pdf.
I am grateful for the assistance of Peter Quinlan SC and Pat O'Sullivan QC in making a submission on behalf of the ABA to the Parliamentary Joint Committee on intelligence and security. The ABA submissions canvasses the questionable constitutional validity of the Bill, raise concerns with the breadth and disproportionate impact of the draft provisions and potential for legal uncertainty for government agencies acting upon the automatic loss of citizenship. Finally the submission raises concerns in relation to fair process and the inadequacy of the review model.
The legislation has been redrafted to meet some of our concerns and is now before parliament.

4. PROFILE OF THE ABA

This year the ABA collated membership data of each State and Territory and has now published a Statistical Profile Of Australian Barristers. The Profile provides useful information concerning the composition of the bars and will inform our strategic thinking. For example, the total number of Australian barristers practising at the independent bars is now 6005. Of this number, 77% are male and 23% female, with 10% of all senior counsel being female. The membership of the smaller Bars in ACT, Tas and NT is growing steadily. A copy of the Profile is available here http://www.austbar.asn.au/statistics My thanks to Kim Kemp of the NSW Bar for her assistance in producing the Profile.

5. IMPRISONMENT OF INDIGENOUS PEOPLE

Researchers at the University of New South Wales have published a recent report concerning their investigation of the mental health of prisoners in Australia identifying as Aboriginal and Torres Strait Islander. The UNSW Project found that Indigenous people were 2.4 times more likely to be in juvenile custody than non-Indigenous people and 27% of prisoners in Australia identified as ATSI with a known mental illness or cognitive disability despite making up less than 3% of the State's overall population. The report also revealed that Aboriginal women faced complex health needs and challenges and were significantly impacted by current sentencing habits. The ABA urged support for the National Justice Coalition "Change the Record Campaign": http://www.changetherecord.org.au and will continue to advocate for a raft of supplementary strategies to address the current crisis including the adoption of Close the Gap Justice Targets and reconsideration of mandatory and baseline sentencing.

6. ABOLITION OF THE DEATH PENALTY

On 9 October the ABA and Law Council made a joint submission to the Joint Standing Committee on Foreign Affairs Defence and Trade concerning Australia's Advocacy for Abolition of the Death Penalty. A

copy of the submission is available here: http://www.austbar.asn.au/wp-content/uploads/2015/11/09-10-2015-Sub-Auss-Advocacy-Abolition-Death-Penalty-Final.pdf. On 16 November Dr Natasha Molt of the Law Council and I addressed the Joint Committee hearing in Melbourne.

The ABA strongly supports the development of a strategy for abolition of the death penalty including the establishment of a panel of eminent persons to act as ambassadors for abolition domestically and internationally and the strengthening of our domestic legal framework and practices to ensure that Australia agencies, including the AFP, do not expose a person elsewhere to the real risk of execution.

It is important that the Law Council and ABA continue to stand shoulder to shoulder in their support for the abolition of the death penalty internationally. Today media reports suggest that Indonesia has decided there should be a moratorium on further executions, which is a very pleasing announcement.

7. ADVOCATES IMMUNITY

Members may be aware that the High Court has granted special leave to consider the advocates immunity in the case of Attwells v Jackson Lalic. The ABA considered seeking leave to appear as amicus in the proceeding and engaged Clayton Utz and DLA Piper to assist, instructing Dick Whitington QC, Paul Liondas and Ben Doyle in this process. I am very grateful for the contributions of each. I understand the matter will be listed by the Court later this year.

8. APPOINTMENTS AND FAREWELLS

I am delighted to note the appointment of Brigitte Markovic to the Federal Court in August, 2015, welcomed by Jane Needham SC on behalf of the ABA and Mark Moshinsky QC in October this year on 11 November, 2015 by me on behalf of the ABA and Paul Anastassiou QC on behalf of the Victorian Bar. Mark is a former Council member of the ABA and a former Chairman of the Victorian Bar. On 20 November I will appear at a sitting of the Federal Court to farewell Justice Shane Marshall and Paul Anastassiou QC will appear on behalf of the Victorian Bar.

A number of appointments have been made to the Federal Circuit Court including Josh Wilson QC. Josh has a long-standing association as a coach with the Advocacy Training Council and we are very grateful for his contribution over so many years to the work of ATC in Australia and internationally. I also congratulate Tim Heffernan to the Adelaide Registry, Steven Middleton to Newcastle and Philip Dowdy to the Sydney Registry.

9. ADVOCACY TRAINING

The Advocacy Training Council conducted very successful Essential Trial Advocacy and Appellate Advocacy Programs in June this year in Adelaide and Brisbane respectively.

Places are available in the Advanced Trial Advocacy residential in Melbourne in late January 2016. The course is designed for experienced advocates with the option of either a criminal or civil brief based upon real cases. The coaches include senior Australian judges as well as senior international and Australian silks and juniors as well as professional voice, movement and impact coaches accredited by the ABA ATC.

I encourage all members to consider the program as a way to brush up on advocacy skills, our fundamental tool of trade. It may be very useful for those who have been out of court for a time preparing large matters, returning from leave, or those considering making application for appointment as senior counsel, as a way to gain insight into and improve your own style. The ABA will also sponsor a number of places in the ATC Advanced Program for indigenous barristers.

10. INCORPORATION/AGM

I am pleased to announce that this year, after many years of consideration, the ABA has finally incorporated and moved to a corporate structure. I am very grateful for the contribution of a number of people involved in this process including Tony Lang, Chris D'Aeth, Philip Selth and our new company secretary Jennifer Pearce. The new corporate structure will provide the appropriate corporate governance mechanisms and protection of ABA assets going forward.

11. ABA SILKS DINNER

All new silks for 2015 will be invited to take their bows before the High Court of Australia at 3.30pm on 1 February, 2016. The Chief Justice will invite all new silks and their families to a Reception immediately after the ceremony.
A dinner to mark the occasion will be held at the Great Hall of the High Court on 1 February, 2016 at 7.00pm. All barristers and their partners are invited to attend.

12. ABA CONFERENCE 2016/2017

The ABA Council has resolved to hold our first national conference jointly with the Victorian Bar in Melbourne on 26-27 October, 2016. This is a wonderful initiative that will cater to members biannually. Treasurer Will Alstergren QC is designing an exciting program to appeal to all members with the assistance of Sarah Fregon, CEO of the Victorian Bar.

INTERNATIONAL ENGAGEMENT

13. ABA BOSTON AND WASHINGTON CONFERENCES

The bi-annual ABA Conferences in Washington DC and Boston USA in July this year were a resounding success and those attending enjoyed the best of these wonderful cities and a terrific program focusing on US jurisprudence and trial practice lessons for Australia. We were able to hear firsthand from federal and state Judges and trial attorneys, as well as some wonderful international and home grown speakers. I am very grateful to Chris D'Aeth, Bali Kaur and all who made the conferences a success.

14. ABA CONFERENCE 2017

The ABA Council has resolved to conduct the next biannual 2017 Conference in Ireland. This conference will be supplemented by our work in Asia noted below.

15. FOCUS ON ASIA

The ABA has embarked upon an ambitious program of short CPD programs in Singapore. The first of these weekend sessions was undertaken in late October. The Vice-President Patrick O'Sullivan QC and Peter Quinlan SC presented papers and I participated in a panel discussion of issues around pure economic loss and the liability of public authorities in tort at the request of the Law Society of Singapore to a group of about 50 lawyers. The program will be the first of a number of CPDs designed to showcase the expertise and talents of Australian barristers in Singapore. The ABA Council will consider how to continue with this program on a cost effective basis. This program and our ongoing advocacy training in the region, will lead up to the ABA National Conference to be held in Singapore in 2018. In addition I will be participating in a Convergence Conference in Singapore on 21 and 22 January, 2016 at the request of the Chief Justice of Singapore, Chief Sunderesh Menon. Chief Justices Menon and French are keynote speakers the Conference and there will be a focus on the economic integration and convergence in trade practices amongst Asian countries, the need to retool the legal and regulatory frameworks across Asia and examine how legal convergence of business laws can be expedited in an Asian context. I will be speaking on the second day on cross border enforcement of arbitral awards and judgments and the benefits of adoption of

the Hague Convention On Choice Of Court Agreements.
The Conference is an important step towards our participation and greater cooperation in the Asian region and our influence in legal practice and jurisprudence in the region.
The Conference will see the launch an Asian Business Law Institute which will work on producing statements of law on various topics of transnational impact, such as insolvency, tax and competition law and produce authoritative statements on the law in Australia, Singapore, India and China. This in an ambitious program and the ABA is very pleased to be participating at the outset. More than 500 lawyers from the region have already registered. Anyone with an interest in exploring the prospects of transnational work should definitely attend this conference: http://www.legalconvergenceasia.com/.

16. **IBA AND OPENING OF THE LEGAL YEAR UK**

In early November the Vice-President and I joined in welcoming delegates to the LAWASIA Conference in Sydney and supported the in regional meeting of Chief Justices to coincide with that conference. Chief Justice Menon then addressed the Queensland Bar and Law Society on the dispute resolution landscape in Singapore.

This year I attended the International Bar Association Conference in Vienna, following the opening of the Legal Year Ceremonies and Conferences in London. While the Conference is primarily a Conference for solicitors there is much of interest in the sessions including a significant focus on challenges to the rule of law globally and regulation of the profession.
While our participation in the IBA is currently under review, it is noted that the IBA Conference in 2017 will be held in Sydney and it is expected that Australian Judges and barristers alike will make a significant contribution to the business sessions of the Conference.

17. **PNG TRAVEL BAN**

The ABA expressed concern that members of the Queensland Bar were being denied entry to PNG to represent the interests of their clients. Happily, representations to the PNG government and media attention to the case appear to have resulted in the lifting of the ban. http://www.austbar.asn.au/about-the-aba/media-releases

Fiona McLeod S.C.
President
@AustBarAssoc
http://www.austbar.asn.au

CLOSING THE GAP JUSTICE TARGETS FOR SAFER, STRONGER COMMUNITIES

The Australian Labor Party today announced its policy on using justice reinvestment to reduce the unacceptably high levels of Indigenous incarceration. An Indigenous adult is 15 times more likely to be imprisoned than a non-Indigenous adult and an Indigenous child is 24 times more likely to be in detention.

Why are we doing this?

A Shorten Labor Government will deliver a nationally coordinated approach to close the gap in Indigenous incarceration and victimisation rates. These rates have reached a crisis point.

A young Indigenous man is more likely to go to jail than university.

An Indigenous adult is 15 times more likely to be imprisoned than a non-Indigenous adult and an Indigenous child is 24 times more likely to be in detention.

And an Indigenous woman is 34 time more likely to be hospitalised as a result of family violence than other women.

This is unacceptable.

Labor will apply leadership and innovation to address the justice gap – though community-driven and national strategies that empower communities to address the complex causes of incarceration and crime.

Labor believes we cannot close the gap in education, health and employment disadvantage between Indigenous and non-Indigenous Australians without national leadership to change the record and build safer, stronger communities.

Labor acknowledges the work of successive Aboriginal and Torres Strait Islander Social Justice Commissioners, the Change the Record campaign and the work of the House of Representatives Standing committee on Aboriginal and Torres Strait Islander Affairs for its 2011 report that have all recommended a focus on this issue.

Labor's plan

Labor's national plan to meet the justice gap will include:

1. The first meeting of Council of Australian Governments (COAG) convened under a Shorten Labor Government will consider priorities for justice targets to be included under the Closing the Gap framework that build safer communities and address levels of Indigenous incarceration. Following this meeting COAG will establish a Working Group of State, Territory and Local Government agencies, as well as key community organisations, to develop measurable targets that address rising incarceration rates and build safer communities. This will focus national attention on closing the gap in these areas, alongside and complementing existing targets in education, employment, the early years, life expectancy and mortality.

2. Labor will establish three new launch sites in a major city, regional town and remote community that build on existing community-led initiatives to explore the role of justice reinvestment in preventing crime and reducing incarceration. These sites will be identified by working with State and Territory Governments, as there are currently justice reinvestment initiatives at various stages of development across Australia.

3. Labor will resource a long-term study of the effectiveness of the justice reinvestment project currently underway in Bourke, New South Wales, to see what Australia can learn from this specific initiative.

4. Labor understands the need for a strong evidence base, to understand what is working and inform future policy. Through COAG, Labor will establish a national coordinating body to build the evidence base, collect data and measure progress as the new targets are implemented, and to monitor the effectiveness of justice reinvestment in the Australian context.

What is justice reinvestment?

Justice reinvestment works on the principle of redirecting funds spent on justice system to prevention and diversionary programs to address underlying causes of offending with disproportionally high levels of incarceration.

This is not about being 'soft' on crime, or giving offenders a free pass. It's about breaking the vicious cycle of disadvantage, the demoralising treadmill of offending and incarceration.

Justice reinvestment programs are being implemented in the United States where 27 states are investigating or applying the principles of justice reinvestment. Notably in Texas, between 2008 and 20010, funds were redirected to drug and alcohol treatment, behavioural, prevention, recidivism and diversionary programs, leading to decreases in the prison population and savings by cancelling plans to build new prisons.

Labor acknowledges the success of justice reinvestment will depend on community-engagement and location-specific responses which give communities ownership of the issues and the solution.

We also acknowledge the need for all levels of government to work together, which is why we will work through COAG as the justice reinvestment sites are established and implemented.

Who benefits?

Justice reinvestment offers opportunities for communities and saves money – every dollar spent on imprisonment is one less dollar for our communities.

The Report on Government Services 2015 shows it costs the Australian taxpayer $292 a day to keep a person in prison.

By preventing crime and reducing incarceration we also give our young people more opportunity to finish their education and have greater opportunities to participate in employment.

Incarceration and family violence is cyclical, leading to more crime and incarceration. National action and focus is needed to break this cycle.

Successful programs

Two years ago the town of Bourke in the west of New South Wales, topped the state for six of the eight crime categories - including family violence, sexual assault and robbery.

In February 2013, a headline in the Sydney Morning Herald reported that if Bourke was a nation, on a per capita basis, it would be 'more dangerous than any country in the world'.

The people of Bourke took it upon themselves to change this. Using the 'justice reinvestment' model, the community brought together 18 different organisations: police, magistrates, legal services, mental health experts and community groups to examine the causes of crime – and to work on preventing crime. The approach was owned and championed by local people and informed by local knowledge and local expertise – and supported by the NSW state government.

In doing so, the people of Bourke built the capacity of communities to tackle the underlying causes of crime: substance abuse, disengagement from school and family dislocation. Similar programs are underway in Katherine, in the Northern Territory – where the NT Law society is helping fund a project. The South Australian Government has offered its support to two sites.

Labor's record

Labor first committed to a justice target at the 2013 election, recognising that a nationally coordinated

MCCARTHY APPOINTED AS PRESIDENTIAL MEMBER TO ACAT

Attorney-General Simon Corbell has announced the appointments of Geoffrey McCarthy and Mary-Therese Daniel as presidential members from 1 January 2016 until December 2022, and Mr Robert Orr PSM QC and Professor Peta Spender were appointed as acting presidential members until December 2022 and February 2023.

Mr Corbell also announced the temporary reappointment of Linda Crebbin as General President for 12 months to allow consultation on a review of ACAT's structure and jurisdiction to take place. In addition to her role as General President, Ms Crebbin will take over the functions of the Appeal President.

We agree with the Attorney's sentiments that "Ms Crebbin's leadership and experience in issues like mental health, consumer protection and domestic violence have been instrumental in making ACAT such a valuable asset to the ACT's justice system," and that "as the administrative head of ACAT, Ms Crebbin has always produced outstanding results in often trying circumstances. ACAT has become a vital part of the ACT's legal fabric and Ms Crebbin has certainly contributed to its place in our community". We welcome Ms Crebbin's reappointment.

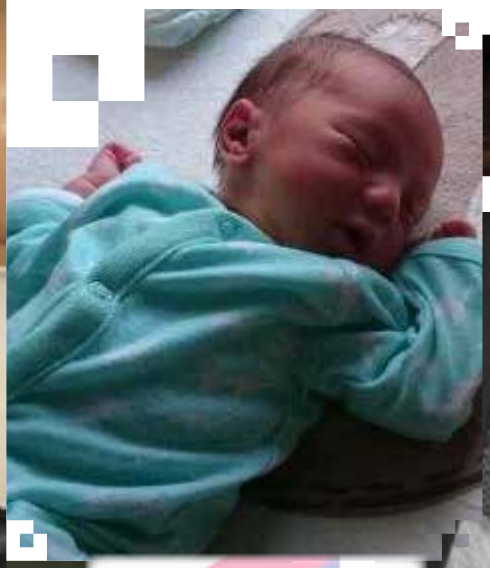
Mr McCarthy has been at the ACT Bar for 12 years and has extensive prior legal practice experience with the Australian Government Solicitor. Mr McCarthy has also served as the Bar Association's Treasurer for three and a half years. His contribution on the Bar Council has been valuable. Mr McCarthy has advised the CEO that he will be commencing in his new role on 1 January 2016. We wish Mr McCarthy all the very best as we are confident that his work ethics and personal attributes can only benefit the Canberra Community.

Ms Daniel has been a non-presidential member of ACAT since April 2012, having had 15 years' previous experience as a solicitor in government and private practice.

We congratulate the Attorney on these appointments.

Congratulations to John and Linda on the birth of their grandchildren

Max Teigue & Caitlin Mai Purnell



MAGISTRATES COURT AND CHILDRENS COURT OF THE AUSTRALIAN CAPITAL TERRITORY

NOTICE TO PRACTITIONERS

Court Seals

The seal for the Magistrates Court and the Childrens Court of the Australian Capital Territory will be those appearing below as at 2 November 2015.

Amanda Nuttall
Registrar
ACT Magistrates Court

21 October 2015

Magistrates Court Building
Knowles Place
Canberra ACT 2600

GPO Box 370
Canberra ACT 2601

Telephone: (02) 6205 5275
Facsimile: (02) 6205 4856
Web page :www.courts.act.gov.au

MAGISTRATES COURT
OF THE AUSTRALIAN CAPITAL TERRITORY

NOTICE TO PRACTITIONERS

Directions Lists; Applications in Proceedings; Listing Hearings; and Return of Subpoena

As at the commencement of 2016 the Magistrates Court Civil Listings will be re-configured so that the lists will be scheduled as follows:

Listing Hearings	Tuesdays at 9:30 am
Directions Lists	Tuesdays at 10:00 am
Applications in Proceedings	Wednesdays at 9:45 am
Enforcement Hearings	Wednesdays at 10:30 am
Return of Subpoena	Thursdays at 9:45 am

Any matters that currently have a return listing will not be re-scheduled and will proceed at the already set time.

The Registrar will undertake a call over of applications at 9:45 on Wednesdays and those matters which do not fall within the jurisdiction of the Registrar will be put over to a Magistrate for 10 am.

Amanda Nuttall
Registrar
ACT Magistrates Court

21 October 2015

Magistrates Court Building
Knowles Place
Canberra ACT 2600

GPO Box 370
Canberra ACT 2601

Telephone: (02) 6205 5275
Facsimile: (02) 6205 4856
Web page :www.courts.act.gov.au

MAGISTRATES COURT
OF THE AUSTRALIAN CAPITAL TERRITORY

NOTICE TO PRACTITIONERS

Christmas Sitting Dates and Shutdown 2015/2016

The last listing day for the Magistrates Court for 2015 will be Wednesday 22 December 2015. Wednesday 22 December, will be a half day and finish at 1pm.

Civil listings will recommence on Wednesday 13 January 2016. The A1 and A2 lists will recommence on Monday 11 January 2016.

The Registry will be closed from 4:30pm on 24 December 2015 and will open at 9am on 4 January 2016.

The following dates are duty Magistrate days, during which the duty Magistrate will sit for bail (adult and children and young people); Emergency Care and Protection proceedings and applications for Interim Domestic Violence an Protection Orders). The Registrar also will sit for applications for Interim Domestic Violence and Protection Orders:

- 23 and 24 December 2015; 4-8 January 2016.

ACT Magistrates Court will sit ***only*** for the purposes of Bail (adult and children/young people) and Emergency Care and Protection proceedings on the following days and will only sit for the period necessary (ie these days will proceed in the same manner as Saturday and Public Holiday Court days):

- 26 December 2015;
- 28-31 December 2015; and
- 2 January 2016.

Amanda Nuttall
Registrar
ACT Magistrates Court

21 October 2015

Magistrates Court Building
Knowles Place
Canberra ACT 2600

GPO Box 370
Canberra ACT 2601

Telephone: (02) 6205 5275
Facsimile: (02) 6205 4856
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MEMBERS CHRISTMAS LUNCH

UNIVERSITY HOUSE, FRIDAY 11 DECEMBER 2015

Advanced Trial Advocacy Course

Melbourne, 18 - 22 January 2016

COMMENCEMENT OF LEGAL YEAR

Supreme Court of the ACT, 1 FEBRUARY 2016

CPD MINI-CONFERENCE

SATURDAY, 19 MARCH 2016 - Venue TBC

Appellate Advocacy

Brisbane, 10-12 June 2016

Essential Trial Advocacy

Adelaide, 27 June - 1 July 2016

ABA CONFERENCE

Melbourne, 26-27 October 2016

FEDERAL COURT OF AUSTRALIA - EMPLOYMENT AND INDUSTRIAL RELATIONS NPA

NSW and ACT Practitioners' Consultation Forum - 2 December 2015

A consultation forum regarding the National Court Framework (NCF) and the Employment and Industrial Relations National Practice Area (NPA) will be presented by Justice Buchanan on Wednesday, 2 December 2015 from 5:30 pm to 6:30 pm.

This forum will be video linked to the Canberra registry. For details of the Consultation Forum please refer to the Court's website at:

http://www.fedcourt.gov.au/news-and-events/21-october-2015/sydney

Join us for Christmas Lunch!

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 11 December 2015
to commence at 12.30pm

Cost: $100.00 per person (inclusive of GST)

R.S.V.P - 4 December 2015

Tax Invoice & Registration Form — ABN 84 008 481 258

Please accept my registration for the Christmas Lunch on 11 December 2015. 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 @ $100.00 each	$	☐ Cash	☐ Cheque (to ACT Bar Association)
Name:		☐ Please debit my: [ ] Visa	[ ] Mastercard
Chambers:		Card No.: __ __ __ __/__ __ __ __/__ __ __ __/__ __ __ __	
Phone:		Expiry Date: __ __/__ __	
Email:		Card holder name:	
		Signature:	

Merry Christmas

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