Bar Bulletin

Issue: September 2014

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Our Founding Fathers

W Johnson WK Nicholl RG Bailey

Message from the President

If Beatrice Mtetwa is not the most courageous living barrister, I would like to know who is?

Mtetwa was the reason I decided to attend the World Bar Conference held in Queenstown, New Zealand from 4 to 6 September 2014. It was doubtful, until the last moment, whether Mtetwa would be able to attend as she is frequently jailed and tortured in Zimbabwe for merely representing clients. Fortunately she was out of jail, able to attend and inspirational to hear.

She has been tortured so badly that her face was swollen beyond recognition and on another occasion beaten about her back so badly she could not even sit in a car for a week. If all this is not bad enough, she has become very isolated because other senior lawyers will not associate with her for fear of upsetting the regime and also being jailed.

Despite all, this brave woman will return to Zimbabwe to represent more litigants and eventually face further imprisonment and torture.

And if this is not amazing in itself, Mtetwa does not believe she is anything special! What a courageous, wonderful woman and a shining example to all of us.

At the same conference, it was interesting to note the astonishment of delegates when Julian Burnside QC outlined the Australian position in relation to the treatment of asylum seekers, especially their mandatory detention and the impossible position faced when seeking to defend someone (due to the amendments in the National Security Act) when you are not entitled to know what the evidence against your client is or to hear or test the evidence against them.

Barristers must have the moral courage to speak out against injustices in an endeavor to bring about much needed change.

Every time Justice Glen Martin, a judge of the QLD Supreme Court since 2007 spoke, he demonstrated why he should be Chief Justice of that state and what an opportunity was lost when he was not so appointed. We need the appointment of judicial officers with the moral courage to act without fear or favour, and Justice Martin is clearly one of them.

How strange it was to be at a conference whose theme was "Advocates as Protectors of the Rule of Law" and to hear of our Prime Minister's decision to sell uranium to India, a non-signatory to the Nuclear Non-Proliferation Treaty, without safeguards, justified on the basis that India is a fairly functioning democracy with "the rule of law". One wonders if our Prime Minister is aware that cases take 9 years on average to progress through the Indian Courts, and that men are rarely successfully prosecuted, if prosecuted at all for serious and unspeakable acts of sexual assault and rape of women. So much for his faith in the Indian "rule of law".

The need to foster and promote the independent bar is something to which we should all aspire. In particular encouragement, rather than the discouragement or even bullying by judicial officers or fellow barristers, is something we must all be vigilant to stop.

My term as President of the ACT Bar Association comes to an end on 18 September 2014. It has been a fascinating and challenging journey. Thank you for giving me the opportunity to have served.

Greg Stretton SC

ANTI-TERROR Powers

We live in a world that appears less safe than when Lionel Murphy carried out his raid on ASIO. In the 70's we saw the end of the Vietnam War, a change of government after 23 years of coalition rule and what appears to be a new age of legislative reform. The Whitlam government was genuinely involved in real reform in areas of family law, administrative law, civil liberties, freedom of information, trade practices and many other areas. The Australian government was involved in granting more freedom to its citizens and more access to information and generally reducing the powers of the State and its interference with our private lives.

Since the terrorist attack on the twin towers and the London bombing, we have seen a dramatic increase in the powers and funding of police and ASIO and a huge reduction of personal freedom. We now even have a denial of information about refugees attempting to illegally come to Australia supposedly on justifiable grounds of national security vis-a-vis "Sovereign Borders".

Now under Prime Minister Abbott, we have a call to Arms to enlist in "Team Australia" or "Fire Brigade Australia" to justify an enormous expression of anti-terror laws. Those that oppose this call to arms are painted as anti 'Australian' or against the 'national interest'. We have the despicable acts of Islamists cutting off the head of an American journalist and on 'u-tube' displaying of a 7 year old boy holding a severed head as a supposed protagonist for the same cause.

The vast majority of Australian's are against terrorist acts and aspiration. We want to believe in a safe and peaceful world where mankind is 'improving' a caring for each other and looking after our most vulnerable with expansions in the Australian economy and a better way of life.

Do we need to potentially lose so much freedom to protect our nation against terrorism? This is not an easy question to answer. Do we need to grant immunity from prosecution to intelligence officers engaged in specified operations? Should journalists be exposed to jail for informing us about information in relation to anti terror investigations? Is it necessary to require companies to keep metadata? Is it necessary to reverse the onus of proof in relation to persons who travel to certain overseas areas? Is it necessary to ban organisations and make their members liable for imprisonment if they are seen or deemed to be supporting terrorism? The answer is not simple - because it depends on what is done and said that can cause problems. Is it necessary to grant ASIO power to detain and question any person in secret fora - even though the person is not suspected of terrorism? Is it necessary to empower the forces of the state, i.e. ASIO involved in investigating terrorism the "power" to imprison persons being investigated if they refuse to answer any questions. Is the right to silence no longer worth preserving?

Can we live peacefully and protect our citizens and our nation without these draconian powers that seem to belong in a form of government and a way of life never experienced by Australians before. These are troublesome times and the answers are not easy.

Mandatory Sentencing

The Victorian government in the lead up to an election has played the 'tough on crime' card again by announcing the toughest laws yet in relation to the 'one punch' or 'coward punch' assaults that lead to death. Nick Cowdroy QC as the DPP in NSW refused to get involved in the election campaign. The ABA has always been against mandatory sentencing stating that such laws do not achieve the rationale for such laws, namely deterrence, plus such laws undermine judicial discretion and can cause unfairness in certain cases. The ABA President, Mark Livesey QC said, "while they are heinous acts and deserve severe punishment, we also need to recognise that they are often opportunistic acts, often fueled by alcohol, and offenders are not likely to pause to consider that there is a mandatory sentence".

As a prosecutor and defence counsel, I have never come across a defendant who told the court or me that the current jail term was part of his contemplation before or during the commission of the offence. We are lucky indeed that in the ACT, our Attorney in particular and the current government are not in favour of mandatory sentencing.

Every State and Territory has laws making child pornography an offence. Every State and Territory has a system of placing persons convicted of child pornography liable to be placed on a sex offenders register - often referred to as the "paedophile register." Those on the register are barred from working in child related employment.

The Attorneys have known for some time that the "net" has been cast too wide in relation to unsuspecting young persons "who" commit child pornography. If two 16 year olds who are in a consenting sexual relationship send to each other and their friends explicit sexual images of themselves by phone or computer, then person A who receives such images, even if unsolicited, is at risk of being charged with pornography if the young person consented to receiving such an image and so a 16 year old friend who without the consent of the initial distributor sends off that image to others, then there is virtually no redress for A if charged i.e A will finish up on the Register.

Sexting as it is called, is apparently very common amongst "children", i.e. persons under 18 years of age. The explicit "selfie" is popular. This makes under 18 year olds at risk of the full rigour of our child pornography laws. Victoria is looking at changing these laws and has produced a reform from their law reform committee addressing these problems. One would hope that such an issue would receive Australia wide 'reforms'.

Thanks Stretto

The King is dead. Long live the King!

The ACT Bar Association has been very well served by Stretton SC in his term as its President. Being the President is becoming more time consuming and generally more onerous. There are issues such as the "Listings" of criminal matters and the appointment of a 5th Judge which can create tension and disharmony.

Nevertheless, when the Bar has a majority view, it is the duty of the President to pursue and promote that view in a fearless manner. Stretton SC has certainly done that. The President is the public face of all barristers and discharging the office dispassionately but forcefully can be a lonely task at times. So thanks Stretto for your great work, you can now "retire" to a pasture rich paddock. The Bar is grateful for all your hard work and a job well done.

Message from The Hon Chief Justice Helen Murrell

I would like to thank outgoing President Greg Stretton for the support that he has provided to me during my first year as Chief Justice, and for the humour that he has brought to almost every occasion. I look forward to working with the incoming president, Shane Gill.

The Court will soon publish its first Annual Review, in which we will report to the people of the ACT about the administration of justice in the Court during the 2013/2014 year. It has been a time of change. As the profession is aware, following the successful Central criminal listing pilot in February/April 2014, criminal trials are now centrally listed.

From the Court's perspective, the listing seems to be working well. There will always be a small number of matters that cannot be reached, but the vast majority are being reached during the week that they are listed.

A court-based mediation pilot in relation to 95 older backlog civil matters was conducted in March/April 2014. Those matters that were not resolved at mediation (21 matters) were listed for hearing before Acting Judges in July/August 2014. Eighteen of the twenty one matters settled just prior to or on the hearing date and only three of the original 95 matters actually required a full hearing. The overall settlement rate was significantly higher than that for civil matters generally.

It is difficult to know the reasons for that apparent anomaly. In any event, court-based mediation will, in the future, be an important aspect of the Court's management of civil matters.

In 2013/2014, the Court's clearance rate for civil matters exceeded 100%, i.e. more matters were finalised than were lodged. However, despite the success of the court-based mediation pilot, there was a very limited impact on the civil backlog.

Without additional judicial resources, it is most unlikely that significant progress can be made on the backlog.

The Court's clearance rate for criminal matters exceeded 100% for non-appeal matters. This result is probably attributable to the intense criminal listing during the February/April pilot. During this financial year, the Court will be focusing on eliminating the remaining small criminal backlog and ensuring that, in the future, all criminal matters are listed efficiently.

There is a small backlog of Court of Appeal matters and, in the first half of 2015, this will be addressed by listing two additional weeks for Court of Appeal matters.

Procedurally, further changes are underway. Following consultation with the profession, the new practice direction concerning case management of civil proceedings commenced by originating claim will affect all proceedings commenced by originating claim filed after 3 November 2014. It will not affect originating applications.

Welcome New Practising Barristers

The Bar Council welcomes its newest Readers at the ACT Bar.

Heidi Robinson

Heidi joins the ACT Bar from the ACT Government Solicitor, where she led the employment and industrial relations practice group. Heidi's other experience includes corporate law and commercial litigation in private firms, as in-house counsel at a large Commonwealth department and as the Director of the Office of Industrial Relations in the ACT Government Senior Executive Service.

Heidi has conducted a significant number of sensitive and high profile cases on behalf of the ACT Government. She has extensive experience in most aspects of employment and industrial law, including in unfair dismissals, adverse action, disciplinary investigations, industrial disputes, workers compensation and discrimination in employment. She also has strong experience in administrative and regulatory law more generally, including, professional discipline, access to information, firearms licensing and planning matters. She has conducted litigation in most Territory and Federal courts and tribunals.

Heidi is reading with Geoffrey McCarthy of Blackburn Chambers and is contactable on 02 6100 1655 and at robinson@blackburnchambers.com.au.

Dan Crowe

For the past three years prior to coming to the Bar, Dan was employed by DLA Piper as a Senior Associate in the Litigation & Regulatory team. During that time Dan acted for a range of insurer and government agency clients in different courts and tribunals and across various types of litigated disputes, including personal injury claims (both statutory and common law), employment matters and commercial disputes. Dan also acted for a large Commonwealth government department in relation to a significant software licence matter in the Federal Court.

Prior to working at DLA Piper, Dan was employed as a Senior Associate at Maliganis Edwards Johnson where he acted for claimants and plaintiffs across a variety of personal injury matters.

Dan is reading with Andrew Muller of the Canberra Bar and David Wilson of the Sydney Bar and is contactable on 02 6100 2332 and at dcrowe@blackburnchambers.com.au.

Judiciary Challenges Bar over Human Rights

By Sean Costello, ACT Human Rights Commission

Legislated human rights may only be in its infancy in Australia but the experiences of other jurisdictions suggest now is a critical time in the history of its jurisprudence. That was the message from the Victorian judiciary to counsel at the recent 'Human Rights Under the Charter' conference. It is a message equally applicable to ACT law, as the ACT and Victoria are the only jurisdictions in Australia to have enacted human rights legislation. The ACT Human Rights Act this year celebrated its tenth year of operation.

The Victorian Judicial College hosted the conference, championed by the Hon Chief Justice Warren. Speakers included the Rt Hon Lord David Neuberger, President of the UK Supreme Court, and the Hon Sir Anthony Mason. Seminal cases like *Ghaidan v Godin-Mendoza* [2004] UKHL 30 in the United Kingdom, and *R v Hansen* [2007] 3 NZLR 1 in New Zealand, were discussed, including the fact both were decided in the second decade of human rights legislation being in operation. The Conference was well attended by members of the Victorian judiciary and bar, along with some interlopers from the ACT, all likely contemplating how they might utilise such arguments in future proceedings.

Several recent decisions point to Australian human rights jurisprudence reaching a critical juncture. For example, conference speakers questioned if the lack of a *ratio* in the High Court's decision in *R v Momcilovic* [2011] HCA 34 regarding Declarations of Incompatibility, meant that the methodology for determining if a piece of legislation is compatible with human rights remains a live question. An adoption of the New Zealand methodology enunciated in *R v Hansen,* for example, would likely reduce the number of Declarations, and enhance the ability of plaintiff's to argue human rights consistent interpretations of ACT law.

Another area of uncertainty is the extent of public authorities' obligations, and the fora for determining when such obligations are breached. In the recent ACT decision of *LM v Children's' Court* [2014] ACTSC 26, Master Mossop of the Supreme Court considered the ability of the Children's Court (and ACAT other courts other than the Supreme Court) to assess whether a Public Authority has breached its human rights obligations, and the extent of any remedy for a breach. The Court considered if, and how, the Children's Court may assess the actions and decisions of the Director of Public Prosecutions against human rights, regarding the DPP's deciding to charge a young offender with a more serious offence after she had plead guilty to a lesser one. The Master agreed in principle that such courts and tribunals could consider HRA compliance, however also raised questions how the court should balance potentially 'unlawful' actions of an authority against alleged criminal conduct, particularly when the remedy sought was a permanent stay of proceedings. The Master confirmed an express power to grant relief under the HRA is given only to the Supreme Court. However, His Honour also suggested that inferior courts and tribunals (and the Supreme Court) retain their inherent, statutory or common law jurisdictions to grant remedies, but left open the question as to whether such a remedy may include factors beyond the traditional scope of that remedy. The Master ultimately determined that a permanent stay should not be granted. Until these issues are settled, it is unclear to what extent ACAT and other courts may assess, and remedy, breaches of the HRA.

The ACT Human Rights Act remains under utilised in civil law matters. The bulk of the more than 250 cases that have raised the Act have been criminal, despite a new direct right of action against ACT Government agencies commencing on 1 January 2009. Five years on, and few civil matters have explored the extent of the obligations on such agencies to meet the dual obligations of acting, and making decisions, consistently with human rights.

As *LM* demonstrates, the extent to which human rights remedies and tests intersect with the existing common law remains unclear. In his presentation at the Victorian Conference, The Hon. Justice Emilios Kyrou noted that Victorian jurisprudence such as *Castles v Secretary to the Department of Justice [2010] VSC 310* suggests that Public Authorities must produce documented evidence that they have taken human rights into account in their decision making. The Court in that matter found that a prisoner should be able to maintain IVF treatment while in detention. His Honour further noted that the upcoming decision of the Victorian Court of Appeal in *Bare v Small* [2013] VSC 129 would likely provide further clarity on the obligations of public authorities. In *Bare,* the Victorian Supreme court considered an application for judicial review of a decision by the Office of Police Integrity to refer a complaint to the Victorian Police for investigation. The Appeal will consider the Court's finding that the right to protection from cruel, inhuman and degrading treatment does not include a right to an independent investigation of a complaint of such treatment, and may also explore the finding that a public authority acting incompatibly with human rights will not necessarily invalidate their decision.

Some of these matters might be dealt with through legislative amendment, but other human rights jurisdictions have tended to solve these questions through jurisprudence. In New Zealand, the courts determined that damages could be awarded for human rights breaches (see *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NSLR 667); and in *Ghaidan,* the House of Lords applied a test to liberally reinterpret legislation.

It seems inevitable that these questions will be resolved in the coming years; perhaps through an increase in civil human rights arguments been made in the ACT courts.

Conference materials are available at http://www.judicialcollege.vic.edu.au/.

Recent Judgments

Supreme Court of the ACT

Walters & Ors v Kemp (No 2) [2014] ACTSC 251 »

September 26, 2014

Walters & Ors v Kemp (No 2) [2014] ACTSC 251 (26 September 2014) Judge: Burns J – Supreme Court of the ACT - SC 228 of 2011 - Interlocutory application - CIVIL PROCEEDINGS – Application to Join a Third Party as a Defendant – whether third party is a concurrent wrongdoer – whether third party is a necessary and proper party – whether third party is subject to advocates' immunity – whether claim against third party is obviously untenable – whether claim against third party is statute barred - CIVIL PROCEEDINGS – Application to Amend Further Amended Defence and Counterclaim…

Senton v Steen [2014] ACTSC 249 »

September 26, 2014

Senton v Steen [2014] ACTSC 249 (26 September 2014) Master Harper – Supreme Court of the ACT - SC 802 of 2006 - COSTS – Calderbank offer by plaintiff before trial – offer by plaintiff to settle for figure below award of damages by the court after reduction for contributory negligence – no evidence of terms of retainer between plaintiff and plaintiff's solicitors – order for party-and-party costs up to date of expiry of Calderbank offer and solicitor-and-client costs after that date.

R v Nikro [2014] ACTSC 241 »

September 25, 2014

R v Nikro [2014] ACTSC 241 (25 September 2014) Judge: Burns J – Supreme Court of the ACT - SCC 375 of 2011; SCC 146 of 2012 - CRIMINAL LAW – Drug Offences – trial by judge alone – cultivated a

trafficable quantity of cannabis plants for selling - EVIDENCE – Judicial Discretion to admit or exclude Evidence – coincidence evidence.

Lallemand and Stevenson v Brown and Swan [2014] ACTSC 235 »

September 25, 2014

Lallemand and Stevenson v Brown and Swan [2014] ACTSC 235 (25 September 2014) Master Mossop – Supreme Court of the ACT - EQUITY - Equitable doctrines and presumptions – Barnes v Addy claim - equitable defences – laches – delay with prejudice – whether the defence of laches is available notwithstanding whether the statutory limitation period has expired - PRACTICE AND PROCEDURE – Insufficient pleadings – application to amend statement of claim at the end of the trial

R v Singh; R v Singh [2014] ACTSC 250 »

September 22, 2014

R v Randhir Singh; R v Ajitpal Singh [2014] ACTSC 250 (22 September 2014) Judge: Rares J – Supreme Court of the ACT - SCC 13 of 2014; SCC 14 of 2014 - CRIMINAL LAW – sentencing – jury verdicts – joint offence of abduction with intent to engage in sexual intercourse – unlawful confinement – sexual intercourse without consent – act of indecency – two offenders – five offences by each offender – three hour ordeal of victim – deportation upon release not relevant in determining sentence – use of blackmail and threats to abduct victim and negate…

Vizovitis v Ryan [2014] ACTSC 243 »

September 19, 2014

Vizovitis v Ryan [2014] ACTSC 243 (19 September 2014) Master Harper – Supreme Court of the ACT - SC 694 of 2004 - The court declares that the agreements as to costs between the parties dated 23 March 1999 and 10 December 2002 are not binding on the parties.

R v McGuckin [2014] ACTSC 242 »

September 18, 2014

R v Kristy Louise McGuckin [2014] ACTSC 242 (18 September 2014) Judge: Refshauge J – Supreme Court of the ACT - CRIMINAL LAW – PARTICULAR OFFENCES – Aggravated robbery – Assault occasioning actual bodily harm – Recklessly causing damage to property – Not guilty by reason of mental impairment - CRIMINAL LAW – GENERAL MATTERS – General Liability and Capacity – Pleas of not guilty by reason of mental impairment – Difficulties in diagnosis – Differing diagnoses

Gelencser v Lucas; Gelencser v Ash and Insurance Australia Limited trading as NRMA Insurance [2014] ACTSC 207 »

September 11, 2014

Gelencser v Lucas; Gelencser v Ash and Insurance Australia Limited trading as NRMA Insurance [2014] ACTSC 207 (11 September 2014) Judge: Burns J – Supreme Court of the ACT - SC 101 of 2010 - TORTS – Negligence – personal injury – motor vehicle accidents – liability admitted – apportionment of damages – assessment of damages

In the matter of an application for bail by Eiginson [2014] ACTSC 234 »

September 5, 2014

In the matter of an application for bail by Eiginson [2014] ACTSC 234 (5 September 2014) Judge: Refshauge J - Supreme Court of the ACT - SCC 163 of 2014 - CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – Bail – Jurisdiction of Supreme Court to hear application – Applicant charged with stalking and unauthorised divulging of prescribed information – Whether accused a "flight risk" – Whether accused likely to commit further offences if granted bail – Accused has ties to the jurisdiction – Accused has no criminal history – Conditional bail granted

Greenway v Teoh [2014] ACTSC 224 »

September 4, 2014

Greenway v Teoh [2014] ACTSC 224 (4 September 2014) Master Mossop – Supreme Court of the ACT - SC 483 of 2013 - Interlocutory application - LIMITATION OF ACTIONS – personal injury – motor vehicle accident – whether paragraphs of an affidavit containing references to settlement offers should be admitted into evidence – scope of s 131(2)(i) Evidence Act 2011 (ACT)

Seldon's Corner

Bench & Bar 50th

The 50th celebration Bench and Bar Dinner with partners was a great success. A good roll up was regaled by the President, Mr Junior and Justice McCallum. Justice McCallum was warmly welcomed in her return to the ACT and charmed us all with a memorable speech that brought back memories and laughter to most of us. I couldn't help but think how wonderful it would be to have her as our fifth judge on the Supreme Court here. The food and wine were magnificent and thanks to Svettie for her usual great organisation!

Congrat's to Jon White SC

The Bulletin congratulates Jon White SC in his elevation to the rank of senior counsel. The DPP is only led by him and his elevation recongises the leadership role he has displayed in the DPP and the profession generally. Chief Justice Murrell gave White SC a memorable welcome at his bow ceremony on 8 August 2014.

Farewell Barb Lodding!

After 29 years working for Blackburn Chambers, Barb Lodding has finally retired. She certainly played a part in the professional life of the majority of practising barristers during her time at Blackburn. The Bulletin thanks her for her contribution and wishes her well in her retirement.

Welcome Baby Elijah Steven Katavic!

Congratulations Kristy and George on the blessing of your little boy. Elijah was born at 3.01pm on 29 June 2014, weighing only 4.4kgs and 53cm long! Mum and bub are both doing very well and Elijah growing rapidly. The Bulletin wishes the Katavic's every joy and happiness with both of their children Aria and Elijah.


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Rolfe Classic BMW
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