

# A lot of water under the bridge since the last edition of *Balance*

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## The Society has been busy advocating on legal issues

### Business Council

The Society is a member of the Business Council which brings together many of the peak industry bodies from across the Territory. The Society represents the legal profession as members of the business community. Issues relevant to the membership of the Council include recruitment and retention of qualified staff as well as infrastructure of Courts and corrections.

### Administrative Law Reform Advisory Group

Administrative Law Reform Advisory Group met on 12 July to discuss the potential for an administrative appeals tribunal in the Northern Territory. The Society endorses the need for a stand-alone administrative review tribunal and called for further meetings of the group to discuss the best way forward. Such reform would bring together and simplify the complex web of administrative review mechanisms currently available in the territory. Importantly this presents an opportunity to reduce the red tape for business and improve administrative decision making across government.

### Small Claims Jurisdiction

The Society provided a response to the Issues Paper concerning Changes to the Small Claims Jurisdiction. Reforms proposed included the increase in the jurisdictional limit of small claims matters to \$25,000 and the exclusion of legal practitioners from appearing without leave of the Court. In summary the Society's response to the Issues Paper accepted some reform was required but recommended delaying such reforms until evidence can be gathered that identifies the nature of problems within the jurisdiction and their causes. The Society identified a need for clearer articulation of the issues and:

- more comprehensive consultation can be undertaken with members of the community, self-represented litigants, the legal profession and the judiciary;
- waiting until the Productivity Commission has finalised its report into Access to Justice, in order to leverage off their investigation's findings;
- moving towards more conciliatory based measures,

and less focus on matters of procedural compliance.

The Society identified opportunities for immediate reform that directly assist self-represented litigants to better access and understand relevant information around this jurisdiction. These reforms arise from direct experience within the Society and include:

- comprehensive revision of the Local Court website
- making legislation, court Rules and forms more accessible
- preparation of materials to assist self-represented litigants

### The Society needs your help

Whilst the Courts can collect data on matters that commence and has indicated that 47% of matters filed in the Small Claims jurisdiction were unrepresented (it is not clear if one or all parties were unrepresented); it is difficult to collect information about those that were not. In particular the Society seeks information about:

- What are the issues your clients experience when dealing with the Local Court, and particularly claims under \$25,000?

- Do you or your firm accept plaintiff or defendant work for claims under \$25,000?
- If you do not accept such work what are the three main reasons?
- Of those matters where you do act what is your average billing to finalisation – roughly?
- Would capped recoverable costs encourage you to assist more clients with such work?

## Court Reforms

The Society is aware of the proposal to amend the *Local Court Act* to consolidate all the Acts presently dealing with magistrates and their courts and jurisdictions other than the Work Health jurisdiction. These reforms will include amendment to or consolidation of the *Justices Act*, the *Local Court Act* and the *Magistrates Act*. The Society anticipates being invited to make submissions on a draft Bill and invites interested members of the profession to contact the Society to register interest in participating in formulating the Society's position on these reforms. Alternatively you can contact Ms Peggy Cheong chair of the Legal Practice Committee.

## Advance Personal Planning Bill

The Bill proposes to provide a legislative framework for appointing and directing alternative decision makers for both medical and financial matters. Imagining a time where you may not be able to make decisions for yourself is difficult, undeniably endeavouring to put your affairs in order includes considering these eventualities. Legal practitioners drafting wills and powers of attorney for clients may also be called upon to advise and assist clients to deal with these issues.

In order to promptly respond to the Bill the Society formed

a working party from members of the Commercial Law and Social Justice Committees with additional interested members such as Barbara Bradshaw. The Society also sought the advice of a member of the Ministerial Advisory Committee that drafted the *National Framework for Advanced Care Directives*— John McMahon.

Importantly the Bill:

- Is intended to support Territorians who wish to make decisions in advance or to appoint alternative decision makers regarding their care.
- Proposes to support the current common law position summarised in *Hunter and New England Area Health Service v A* [2009] NSWSC 761 and not invalidate currently valid directives or those presently able to be validly drafted interstate.
- Will provide for financial and health care decisions.

The Society's principle concern was to see that the correct balance was struck between encouraging formal advanced care plans (which should be an easy document to update) and providing appropriate safeguards around financial decision making powers. The Society encourages the passage of the Bill as an important reform that is urgently needed. There is much detail about consequential reforms, particularly in the area of adult guardianship and the Society looks forward to further assisting in guiding these reforms.

In summary the Society's comments were:

- A suite of reforms across related legislation is required, and should be more fully considered by government;
- Legal mechanisms for advanced planning in respect of health and welfare should be clearly distinguished from legislation in respect

of planning for financial and property matters;

- Legislation concerning planning for a person's health and welfare should be consolidated under one Act;
- Additional laws concerning planning for financial and property affairs should be dealt with by way of amendments to the Powers of Attorneys Act;
- Use of the best interest test should be replaced with the substituted judgment test;
- There should be no ambiguity that directives provided pursuant to the common law are preserved;
- Removal of the option of appointing joint decision makers;
- The title of the proposed Act should be amended to either the Advanced Health Care Directives Act or the Powers of Attorney (Medical) Act.

## Renewals, how was it for you?

The crazy busy time that is renewals of practising certificates. How did you go? Each year we evaluate how this process went. If you have any complaints, suggestions or compliments we appreciate the opportunities for improvement.

## CLANT Bali conference 2013

I congratulate CLANT on its 14th conference. There were many important papers delivered and whilst I have discussed some below I would encourage everyone to visit the CLANT website <http://clant.org.au/index.php/the-bali-conference/2013>.

## View from the Bench

Chief Justice Riley (through Mildren) and his paper 'Victims

of the System: a View from the Bench' raised concerns about the erosion of community confidence in the legal system through the 'implementation of short-term policies pursued without regard to long-term consequences.' The Chief Justice identified three areas in which the executive (not through conscious effort) undermined the standing of the judiciary:

- Legislating to require the judiciary to perform non-judicial roles or address non-judicial issues
- Legislating to constrain the ability of the judiciary to accord justice in individual cases
- Failing to provide adequate resources to enable the judiciary to carry out its functions effectively and efficiently.

An adaptation of this speech *Maintaining the status of the Judiciary* can be found at (2013) 2 NTLR 307.

## Civil Commitment

Dr Olav Nielssen of the University of New South Wales spoke about 'justifications and rationalisations for the civil commitment of sexual offenders after the expiry of their sentences' or in other words the fallibility of psychiatric input to risk assessment of potential to re-offend.

Dr Nielssen discussed the flaws in the many evaluative tools used to assess risk of reoffending. In conclusion Dr Nielssen noted the conflict of interest of the 'risk assessment industry' which promotes the use of patented risk assessment tools and where the tools are arguably of limited utility.

## Judicial bullying

Suzan Cox QC presented a paper on the topic of judicial bullying. Ms Cox focussed on how the profession and the judiciary can support each other to stamp out

bullying behaviours from the Bench. Questions flowed after this paper as did the sad story of the suicide of a legal practitioner who had appeared before a known bully. What can be done?

In my limited time in this role the issue of judicial bullying has been raised with me on a number of occasions. The Society does have a role in taking these concerns to the head of jurisdiction but this depends entirely on the relationships fostered between the Society and the Courts. Unfortunately, this mechanism is by no means perfect. Queensland Supreme Court Judge Glenn Martin sums up the limitations of following this course "the judge in question was immune to the advice and guidance given and continued to offend." (reported in the Australian on 17 May 2013)

The Courts are difficult places and arguably the Bench is also a difficult place to be. When does well deserved frank feedback about inadequate ("absolutely woeful" in the words of my principal) submissions turn into gut-wrenching humiliation in front of your client and your peers? Unlike the managing partner that can make amends by:

- taking you for a coffee / buying you lunch
- offering you some reassurance that all is not lost "you do great photocopying"
- reminding you about employee assistance programs
- finding out a little more about you and other stressors in your life
- being more considerate next time
- making a second attempt when time/emotions/ nerves are not so raw

There is no such opportunity for the Bench. Unlike the managing partner, the judicial officer does not have the same opportunities to

gauge their impact, mend bridges nor to reflect that maybe they went a little too hard or unnecessarily laboured the point. Arguably, it would be inappropriate to consider how comments from the bench may be received. That is not to say that judicial officers do not have tools available to them to inform and reform their conduct. In speaking with judicial officers many commented on the use of tools such as 360° Feedback that had helped them improve in all sorts of ways.

Individually we also have a role. Many members of the profession and those now on the bench have experienced a tough day in Court. We can look back now in a "what does not kill me makes me stronger" sort of way. We can take the knowledge that we made it through and help others in that dark place. And even if you are new at this game you can still help by starting up a conversation. <https://www.ruokday.com/resources-for-you/how-to-ask-ru-ok/>

R U OK? has tips about how to start that conversation that could change a life. I hope you took the opportunity to celebrate RUOK? Day on 12 September 2013. Asking an open ended question or breaking the ice with a joke, listening without judgment and encouraging action.

*"Have you considered making an appointment with your doctor or maybe with EASA?"*

Importantly there are reforms on the horizon that will continue to keep the concern regarding bullying on the agenda. In particular the soon to be finalised Safe Work Australia Code of practice "preventing and responding to bullying in the workplace." As employers we are challenged and our responsibility to provide a safe system of work now extends to venues outside the office. Bullying remains a complex issue because it has a subjective element, when does reasonable management action



IF YOU ARE EXPERIENCING WORKPLACE, PERSONAL OR EMOTIONAL ISSUES WHICH ARE AFFECTING YOUR WORK OR PERSONAL LIFE, PLEASE CALL LAW CARE VIA THE EMPLOYEE ASSISTANCE PROGRAM ON 1800 193 123 TO MAKE AN APPOINTMENT.

E: [EASADARWIN@EASA.ORG.AU](mailto:EASADARWIN@EASA.ORG.AU) • [WWW.EASA.ORG.AU](http://WWW.EASA.ORG.AU)

become bullying? Partners or senior associates are promoted more often for their billing abilities than sound management or sophisticated interpersonal skills. We must rise to this challenge and help each other to be better at what we do. "To comply with these laws it may just require a different way of saying things" (*Bullying policies and management training a must* in *Law Society Journal*, August 2013 Vol 51 No 7 p16).

### 'Vulnerability, risk and justice for children and young people in the NT'

Dr Howard Bath Children's Commissioner examined the current state of emergency for children of the Territory.

Dr Bath commenced by reporting recent data and comparisons of pre intervention and post

intervention reported child sexual abuse offences and subsequent substantiations. Dr Bath noted that substantiated cases remain at about the same level since before the intervention. Despite this Dr Bath identified that there was an emergency in child wellbeing and safety and on just about every measure children in the Northern Territory were (and continue to be) worse off. Dr Bath looked at identified developmental hazards such as

- exposure to family violence,
- teen parenting, ( carer instability, poverty) more likely to come into contact with youth justice (parents)
- exposure to alcohol in utero, noting that children will carry the burden of that exposure through their entire life. No stats in Northern Territory on FASD
- exposure to nicotine in utero. Higher smoking rates than

12% syndrome

- Poor nutrition
- Various diseases such as otitis media
- Abuse and neglect

All of these hazards are at much higher rates in Northern Territory and of all these hazards, abuse and neglect are the greatest predictors of contact with youth justice system.

Dr Bath noted that these hazards expose children to predictable outcomes; in particular Northern Territory children

- have infant mortality rates three times higher than the national average;
- have the lowest school attendance;
- have the highest (amongst highest in the western world) incidence of child and youth suicide in Australia, and

- have very high rate of multiple developmental vulnerability.

Dr Bath went on to look at the Australian Early Development Index (AEDI 2012), which is a benchmark of childhood development where those with two or more indicators will require specialist assistance as they enter school. Nationally that is 10.8% of children and 26% Australian Aboriginal children. That rises to 38% of all Aboriginal children in the Northern Territory and 49.9% of all remote Aboriginal children in the Northern Territory.

Dr Bath noted that whilst these figures are alarming and can only be described as catastrophic this is an improvement on earlier figures.

Dr Bath went on to summarise research that has established the connection between adverse early childhood experiences and later behavioural and social difficulties as well as physical disease. In summary these children have brains that are physically different to other children in areas such as:

- Stress management systems
- Memory processing
- Verbal intelligence, depression and anxiety

Dr Bath identified the emerging research that identifies the toxic effect of stress on the childhood brain. Dr Bath stated plainly the challenge for policy makers that “unless we can turn the tide of violence, the future for children in the Northern Territory is bleak indeed.” Dr Bath concluded his talk with a call to arms, to take

action on the one contributor we can do most about Alcohol which plays a central role in 2/3 of violent episodes. Dr Bath calls for a whole of community action plans to ensure the safety and wellbeing of women and children.

## Alcohol Mandatory Treatment

The Society made submission on the Alcohol Mandatory Treatment Bill. After these submissions the Department of Health approved some changes to the Bill, notably reducing the assessment period from six to four days and the time allowed for the Tribunal to make a decision from seven days to four days. The subsequent Bill also provided that it was a criminal offence to abscond three times from treatment, rather than on the first occasion. Although such changes were welcomed, they did not go far enough in the view of the Society and as such the concerns raised in this response continue for the Society.

On 1 July 2013 the amended Bill passed into law. Despite the amendment, the Society's concerns remain. Significantly, the regime does not align with the National Drug Strategy 2010-2015 most notably because it is not a part of a comprehensive strategy. The Society's remaining concerns can be summarised as follows:

- **Prolonged detention:** The Society is concerned about the regime's use of prolonged involuntary detention, particularly in the assessment

phase - a total of eight days may pass prior to an order of the Tribunal being made;

- **Limited legal protections:** Inadequate legal protections for individuals involuntarily detained;
- **No release mechanism:** In the assessment phase, there is no mechanism to facilitate release of wrongfully detained persons;
- **Criminal Justice System:** The creation of criminal offences and their impact on the criminal justice system and the overcrowded correctional services system;
- **Impact on ATSI people:** The disproportionate impact on Aboriginal and Torres Strait Islander (ATSI) people in the community
- **Legal representation:** A lack of resources for the legal representation needs of affected individuals;
- **Residential treatment as a last resort:** Adoption of a novel treatment regime in the absence of evidence;

The Society continues to advocate that this regime is an alarming erosion of individual rights without adequate legal safeguards and absent evidence of the efficacy or validity of this approach. The proposal to locate people the subject of assessment or rehabilitation orders at the yet to be built new correctional facility further underlines these concerns.

Until we meet again. ●

## NORTHERN TERRITORY WOMEN LAWYERS ASSOCIATION ~ AGM

The AGM for the NTWLA will be held on Wednesday 6 November. The time and venue will be announced nearer the time. Some members of the present committee will be retiring and the President Lisa Coffey is unable to stand again as the Constitution limits her term to two years. SO if you would like to join an energetic committee to organise events to women lawyers in Darwin or Alice Springs, please send an expression of interest to [ntwomenlawyersassoc@gmail.com](mailto:ntwomenlawyersassoc@gmail.com). In particular if you have a keen interest in women's issues nationally, you may consider being the AWL representative – represents NTWLA at AWL teleconference meetings and reports back to NTWLA on their activities.